

Judicial Intervention: “What Society Has Come To Demand”¹

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*The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw
And I, my Lords, embody the Law.*

(The Lord High Chancellor, Iolanthe, W.S.Gilbert)

Introduction

Legislative and judicial intervention to impose conditions on relations between employers and employees is long established and well known, if only because of Justice Higgins' antagonism to the “higgling of the market place” and his notorious interventionism such as the establishment of the unemployment-producing basic wage in the Harvester case.² As the Commonwealth Government has no *general* legislative power specifically to regulate employer-employee relations, the question naturally arises as to the origins of such intervention at the Commonwealth level. One answer is that it has reflected a distorted and unjustified use of the notionally limited constitutional power in relation to the prevention and settlement of interstate industrial disputes, as well as totally exaggerated perceptions of the capacity of third parties to resolve such disputes.³ But the

¹This paper is a slightly revised version of a paper given to the HR Nicholls Society conference ‘Union Privilege v. Workers Rights’ in Melbourne on 23–24 March 2001. I would like to acknowledge the generous assistance provided for this paper by Dr John Forbes, Mr Stuart Wood and Mr Geoff Hogbin. They are not responsible, however, for my comments and interpretations of judicial intervention.

² Higgins' decision in the Harvester case was subsequently declared unconstitutional by the High Court of which he was a member! But the interventionist doctrines he set down and the arguments he used to justify them were quickly taken up by State arbitral tribunals and “the basic wage” was, State by State, lawfully established by them and resulted in a 20 percent increase in the mandated wage rate at the bottom end of the labour market. The impact on unemployment, particularly for the unskilled was, predictably, substantial and employment did not recover until the inflation of the post WWI period reduced real wages to pre Harvester levels. (Colin Forster *An Economic Consequence of Mr Justice Higgins*, Aust. Economic History Review, Vol 25, No 2, Sept 1985)

³ The original justification for the 1904 legislation establishing a *compulsory* conciliation and arbitration system was that it would prevent strikes and lockouts. Mr Justice Higgins' romantic assertion was that ‘there should be no more necessity for strikes and stoppages’ because....”the process of conciliation with arbitration in the background is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interests of the public”. (H. Higgins, *A New Province for Law and Order*, Sydney Workers' Educational Association of New South Wales, Sydney, 1922, p. 2). The

extent of arbitral intervention also reflects a total failure to understand the employment relationship.

This failure, combined with the misuse of Section 51 xxxv, has resulted in the body of industrial relations arbitrators⁴ ‘capturing’ the system and, as part of that capture, imposing employment conditions as part of its attempts to settle disputes. With the connivance of the tribunals, the union movement has readily been able to “create” an interstate dispute and then submit it to be settled by the case-hungry Industrial Relations Commission.⁵ The Commission’s actual (and assumed) responsibility for preventing and settling industrial disputes thus provided it with the opportunity to impose a wide range of employment conditions, including the fixing of wage levels, and it has certainly done that. According to one authority, the IRC’s strategy even includes the making of “recommendations” rather than “orders” in order to avoid the possibility of legal challenge to which orders might be subject. Unsurprisingly, unions often (mis)use these by giving the impression to members and the media that they are decisions.⁶

We now know, of course, that the IRC has had a poor record not only in preventing and settling disputes but in regard to its influence on the labour market and the distribution of earnings within that market.⁷ Yet, with its half-sisters at the Federal Court, the IRC continues to interpret legislation governing employer-employee relations in a way that makes it much more difficult and more costly for employers to enter into employer-employee relationships, a situation which reduces employment opportunities particularly at the bottom rung of the employment ladder. More generally, there continues to be a reluctance to confront the issue of the attack on the employer-employee relationship at the political level.

establishment of the system was very much a response to the times, most notably the extensive strikes that occurred in the 1890s during the recession that emerged and continued throughout most of that decade. One major proponent of the system saw “the Great Strikes and the perception and perseverance of a handful of men _ liberal-minded and labour-minded _ as the main active joint agents in the establishment of arbitration ... The Great Strikes changed the climate of opinion. Although the strikes were confined to a small number of industries, they were in economically strategic industries and the strikes lasted a long time. This was unprecedented.” (J. Isaac, ‘The Foundations of Arbitration’, *Labour and Industry*, Vol. 1, 1987, pp. 157-8).

⁴ One of the most contentious on-going issues in the history of Australia’s arbitral tribunals was whether the members of these tribunals were, or were not, judges. The second president of the Conciliation & Arbitration Court, H B Higgins, held joint appointments, as President of the C&A Court and as a justice of the High Court. When John Stone, then Treasury Secretary, gave the Shann Memorial Lecture in 1984 he referred to members of arbitral tribunals “preening themselves as Justices”(A *Decade of Shann Memorial Lectures*, 1993 edited Siddique Academic Press International page 162), a shaft which caused immense pain within the tribunate. The High Court in the 1956 Boilermakers Case made it very clear that they were not.

⁵ The fact that interstate disputes have had to be “created” helps explain Australia’s poor record in relation to industrial dispute.

⁶ Oral advice from Mr Barrie Purvis, Executive Director, Australian Wool Selling Brokers Employers Federation, 1963-92. While the Commission argued that its recommendations reflected its conciliation role, that role was not a necessary part of legal proceedings and could have been undertaken separately.

⁷ See my *The Case For Further Deregulation of the Labour Market*, November 1998.

For those who understand that third party intervention into the employment relationship is almost always detrimental to the economic value of the relationship (particularly to the employee), it seems important to try to expose the underlying essential elements in that relationship, with the hope that this might influence the thinking of relevant institutions. It is increasingly being recognized, even in the economics profession, that the extent to which our judicial and political institutions are sympathetically inclined to entrepreneurial activity is an important determinant of the strength of the economic, family and social structure of the whole community.

Is There A Legal Theory?

Our legal institutions are of the greatest importance in this regard and one has always presumed that a sound theoretical or philosophical basis for the making of law by judges guided their activities. Such law making has been continuing for so long that AP Herbert was even prompted to quip in 1935 that “The Common Law of England has been laboriously built about a mythical figure—the figure of *The Reasonable Man*.”⁸ But Herbert wrote at a time when statute law was much more limited. Now that we have reams of statutes it is appropriate to enquire as to the basis of modern law making. As a possible source of wisdom it seemed appropriate to examine the views of the present Chief Justice of the High Court, Murray Gleeson.

In an article entitled “Individualized Justice—The Holy Grail”⁹ which he wrote in 1995 when Chief Justice of NSW, His Honour highlighted the growing trend for judicial decisions to be based on individualized or subjective assessments of a case rather than the straight application of general rules. He instanced many departures from such general rules.

Thus, a killer who (successfully) uses a defense of diminished responsibility or provocation can escape with a conviction for manslaughter rather than murder. Those who imagine they have a contract may have their actions judged to be unconscionable or unfair or inequitable, thereby preventing the enforcement of an agreement. Indeed, one is astonished to learn from Justice Gleeson that “we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract”. In tort, there is now a situation where “the concept of reasonableness is of key importance and the duty owed by one person to another depends so much on the facts of the case.”¹⁰ And the idea that hearsay is not admissible in evidence is apparently old fashioned if it can be regarded as reliable or even needed.

Did Chief Justice Gleeson attempt to identify any philosophy or theory behind the development of subjectivisation? Not as far as I could discover. He attributed it largely to a mysterious beast called “the consequences of what society has come to demand” of the legal system, so that it reflects “the spirit of the times” that sees justice as “much less likely to be met by formal and inflexible rules”. However, although he did not argue

⁸ *Uncommon Law* (1935)

⁹ The Australian Law Journal Volume 8 June 1995

¹⁰ Judges and legal commentators have even “noted the tendency of the law of tort to supplant contract”.

against this trend, he was clearly moved to express some concerns about how it should be handled. Accordingly, he suggested that “there is a balance to be maintained and it is important to note the consequences, for the law and the justice system, of this seemingly irreversible move towards subjectivisation of issues and, also, some constraints to which the process remains subject.”

Chief Justice Gleeson identified several constraints that should apply to the use of this individualized approach. He noted the need for consistency so that “the outcome of cases (should) depend as little as humanly possible upon the identity of the judges who decide them”. Encouragingly, he also saw an “abiding need for predictability and certainty” because it particularly affects the “willingness of people to engage in commercial transactions.” And, although not ruling out judicial lawmaking (it must be incremental and involve the development of established principle), he saw a need to avoid judges acting “as ad hoc legislators who, by decree, determine an appropriate outcome on a case-by-case basis.” Finally, he suggested a need to recognize that “there is no general principle of fairness which will always yield a result if only the judge can manage to get close enough to the facts of the individual case.....The law responds to many impulses in addition to the dictates of apparent fairness in individual cases, and these need to be given full weight in any rational development of the law.”

Unfortunately, Chief Justice Gleeson did not reveal how these so-called constraints should be exercised in practice: presumably judges themselves are to weigh the scales of justice, which raises obvious questions. He did acknowledge, though, that an important effect of the subjectivisation process has been a greatly increased attention to detail and additional pressure on the court system. Indeed, he made the alarming admission that:

“One cannot help feeling, on occasion, that the kind of truth for which the courts sometimes search is nonexistent, or at least undiscoverable. The justice system is rarely equipped to undertake an exhaustive investigation of the merits of a particular dispute, and only by a fairly strict limitation of issues can courts hope to achieve even an approximate knowledge of the facts of a case.”

In his Boyer lectures, delivered last year after his appointment as Chief Justice of the High Court, he also noted “important practical limitations on the capacity of judges to make law” and he acknowledged that, “if the Constitution is silent on human rights and freedoms, then it is up to Parliament from time to time to deal with that subject—or not to deal with it—as it thinks fit.” But, in almost the same breath, he asserted that, once a human rights issue comes before the courts, the protection of the rights and freedoms of individuals and minority groups is “an essential part of the role of the courts”. Indeed, Chief Justice Gleeson described (as) “one of the most important and difficult issues of current debate”... the... “working out (of) the principles according to which the will of an elected parliament that is responsive to popular opinion must bend to the law, as enforced by unelected and independent judges.”

Unfortunately, the Chief Justice made no attempt to elaborate on why the High Court has made significant subjective judgments in, for example, human rights and other areas. Yet,

as Justice Meagher pointed out three years ago, although “there are to be found in the constitution very few express, or necessarily implied, civil rights....the High Court has begun reading into the Constitution civil rights which are certainly not overtly mentioned there, nor which are necessarily implied there on any ordinary rules of construction, but which are ‘implied’ because the current judges of the High Court regard them as indispensable democratic rights.”¹¹ Justice Meagher noted in particular the High Court’s discoveries of a right to freedom of communication on matters relevant to political discussion¹², a new right to equality of legislative and executive treatment, an implied right to a fair trial and a right in certain circumstances to be free of the laws of defamation.

Justice Meagher did not discuss the Court’s highly controversial decisions in relation to Aboriginal issues, presumably because it does not read rights into the Constitution per se. In responding to criticisms that the High Court had been trying to usurp the role of Parliament, a former Chief Justice of the High Court, Sir Anthony Mason, defended the Mabo decision on the simple basis that “In some circumstances governments and legislatures prefer to leave the determination of a controversial question to the courts rather than leave the question to be decided by the political process.”¹³ In a speech in November 1993, Mason patronized critics of judicial activism as believers in “fairy tales”, who are “entirely ignorant of the history of the common law.”¹⁴

All this suggests it would be fair to conclude that, while there are significant reservations about the process and implications of subjectivisation in at least some quarters, it appears to have become accepted that, viewed in some sense as a whole, the judiciary will, when given the opportunity to do so, adjust the balance of decision making to accord with what are perceived to be society’s demands. In this regard, therefore, the industrial judiciary might be said, not simply to have been providing (as one High Court judge is said to have described it) “milk bar justice”, but to have been in line with legal theory, if it can dignified with such a title.

From one perspective this can be seen as appropriately democratic and reasonable: after all the judiciary should not be allowed to fall into disrepute by preserving out of date social standards. But when and which of the plethora of society demands are to be regarded as genuine and, in particular, how does an un-elected official justify determining whether or not they should be conceded? Moreover, how does a judge balance the adverse implications, such as the uncertainty that may flow from the subjective approach? Chief Justice Gleeson’s observation in his 1995 article that it is difficult to

¹¹ Australian Law Journal, Volume 72, January 1998. In the Thirty First Deakin Lecture of 9 October 1997, *The High Court of Australia: A Study in the Abuse of Power*, Professor Greg Craven is similarly (and more extensively) as critical as Meagher J.

¹² In the Australian Capital Television Case the decision that implied the right of free speech apparently prevented the curtailment of political advertising prior to an election. Meagher J argues that the main beneficiaries of this decision are “the media moguls.”

¹³ *Chief Justice Defends Ruling as Lawful*, The Australian, 2 July 1993.

¹⁴ *It’s Time To Rule Legal Fairytales Out of Court*, The Australian. 8 November 1993. For a further analysis of Chief Justice Mason’s extraordinary behaviour, see Dr John Forbes’ comments in the paper he presented at the fourth conference of the Samuel Griffith Society, 29-31 July 1994

have even a reasonable assurance about contractual rights and obligations is worrying, especially for commercial transactions.

In short, for those who regard the current degree of regulation of the labour market as an onerous burden (falling particularly on employees) there is an opportunity to highlight the serious underlying *legal* problems with judicial intervention in the contractual relationship between employers and employees, not to mention any economic or social problems. Further, if judicial decisions do reflect what society is actually demanding, that suggests that every opportunity should be taken to emphasise the potential social and economic problems with such intervention.

The Inequality of Bargaining Power Argument

At the heart of the problem is the (mistaken) perception that there is a major imbalance of bargaining power between employers and employees that would, if allowed free rein, operate against employees, and reduce the rewards they would otherwise obtain from their working relationship with employers. For those in the judiciary who accept this misperception, subjectivisation demands and allows the imbalance be corrected in the interests of fairness.

At first glance, it does seem obvious that employers have an intrinsically much stronger position deriving from their greater wealth and their power to hire and their now much reduced capacity to fire. Yet this notion has been too readily accepted and little analysis appears to have been undertaken into whether it corresponds with reality. HR Nicholls Society members are well aware, for example, that sub-contractors who work on building sites, and who actively compete against other subbies, earn an average annual wage of over \$40,000 without any ‘protection’ other than their own bargaining power and trade skills. They work, moreover, in an industry that is one of the most efficient in the world, that is virtually dispute free, and that provides no evidence that its trades-people feel “exploited” by what is effectively a free market system.

What is too little recognized is that modern labour markets actually operate within a competitive environment. As the demand for and supply of labour occurs in a context where over 1,000,000 businesses compete for the labour services of over 9,000,000 workers, that situation can scarcely allow the exercise of monopsony power by employers except in certain limited situations. Of course, competition in the labour market is heavily constrained by regulation but employers do compete between themselves within that context and they compete for a labour supply that offers only a limited quantity of each of the various different kinds of labour. Indeed, there effectively exists not one single labour market but a whole series.¹⁵

¹⁵ During a debate I had with former Deputy President of the AIRC, Professor Keith Hancock, at a meeting of the South Australian Economic Society on 30 May 2000, Hancock conceded that not enough account had been taken of the competition constraint that employers face but argued that “there remain instances where employers can exert significant bargaining power”. He referred specifically to companies such as CRA (which had by then gone out of existence), BHP, Telstra, Patrick Stevedores and Qantas ie he implied that these companies are not subject to competitive constraints in the labour market. Hancock also asserted that “the notion of negotiation at the point of hiring is, in most instances, nonsense.”

It is also relevant that, in circumstances where the labour market operated in the 1990s under more competitive conditions, the share of national income going to labour remained stable and average real wages increased strongly. This outcome occurred, moreover, despite predictions that labour would experience adverse effects on both employment and real wages from the more competitive environment which businesses had to face from tariff reductions, competition policy and the like.

By contrast with the 1990s, the 1970s and 1980s experienced considerably higher interventionism in employer-employee relations by government and arbitral and judicial authorities. The initial outcome was a short, sharp increase in labour's share of national income in the mid 1970s, but followed by a long, steady decline in that share in an environment where there was only a tiny annual growth in real wages and a relatively small growth in the rate of profit.¹⁶

This marked contrast in the outcomes under widely different extents of interventionism clearly suggests that more intervention, allegedly on behalf of workers, does not increase their returns on their labour, and certainly does not improve business output and profits. It is not to say, of course, that the labour market operated satisfactorily in the 1990s. Judicial intervention continued apace and the reduction in unemployment was due more to the large increase (from 15 to 22 per cent) in the proportion of the working age population on income support payments than to a more competitive labour market.¹⁷ The limited nature of the improvement in the rates of underlying unemployment and employment will be revealed in the current slow-down in economic activity.

Even so, the improvement in labour market performance under more competitive arrangements does provide an additional basis for challenging the inequality of bargaining power argument. And the likely increase in the unemployment rate in the short term can be used to reinforce arguments for reform.¹⁸

Interpretation of Employment Contracts

Turning more specifically to the capacity for the judiciary to interpret employment contracts, I want now to draw on an invaluable draft paper by Geoff Hogbin which summarises recent thinking by labour economists on employment relationships and

¹⁶ For further analysis, see the Productivity Commission's excellent Staff Research Paper on *Distribution of the Economic Gains of the 1990s*, November 2000.

¹⁷ For further analysis, see my *Reform's big problem is political*, AFR 15 December 2000.

¹⁸ It is noteworthy that the "imbalance of power" arguments now used to legitimize arbitral or judicial intrusion into labour market arrangements have no constitutional or statutory authority. H B Higgins' explicit view was that labour disputes arose because of the market's incapacity to determine the "just" price for labour services, a mediaeval notion which has no meaning (other than in a market context). Higgins believed that the just price had to be determined judicially, and that any deviation from such a price, once determined, was an infraction of the natural order. Unions which defied or ignored his decisions were subjected to his righteous anger.

employment contracts and its relevance in the Australian context.¹⁹ A key point is that this literature highlights the difficulty, if not the impossibility, for third parties to make informed and meaningful judgments on such contracts, let alone rewrite these contracts, *ex post*, to the betterment of the contracting parties²⁰.

The (little recognized) reality is that many elements of employment contracts take the form of expectations and understandings that are impossible (or at least prohibitively difficult and costly) to specify in explicit terms. These implied or *relational* terms are, moreover, as important to the satisfactory performance of a contract as the explicit or *formal* terms that are normally the subject of judicial attention. For example, an outside party cannot really observe and accurately assess performance in relation to the amount of physical and mental effort to be devoted to tasks, the required degree of alertness on the job, and the amount of on-the-job training to be provided and undertaken.

In fact, whether an employment contract operates satisfactorily for both employer and employee depends importantly on whether the self-enforcing and in-built incentives work out in practice. These incentives take the form of both “carrots” and “sticks”. For example, an employee may be induced to make an extra effort by the promise of a career path (a carrot), or a stick involving a threat of incurring the costs of finding a new job in the event of being fired. Most employers are constrained from making excessive demands on employees by the risk of losing their investments in hiring and training if employees quit. Also, getting a reputation as a “bad employer” makes hiring competent workers more difficult and costly in the future. As performance in relation to such implied terms cannot be independently verified, employment contracts simply cannot be enforced *effectively* by a court.

The impossibility of fairly enforcing such implicit contractual terms was almost certainly recognized by courts when they allowed employment contracts under common law to evolve into at-will contracts. There is an analogy here with unfair dismissal cases, where courts concentrate on the more readily verifiable issue of fairness of procedures, rather than on the substance of alleged malfeasances. But this indicates an inability to address overall fairness in the employment relationship, as well as creating a situation that is inherently biased against the employer because of the procedural focus. The “at-will” contract in which the employee’s right “to quit”, at a moment’s notice, was balanced by the employer’s right “to fire” equally spontaneously, has been subverted through unfair dismissal provisions which, while on the face of them are a burden on employers, in reality work against employees, and particularly on people who want to become employees. The costs of complying with these provisions are, in the end, born by employees, consumers and especially the unemployed.

¹⁹ *Employment Relationships, Employment Contracts and Earnings* 2000, (mimeo). I also wish to thank Geoff Hogbin for his assistance in writing this section.

²⁰ James M Malcomson, 1997, *Contracts, Hold-ups and Labor Markets*, *Journal of Economic Literature*, 35(4) pp1916-57 especially p. 1917. Also George Baker, Robert Gibbons and Kevin Murphy, 1999, *Relational Contracts and the Theory of the Firm*, mimeo, Harvard Business School

A recent speech by Rio Tinto Iron Ore Vice President, Sam Walsh, illustrates the difficulties a third party would have in interpreting the trade-offs involved when employers treat employees as individuals in order to maximise their potential to contribute not only to a company's performance but to their own well-being. It is particularly interesting, given that Rio has been a prime target for attack by the union movement for "exploitation" of employees, that Walsh emphasised that "At the core of what we are talking about here is the alignment of employee goals, expectations and behaviours with the goals of the company and the expectations of management" and that he also noted "We are proud of the fact that since 1993 we have not lost any time to industrial disputation."²¹

The inability of courts to effectively enforce employment contracts does not, unfortunately, deter third party adjudication under statutory laws and regulations. But that adjudication tends systematically to undermine the self-enforcing properties of employment contracts, thereby eroding incentives to contribute productive effort to jobs. For example, as adjudicators are simply unable to verify performance with respect to relational terms, and as institutional tradition leads them to favour employees, the existence of unfair dismissal laws has the effect of reducing the penalties employees would normally expect to experience for "shirking". (Shirking is used here as general term to cover slackness and negligence in all dimensions of effort). This can be expected to raise the general level of shirking in the workforce partly because those predisposed to shirk expect to "get away" with more of it, and partly because the morale of more diligent workers tends to be sapped. This loss of morale can be catastrophic in situations such as nursing homes, where the nature of the job is morale sapping to begin with.

But higher levels of shirking have implications for fairness as well as efficiency. Thus, although *prima facie* it may appear that the cost of a decision to reinstate or compensate a fired shirker falls on the employer, in practice it may well be borne by workers generally. Since in the longer term wages must reflect the net value of workers' contribution to production, employers as a group respond to reductions in productivity and/or to required additional supervision costs by providing lower wages than otherwise for staff generally. The result is that the costs of increased shirking resulting from unfair dismissal laws tend to be borne ultimately by more diligent employees.²²

Another fairness problem with unfair dismissal laws is their potential adverse effects on matching between employees and jobs. Such effects will occur when workers capable of

²¹ *Future Success Depends on People*, Sam Walsh, AMMA Conference, Perth, 8-9 March 2001.

²² While this statement is broadly correct, at least two substantial caveats should be noted. First, where a firm has the capacity to earn economic rents (ie returns to special advantages not enjoyed by competitors, such as an unusually rich mineral deposit) union power may be used to capture part of the rent through shirking at the expense of the owners. Second, in non-traded goods industries some of the costs of shirking may be passed on to consumers in the form of higher product prices. Also, the statement does not mean that employers need not be concerned about shirking – an employer who fails to control it at least as well as his competitors will not survive. Rather, in the longer run there tends to be an equal amount of shirking the level of which reflects the prevailing labour market institutions. Moreover, each employer separately has a financial incentive to gain a competitive advantage by devising employment contracts that reduce the costs associated with shirking.

performing more satisfactorily are excluded because of regulatory impediments to firing. This will likely have negative effects on the welfare of workers capable of forming superior job matches. However, as it is impossible to identify those affected, those dispensing “justice” simply cannot take these negative effects into account.

Equally, the judiciary cannot take adequate account of the likely adverse effect of employment protection regulations on marginal workers. When tribunals are biased against them, employers are much less likely to employ such workers because they fear that firing will be costly even if the job-match proves to be unsatisfactory. A spokesman for small business claimed on 20 March that those he represents are “seething” over the unfair dismissals legislation and that “everyone of them has a horror story”.²³ Although such comments may partly reflect the fact that the Federal Government intends to have another try in the Senate to reduce unfair dismissals protection, it undoubtedly also reflects the deterrent effects that protection has on employment. Employers are also much less likely to become involved in unfair dismissal cases, preferring instead to make out-of-court settlements even where there is no substantive case.

It is a consequence of human nature that some employers are heartless and unscrupulous and make unreasonable demands on employees. However, as University of Chicago Law and Economics Professor, Richard Epstein, emphasizes, regulations aimed at achieving perfect justice are frequently counterproductive because they create unintended injustices which outweigh any benefits they might confer. The best protection against exploitation for workers is a freely functioning labour market that allows employees to change jobs if they believe their current employer is treating them unfairly. It is also the most effective way of disciplining employers.

To return to Chief Justice Gleeson’s comment that if “the justice system is rarely equipped to undertake an exhaustive investigation of the merits of a particular dispute, and only by a fairly strict limitation of issues can courts hope to achieve even an approximate knowledge of the facts of a case.” Although this admission was made in considering the law generally, it is clearly very relevant to cases involving the employment relationship. A tribunal that cannot be apprised of all the facts, and cannot comprehend the significance of important aspects of a relationship, is necessarily unable to make a meaningful assessment of that relationship.

It is particularly worrying that the overwhelming focus of tribunals is on the perceived interests of the great majority of workers with secure jobs (insiders) to the neglect of the adverse effects on the minority of marginal workers and the unemployed. While growing numbers of students of labour markets are now prepared to concede such adverse effects, the judiciary has yet to reach even the student stage. In short, the intrinsically complex nature of the employment contract provides another powerful argument against judicial intervention.

²³ *Unfair Dismissal Laws ‘Worse Than Recession’*, Curt Rendall, Institute of Chartered Accountants spokesman on small and medium enterprises, AFR 20 March 2001

Some Recent Developments

The interesting thing is that this issue has at least entered the public debate arena and the industrial judiciary has responded to some extent to expressions of concern in certain quarters that it may longer be reflecting “what society has come to demand.” An editorial in the Australian Financial Review of 7 February 2000 highlighted worrying aspects of the extraordinary decision by Justice Gray that unions had an arguable case that BHP had discriminated against union members in agreements negotiated with individual employees amongst its Pilbara work force. That editorial highlighted:

- The growing tendency for the Federal Court to interpret the Workplace Relations Act in ways that help unions pursue their agendas;
- The difficulty this created for even large employers to effect changes needed to improve efficiency and the likely adverse employment effects;
- The establishment of a panel of specialist Melbourne-based industrial relations judges, nearly all former union barristers, and the need to change arrangements that appeared to continue the industrial relations club.

Two days later The Age published an article by its State political reporter entitled “IR Chaos” drawing attention to the outbreak of major disputes in the construction, airlines, automotive and manufacturing industries. This was clearly the start of a determined attempt by unions to undermine the trend to enterprise and individual bargaining and to force a return to industry-wide bargaining.²⁴

That was followed by a paper presented to the Leo Cussen Institute on 29 March 2000 by Richard Dalton of Freehills arguing that there had developed “aggressive industrial action by unions and a lack of rigour by the Federal Court (and to a lesser extent the AIRC) in applying the relevant compliance provisions under the (Workplace Relations) Act.” Dalton pointed out that certain provisions in the WRA designed to limit industrial action had been rendered ineffective because:

- Firstly, “at times” the AIRC was reluctant to issue orders under Section 127²⁵ to stop industrial action, often preferring to grant union applications for adjournments and long conciliation sessions, with employers thus coming under pressure to compromise to obtain a return to work;
- Secondly, even when Section 127 orders were issued, the Federal Court showed “a distinct reluctance” to issue an injunction to enforce them, adopting instead an

²⁴ See also “Menaced by Union Muscle”, Alan Wood, The Australian, 14 March 2000.

²⁵ The Section empowers the Commission to issue an order to stop or prevent threatened industrial action in relation to an industrial dispute, the negotiation of an agreement or work regulated by an award or certified agreement. The Federal Court can enforce this order by imposing a penalty not exceeding \$10,000 for a body corporate or \$2,000 in other cases and can issue an injunction requiring observance of a penalty provision. However, under Section 170ML industrial action may be taken against an employer during a period of bargaining in relation to an agreement with the employer—so called protected action.

approach that was overly technical and would drag out proceedings. The Court was also “giving primary attention to the unions and employees bargaining positions;”

- Thirdly, attempts by employers to obtain protection against industrial action by having recourse to the Victorian Supreme Court were effectively prevented by the Federal Court, which appeared determined to establish a monopoly position in the judicial decision maker in industrial matters.

It is doubtless possible to argue that this action by the tribunals was consistent with one interpretation of the WRA 1996. However, there can equally be no doubt that it was clearly contrary to the intents of that Act to prevent arbitration on bargaining issues during bargaining periods and to strengthen the compliance provisions to deal with unlawful industrial action. Indeed, in his Second Reading Speech on 23 May 1996, Minister Reith stated that the intent of the compliance provisions was to give “parties suffering from illegal industrial action...access to effective legal redress, including injunctions and/or damages. Industrial action that continues in breach of such directions from the court will be in contempt of court.”

The next stage in highlighting concerns about judicial intervention was the excellent paper presented by Melbourne barrister Stuart Wood to the Society’s May 2000 Conference.²⁶ Wood gave many examples of tribunal decisions on industrial issues and highlighted the fact that many unions simply treat Section 127 orders as having no effect. He pointed out, indeed, that one prominent union official, Craig Johnston, had boasted publicly that “I’ve got hundreds of them and I just throw them in the bin.” Wood also noted that ten of the Federal Court Judges, who had been appointed by the previous Labor Government and who had been part of the previous Industrial Relations Court, were continuing to operate a de facto IR Court through the administrative mechanism of the Federal Court industrial docket system. Although he also observed that four “commercial” judges had started to sit on industrial cases “in the last few months”, his presentation clearly indicated that unions were continuing to receive preference over employers.

Another significant development indicating concerns about the Federal Court was an important article on 12 June 2000 by The Age’s industrial correspondent, Paul Robinson.²⁷ While this article contained some typical Age type misrepresentations and one-sidedness, it made several important revelations, viz:

Firstly, at the judges’ biannual conference in April “some interstate judges expressed concern about the damaging publicity judges in Melbourne were receiving, which they said reflected on the court as a whole;”

Secondly, the Chief Justice of the Federal Court had allocated five extra judges—Merkel, Goldberg, Kenny, Finkelstein and Weinberg to the industrial panel. While these extra

²⁶ *The Death of Dollar Sweets*, May 2000.

²⁷ *Contempt of Court*, P Robinson, The Age, 12 June 2000.

judges were said to be “assisting” Justices North, Marshall and Ryan to cope with a “rapidly increasing industrial workload”, the reality appears to be that those three judges, along with Justice Gray, are largely undertaking other duties. Justice North, for example, appears mainly to be sitting on immigration cases.²⁸

Thirdly, the leading union lawyer, Josh Bornstein, was quoted as accusing certain identities of conducting a campaign against the Federal Court, which is simply “applying the law as it stands”. According to Bornstein this campaign came from “a very small but vocal group associated with the HR Nicholls Society. A lot of Federal Government policy in industrial relations is driven by the HR Nicholls Society and the Institute for Private Enterprise, which is the same as a Labor Government taking advice on IR policy from Spartacists!”

Fourthly, the article attempted to portray as responsible the fining in May by Justice Merkel of union officials Mighell and Johnston for contempt of court in relation to the holding of statewide stop work meetings late in 1999.²⁹ However, the fine of \$40,000 was not only miniscule in relation to the deterrent effects on employment and other damage to business that would have been wrought by these two officials but was made payable by the garnisheeing of their wages ie the penalty could be met by payment over a period. Importantly, the costs order against the employer considerably outweighed the penalty imposed upon the union.

These leaks to a leading Melbourne industrial journalist of the inner thoughts of the Federal Court and its leading supporter were clearly a calculated strategy designed to reduce public criticism of the Court and to portray the opposition as tiny while also showing that the judiciary does respond to “what society has come to demand”. However, to what extent has it responded?

First, although the important Commonwealth Bank case on individual agreements is scheduled to be heard next month by Justice Finkelstein in Melbourne, unions do appear to have reduced their previous attempts to have cases held in the IR capital of Australia. This suggests that the hold on industrial cases within the Federal Court by the coterie of former union barristers has been diminished to some degree.

Second, my research suggests that no injunctions against Supreme Court actions have been granted by the Federal Court since May-June last year. Perhaps this is partly due to the new Federal Court requirement that three judges have to grant a stay of a Supreme Court decision. However, this does not mean that Section 127 has become more effective. It also appears to reflect the Supreme Court’s bad experience with anti-suit injunctions issued by the Federal Court. This has made it reluctant to issue orders against strikes and has therefore made it not worth employers’ while to pursue strike-restraining applications in that Court. There is some benefit for employers, though. By focusing instead on

²⁸ There has been no change, however, in the system by which Federal Court cases are assigned to a judge’s docket and that judge stays with the case. By contrast, in the Supreme Court a case is assigned to a subject-based list rather than a judge’s list.

²⁹ Australian Industry Group v AFMEPKIU [2000] FCA 708.

applications to stop unlawful and violent picketing, they have reduced the chance of unions being successful with an anti-suit injunction.

Third, despite its timidity Justice Merkel's \$40,000 fine of Mighell and Johnston can at least be seen as an attempt by the Federal Court to discipline militant unions by giving effect to a Section 127 order.³⁰ The trouble is that it has not stopped those unions from continuing to throw such orders "in the bin."

In Queensland, for example, in what appears to have something of a pay-back to BHP for its move to implement individual agreements in the Pilbara, the CFMEU has successfully flouted court orders in a number of cases³¹ relating to strong action taken against attempts by that company to improve the efficiency of its coal operations in that State.

Nor did Justice Merkel's fine stop the AMWU's violent attack against that normally pro-union institution, *The Age*, in industrial action last December. That action prevented the publication of the paper on only the second occasion in its 148 year history, and included breaking the paper on the printing presses, pressing emergency buttons to stop the presses and completely disregarding an injunction courageously issued by Justice Marshall at 12.30 am. In that case,³² the unions made no attempt to dispute the facts and Justice Finkelstein imposed penalties of \$8,000 on one union and \$6,000 on another.

However, although the unions were penalized, Justice Finkelstein refused to grant an injunction that would provide the basis for a future contempt action on the ground that "there is no evidence. (of)... a real risk of unlawful industrial action"—but he gave no reasons for that view. Moreover, although he acknowledged the "considerable loss for many people" resulting from the action, his penalties were less than the pathetic maximum of \$10,000 (which has apparently never been "awarded"!)³³. One assumes that *The Age* is continuing to employ those who participated in the destructive actions.

Again, the Merkel decision did not deter the CFMEU from trashing the National Gallery last August, action that was described by Justice Goldberg as follows in the case against the union by Abel Constructions:

On 10 August 2000, members of the Union came to the Gallery site and entered it by smashing the front glass doors. Officers of the Union were either present at the time or shortly thereafter. The members of the Union had used oxy-acetylene equipment to cut through a roller shutter door and about 300 to 400 persons gathered in the foyer area of the Gallery site at sometime around or shortly after 7.00 am to 7.30 am. They

³⁰ Despite the fact the dispute was in Victoria and involved Victorian manufacturing unions, the Australian Industry Group demonstrated its confidence in Victorian judges by deciding to seek the Section 127 order in Sydney, where it was granted by Justice Whitlam.

³¹ BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union [2000] FCA 1614 (21 November 2000); BHP Steel (AIS) Pty Ltd ACN 000 019 625 v Construction, Forestry, Mining & Energy Union [2000] FCA 828 (19 June 2000); BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union [2000] FCA 1853.

³² *The Age Company Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000], FCA 1757.

³³ Presumably it would have been open to *The Age* and others suffering damage to seek redress and compensation at common law.

were addressed by the secretary of the construction and general division of the Victorian Branch of the Union and in the course of the morning, the president of that branch told the employees of the respondent that they either joined the Union or they, referring to the Union, would keep picketing the site every day until they did so. The secretary said that they had closed down the site and would keep it closed until the respondent did a deal with the Union. Later in the morning, the secretary proposed a roster to stay on site and at that point of time most of the members of the Union who were on site left, leaving about fifty persons on site. This occurred around twelve noon.

Whilst the members of the Union were on site, a substantial amount of damage was done to the site. In an affidavit relied upon in earlier Supreme Court proceedings, which has been tendered before this Court, Mr Campisi said that while the members of the Union were on site a considerable amount of damage had been done. That damage included damage to the pedestrian roller door at Sturt Street, damage to the loading dock roller door at Sturt Street, smashing the glass doors at the garden entrance, smashing the glass doors at the St Kilda Road entry; some tools and equipment were stolen; approximately thirty to forty fire extinguishers were discharged; fire hydrants were damaged and floors were flooded. A particular incident involved a bobcat which was driven in to a wall damaging a water riser.

The penalties are still to be announced but the action doubtless contributed to the recent victory of the Martin Kingham team in the elections to the Victorian Branch of the CFMEU and the continued rise of the Worker's First group of which Craig Johnston is now State Secretary. As both Kingham and Johnston's groups are challenging the federal bodies, perhaps Victoria's efforts will soon be more widely available around Australia.

It will also be recalled that the CFMEU's industrial and legal tactics during the Construction Industry 36 hour dispute of early 2000 were a huge success for the union and its pattern agreements have since been extended outside metropolitan Melbourne. Indeed, according to the Master Builders Association the Victorian building industry has experienced continued aggressive industrial action ever since and the unions have repudiated agreements made then not to make additional claims.

One result has been that union claims for increased demolition allowances were met with little resistance from the AIRC and have "blown out". Unions have also engaged in pay-backs against companies that (almost uniquely for the industry) joined together to oppose the Campaign 2000 push. It is little wonder that, having effectively wasted over \$1 million on that opposition, there is greatly increased reluctance by employers to take legal action to curb union militancy. Action by an individual employer is almost unthinkable. Anecdotal evidence suggests a deterioration in productivity in the Victorian building industry over the past year or so.

The best that can be said about the tribunals' treatment of militant action is that employers' access to the Supreme Court to prevent violent picketing, and a somewhat less sympathetic approach to union actions by the Federal Court³⁴ (including the Age case referred to above), appear to have stopped the AMWU achieving all its objectives.

³⁴ PWB Anchor Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2000] FCA 1482 (13 October 2000); Southcorp Australia Pty Limited v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2000] FCA 1480 (12 October 2000); (15 December 2000); PWB Anchor Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union (No 2) [2000] FCA 1491 (18 October 2000).

But Johnston has retained significant media credibility as a spokesman for “the workers” and Section 127 remains relatively ineffective in dealing with militant union action.

Fourth, the Federal Court now appears somewhat less sympathetic to union applications to prevent the introduction of workplace changes by management. In December it gave the Employment Advocate favourable decisions in two separate cases commenced in March 1999 and involving threats of industrial action by Queensland unions with the object of preventing the employment of a non-unionist. However, no decision was made on penalties and the CFMEU has appealed against the decision.

The Employment Advocate was also successful in December in its appeal to the full bench of the Federal Court against a decision by Justice Ryan that the Burnie Port Corporation had contravened the freedom of association provisions by refusing to employ a prospective employee because he would not accept employment under the individual agreements policy that the corporation was pursuing. The Court took the view that the WRA 1996 did not prevent an employer from offering one form of employment rather than another.³⁵

Then there is the important BHP Iron Ore decision³⁶ in which Justice Kenny rejected union claims that BHP’s individual agreements policy constituted discrimination. After initially indicating an intention to appeal, the ACTU evidently decided that it would wait for the newly elected Western Australian Labor Government’s amendments to that State’s industrial legislation, which are scheduled to considerably reduce, if not effectively eliminate, the capacity to enter individual agreements.

However, as in *The Age* case, the role played by the Federal Court leaves a good deal to be desired. The case took over a year to reach a decision, and the considerable period over which senior executives were required to give evidence about the company’s intentions, highlights the absurdity of the judicial role. In effect, Justice Kenny felt it necessary to try to put herself in the position of company executives in order to test whether those executives were genuinely seeking the conclusion of individual agreements for efficiency reasons—“BHPIO management’s reasons for introducing the WPAs (are) a central issue in this case.”

The fact that Justice Kenny’s judgment ran to 76 pages tells a story: If BHP had to incur what must have been large costs in terms of management time alone, how would smaller companies fare if they have to go through similar procedures in trying to introduce individual agreements? It also indicates the economic burdens which the award regime

³⁵ In an address to the Industrial Relations Society of New South Wales on 20 March, the Employment Advocate, Jonathan Hamberger, indicated that the OEA had dealt with over 1,000 freedom of association complaints, with complaints in relation to the right not to be in a union outnumbering complaints in relation to the right to be in a union by about three to one. The great majority of such complaints have been satisfactorily resolved without taking legal action. Of the nine cases that have gone to the Federal Court (four against employers and four against unions), only one has been lost by the Advocate and that is currently the subject of appeal.

³⁶ *AWU v BHP Iron Ore Pty Ltd* [2001] FCA 3; *AWU v John Holland Pty Ltd* [2001] FCA 93; and *NUW v Qenos Pty Ltd* [2001] FCA 178.

imposes on companies and workers alike. Companies such as BHP are able to offer substantial increases in remuneration to workers who accept individual contracts. Such an offer does not indicate mere warm heartedness on the company's part. It indicates that the award regime is imposing a huge economic burden on all involved in the enterprise, and that the rewards which will follow from escape from this regime can be shared between the shareholders and the workers.

BHP is no doubt in a better position to meet the costs of improving work practices and Justice Kenny's decision may have influenced it to step up its fourteen months of attempts to effect major changes in its Queensland coal mines. But, as already mentioned, it has also led to the unions increased militancy and has not stopped them flouting court orders. The fact that attempts by BHP to have the protected bargaining period suspended and the situation arbitrated by the AIRC will not commence until next week is illustrative of the delays in getting effective court action, as is the apparently interminable dispute between the AWU and Caltex at the Kurnell refinery. There, a bargaining round commenced in August 1999 and, although it has been twice terminated by the AIRC on the ground that there was no prospect of reaching agreement, on 1 February 2001 the AWU was able to appeal against the second order.

Overall, despite the Federal Court's greater concern for impartiality between the parties appearing before them, it can scarcely be said to have encouraged attempts by business to improve efficiency. The discouraging side has included the granting of injunctions against the termination of employees and the use of individual agreements and contracts, as well as acceptance of union opposition to other proposed changes. A full bench has even made orders requiring contracting bodies to pay the "site rate" and in one case has prevented outsourcing altogether.

It is true that the Federal Court's interventionist enthusiasm may have been curbed to some extent by the High Court decision last November that, when St George Bank closed a branch and appointed as its agent a nearby chemist who had employed two former employees of the bank, that did not constitute a "transmission of business." The union had previously been successful on appeal to the full bench of the Federal Court in arguing that the agent was bound by the relevant banking award on the ground that Section 149 (1) (d) of the WRA 1996 protects employees against a loss of award entitlements following a transfer of a business.

However, this High Court decision shows the fine line of interpretation involved: the Federal Court had concluded that the Bank had assigned part of its business to the chemist but the High Court said that "it is not correct that it is carrying on banking business. It is carrying on the business of a bank agent."³⁷ It is not difficult to imagine that businesses would be hesitant in making substantive investment and employment decisions dependent on such judgments.

Moreover, while a unanimous High Court decision on 15 March overturned the full bench of the Federal Court, the decision provides that, where the parties have agreed to

³⁷ PP Consultants Pty Limited v Finance Sector Union [2000] HCA 59.

the AIRC arbitrating on issues outside the twenty allowable award matters, it may do so. Unless employers are able to avoid such agreements, this opens up the potential for a return to the “good old days” where the Commission is involved in extensive arbitration. A major objective of the WRA 1996 was to prevent that.

More generally, it is important to recognize that the scope provided for judicial intervention, whether by the AIRC or the Federal Court, remains very large. With regulations and schedules, the WRA 1996 runs to almost 5,000 pages and there are many provisions that require judicial interpretation, not the least being the 20 allowable award matters under Section 89 of the WRA 1996 to which industrial disputes are notionally confined.³⁸

Conclusions

How should we view all this? It can be argued that the responsibility for the extent of third party intervention in Australia in employment relationships lies with the failure of successive governments to address the issue at the political level, and the associated failure of others (particularly the business community) to actively support the rights of people to manage their own relationships. However, the judiciary must also share a substantial part of the blame as it has interpreted the legislation which regulates labour market participants in a way that has effectively imposed upon Australia a highly interventionist set of arrangements, and it has done so with little, if any, understanding of the economic and social implications.

The fact that the legislation is badly in need of reform should not stop the tribunals from interpreting it in ways that recognizes the interests of society as a whole, as distinct from unions in particular. The recent moderation in the extent of judicial intervention in industrial cases does suggest that expressions of concern from various quarters, including this Society, has exerted a modicum of influence on judicial thinking. Indeed, in one sense the state of legal “theory” provides an opportunity. But, even allowing for the apparent readiness of the law to provide from its perspective “what society has come to demand”, there are few signs of any real conversion of thinking.

It is difficult to avoid the conclusion that tribunals continue to allow unions to play a game of testing every possible provision and of doing it in every possible jurisdiction. Business is bearing considerable direct costs, as is the community, both in the form of a wasteful and unnecessary use of resources and through the adverse effects on employment because of the deterrent effects that employers face. It is remarkable that an examination of the plethora of industrial cases dealing with the WRA 1996 reveals no precedent that would enable one to advise an employer that he could confidently pursue

³⁸ While the Government was successful in having the Senate pass legislation on 7 March removing “tallies” from the list, the AIRC had already deleted them from the main meat industry award and replaced them with a payment by results system. However, tallies clauses will now be reviewed in nine awards over the next 12 months. The Democrats refused, though, to delete union picnic days from 750 awards on the ground that workers would continue to have a day off because such days already have public holidays gazetted by the States!

this or that course of action. To the outsider at least, it seems that ad hocery prevails. Chief Justice Gleeson's "abiding need for predictability and certainty" is nowhere to be found: it has been overwhelmed by the "irreversible move towards subjectivisation of issues."

Finally, particularly if Labor were to attain Government in Canberra, there must be a serious question as to whether even the recent slightly more moderate Federal Court approach would last. Labor has already largely adopted the ACTU's industrial relations agenda and was responsible for many of the Federal Court appointees. Those who believe that minimal intervention in employment relationships is in the best interests of the community clearly need to better explain and proselytize their arguments that society is not demanding judicial intervention, and that we would all be much better off without it.