HOW THE JUDICIARY* CONTINUES TO UNDERMINE LABOUR MARKET DEREGULATION**

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Abstract

Despite improved economic growth, participation rates have not increased in recent years and Australian employment/population rates continue below those in comparable countries when they should be above. The existence of two million or so who would like more employment suggests much more potential for increasing employment than the official unemployment figures.

Various factors contribute to this situation. But the general approach of "judicial" decision-making in employer/employee relations is having serious adverse effects on employment decisions. The basis of such decision-making reflects erroneous assumptions and beliefs, including that tribunals and courts have social policy responsibilities independently of Parliament, that there is an imbalance of bargaining power between employers and employees, and that courts have the capacity to make informed judgements about the workability of employment contracts.

Particularly (but not only) in the AIRC, such mistaken assumptions have intruded increasingly without taking proper account of contrary influences that in a modern society should be reflected in the basis of decision-making. These influences include the evident intent of the Workplace Relations Act of 1996 to put less emphasis on judicially-determined employment conditions, the implications of the continuing development of a competitive economy - with educated citizens increasingly able to make their own economic decisions - and the increasing role played by government in providing social security for those on low incomes. Such influences should combine to mean that employers and employees are left generally free to negotiate employment conditions with minimal judicial interference.

Unfortunately, an examination of recent decisions, especially those by AIRC commissioners, indicates increasing interference or failure to interfere when obviously necessary. Such decisions have included failures to protect employers against violent and intimidatory union action, a widening in the definition of industrial action so as to allow more arbitration, an extension of the circumstances in which unions have the right to strike and to enter business premises, a widening of the safety net beyond its objective, an apparently less favourable treatment of non-union agreements and an increasing attempt to restrict employers' use of non-union labour.

A major political response is needed. This could include a wholesale revision of the legislation and a conversion of the AIRC into a mediatory body with no legal powers of arbitration or intervention. It would be timely to make such a change in circumstances where that body has completed one hundred years of regulation.

*'The judicial decision-making process', 'the judiciary' and 'judges' should be read, where appropriate, as including operating tribunals and their members as well as courts and their members.** This paper is an edited and slightly modified version of a paper presented to the HR Nicholls Society's XXV Conference, 7 August 2004.

Introduction

In present times, when fact seems increasingly difficult to distinguish from fiction, Dan Brown's highly imaginative book, *The Da Vinci Code,* has inspired renewed speculation about the existence of the legendary Holy Grail. Why such a fresh burst of interest? As one of Brown's characters speculates - "for most, I suspect the Holy Grail is simply a grand idea…a glorious unattainable treasure that somehow, even in today's world of chaos, inspires us".

Believers in grand ideas are found in many places and the bench seem to have no shortage of those prepared to espouse them. With the completion of the centenary year of the establishment in 1904 of the (then) Conciliation and Arbitration Court it is timely to recall the Holy Grail envisioned by Justice Higgins in his notoriously romantic vision that the establishment of that "court" would mean "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 process of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants: and all in the interests of the public" (Higgins 1922).

This grand idea, a response to the extensive strikes of the 1890s and the motivating force behind the insertion of s51 xxxv in the Constitution, has turned out to be a glorious unattainable treasure. Indeed, over the century of compulsory conciliation and arbitration Australia has experienced a remarkably high rate of industrial disputation, a rate that has generally exceeded the OECD average in the period for which comparable data is available.[1]

I have suggested elsewhere (Moore 1998 and 2001) that the CAC, its successors and other courts dealing with employer-employee relations have been allowed to make unwarranted use of s.51 (xxxv) of the Constitution to develop the highly regulated arrangements that are unique to Australia.[2] I have also argued that, looked at in the broad, workplace relations decisions under these arrangements have not only failed to limit industrial disputation but have had generally adverse economic and social effects, including on employment levels. The purpose of this paper is not, however, to again traverse the history of Australia's experience with the judicial decision-making process in workplace relations. Rather, it is to examine that process over the past three years.

My contention is that such decision-making has gone even further in a direction contrary to the changes in social and economic circumstances in the past twenty years as well as contrary to the intent of legislation passed by Parliament and to the general direction of policies of both major political parties. Several points are relevant.

First, the judiciary has not responded in any substantive way to the development of an economy in which it has become widely accepted that the participants will operate under competitive conditions but, at the same time, in which extensive social security has also become available to help those unable to obtain employment and those judged to require

other forms of social assistance. In short, individuals are nowadays expected to a much greater extent to make their own economic decisions (and are much more capable of doing so) and governments have accepted the responsibility for helping those who are less able to cope.

By contrast, members of the judiciary still often affirm that judges have social policy responsibilities that require them to (as Justice Kirby has put it) lay down the law where there is none.[3] Indeed, Justice Kirby appears to believe that the issue of social rights is a matter for the courts rather than Parliament.[4] But if judges continue to espouse a social responsibility role for themselves they should surely at least recognize that such a role must reflect major changes in societal circumstances. Let us suppose for a brief moment that social and economic circumstances 100 years ago and for the following 80 odd years could be said to have justified the extensive prescriptions by the judiciary of employment conditions. Surely, then, the changes in social and economic conditions and in government policies in these last twenty years should have led the judiciary to recognize that, specific legislative requirements and the law of contract aside, employees in modern societies no longer require to be protected against employers by socially-based judicial determinations and interventions?

Among other points relevant in our relatively modern competitive economy is that the over 1.1 million Australian businesses - with the great majority being small businesses that absorb about half of those employed - have virtually no scope to exercise monopsony powers. In reality they actively compete amongst each other for the services of a workforce of around 10 million. The only logical conclusion for the failure of the judiciary to adjust to such realities has to be that, having created and moulded the employment regulation market, the legal arm is now unwilling to release it from captivity.

Second, and contrary to the reality outlined in the last paragraph, judicial determinations continue to be based on the mistaken belief that, because there is perceived to be a general imbalance of bargaining power between employers and employees, there is an inbuilt conflict situation that only the judiciary can resolve. What the judiciary do not appear to have grasped, however, is that employers do compete actively between themselves for a labour supply that offers only a limited quantity of the various kinds of labour. Indeed, there effectively exists not one single labour market but a whole series.[5]

Associated with this mistaken rationale behind judicial decision-making is the mistaken acceptance by the judiciary that there is an inherent capacity and need for “outsiders” to make meaningful and informed judgments on the workings of employment contracts. In reality, however, whether an employment contract operates satisfactorily for both employer and employee depends primarily on relationships that can only be assessed internally, particularly as to whether self-enforcing and in-built incentives work out in practice. In short, there are important - but judicially unrecognised - implicit contract terms that are not matters about which outsiders are capable of making meaningful decisions.[6]

Third, there is a growing failure to take account of the potentially serious problems arising from the increasingly individualized or subjective assessments of cases rather than the straight application of general rules. Although he did not specifically address such assessments in regard to workplace relations cases, in a 1995 article entitled *Individualised Justice –The Holy Grail* (Gleeson 1995) our present Chief Justice, Murray Gleeson (then Chief Justice of NSW) drew attention to the more individualised approach being adopted by judges across a wide field and noted the potential for such an approach to have serious adverse implications, including for "the willingness of people to engage in commercial transactions". Indeed, although he was careful to point out that judges have "the capacity, and sometimes, the obligation, to exercise qualities of judgement, compassion, human understanding and fairness", the Chief Justice appeared to be sending a message that more judicial constraint is needed.

Regrettably, it would be difficult to conclude that His Honour has been heeded, least of all in regard to judicial decision-making on relations between employers and employees in recent years. And the establishment of a regime of subjective assessments in this area clearly has the potential to add significantly to the risks (and hence the costs) that employers face in deciding their employment policy.

There is no scope here to explore the question as to why, in the face of such comments by the Chief Justice and others, the judiciary has continued to pursue such an individualised approach to decision-making. However, the former Chief General Counsel for the Federal Government, Dennis Rose, recently suggested that "on important social issues…, there seems to be a curious preference in some quarters for decision-making by unelected judges rather than by elected legislatures. There also seems to be a reluctance to subject judges to the various criticisms to which other public figures are exposed for comparable lapses from proper standards of reasoning" (Rose 2004). This observation is consistent with the refusal of editors of several law journals to even discuss the possible publication of the paper I gave to the September 2001 conference of The Samuel Griffith Society criticising excessive judicial intervention in relations between employers and employees.

The sparsity of criticism is the more pertinent given Rose's argument that, as between alternative legally-open conclusions, "judges often need to make choices ("policy choices") ... and will often be influenced, if not determined by personal beliefs on social issues, including morality". However, although Rose is himself highly critical of the legal reasoning behind certain judgments by Justices Deane, Toohey and Gaudron, he suggests that "it is not useful to indulge publicly in…speculation about the causes of errors in judicial reasoning" except where judges choose to make statements "outside their judicial activities".

My assessment is that, whether inside or outside judicial activities, far too many judges leave the clear impression of underlying personal beliefs that, independently of Parliament or the legislation it passes, the judiciary should play a role in determining social policy and, in particular, in ensuring perceived "fair" or socially desirable outcomes. On workplace relations issues one can readily discern this by reverting 100 years to such notoriously mistaken disparagements of the outcomes of "the higgling of

the market place" by Justice Higgins or by drawing on the present day perspectives of Justice Kirby, such as his exaggerated assertions that the national industrial system has had "big successes" in "avoiding nation-wide strikes" and in "providing rapid response" by "bringing disputing parties around the table" (Kirby 2001). Justice Kirby aside, there are other examples of questionable pronouncements and positions taken by judges or commissioners[7] dealing with industrial matters in tribunals and courts, leading to the inevitable conclusion that the personal beliefs evident in such pronouncements are having a substantial (and unwarranted) influence on decisions in particular cases.

Fourth, and more specifically in relation to workplace relations arrangements, far too many of the judiciary (and commentators on judicial decisions) seem to pay little regard to the Acts Interpretation Act of 1901 and the 1981 addition of s 15AA, which provided that "in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object". Also relevant is the 1984 addition of s15AB, which provided that extrinsic materials such as Hansards (and hence Second Reading Speeches) and explanatory memoranda should be used in interpreting legislation.

These legislative requirements ought to have been highly relevant to judicial interpretations of the Workplace Relations Act 1996, whose principal objects include "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level". Further, the Second Reading Speech presented that legislation as "a break with a system of industrial relations that has been based on a view that conflict between employer and employees is fundamental to the relationship and that an adversarial process of resolving disputes is appropriate and inevitable"; as "rejecting the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long – that employees are not only incapable of protecting their own interest, but even of understanding them, without the compulsory involvement of unions and industrial tribunals"; as giving "priority to freedom of association"; and "above all… to empower employees and employers to make decisions about relationships at work, including over wages and conditions, based on their appreciation of their own interest". It was also clearly the intent of the Act to prevent arbitration on bargaining issues during bargaining periods, and to strengthen the compliance provisions to deal with unlawful industrial action.

Of course, like all pieces of legislation involving political compromises, the 1996 Act gives scope for the AIRC to pursue regulatory paths, including to determine a "fair and enforceable" safety net of minimum wages and conditions of employment, and leaves scope for the exercise of judicial discretion. However, my contention is that, particularly having regard to the major changes in economic and political circumstances already mentioned, the legislation and the Second Reading Speech do not provide any justification for the tribunals and courts to pursue the regulatory and discretionary paths to the extent they have been.

What conclusions can be reached about the effects on the performance of the labour market of the pursuit of these regulatory paths? Given that there has been a much improved rate of economic growth since the early 1990s, it seems puzzling that there has not been a much greater improvement in the performance of the labour market and in particular in the employment/population and/or participation rates.[8] Various likely influences have been identified, including the employment deterrent effects arising from the increased access to benefits available through the social security system (see Moore 1998b). What have been overlooked, however, have been the employment deterrent effects of the regulatory system operated by the judiciary. Arguably, regulatory judicial decision-making in workplace relations cases has significantly undermined the attempts since the late 1980s by governments of both political persuasions to improve the functioning of the labour market by reducing its regulation.

I turn now to considering briefly some data relevant to the performance of the labour market in recent years.[9]

Some Relevant Data

First, as to employment potential, data in the OECD's Employment Outlook published in June 2004 show that in 2003 Australia had 69.3 per cent of the working age population (15-64 year olds) employed, significantly lower than for countries with economic, welfare and political systems that are broadly similar to ours, such as the US (71.2%), the UK (72.9%) and New Zealand (72.5%). These higher proportions were not one-offs but have existed for many years. If in 2003 Australia had had similar proportions employed as in the UK, for example, our employment would have been around 400,000 higher ie equivalent to about two thirds of those officially unemployed. But such comparisons understate our employment potential: with our higher rates of literacy and numeracy than these countries, Australia should have higher not lower proportions of working age employed than they have.

Second, in interpreting Australia's participation and/or employment/population rates account needs to be taken of our very high proportion of part-timers, over a quarter of whom say they would like to work more hours. In 2003 we had 28 percent employed part-time compared with 13 percent in the US, 23 percent in the UK and 22 percent in New Zealand. The increasing proportion of part-timers (22 percent were thus employed in 1990) is reflected in the reduction in average annual hours worked by Australians (now down to 34.6 hours per week compared with 35.7 in 1997).[10]

Third, although there has been a major fall in the so-called official unemployment rate compiled on an internationally comparable basis, the effective unemployment rate is much higher. In September 2003 the then unemployment rate of 5.9 percent compared with the labour under-utilisation rate of 12.5 percent published by the ABS in June 2004. While this was a not insignificant improvement on the 15.2 percent rate in September 1996, it still left 1.2 million "under-utilised" (covering those who were working but would like to work more and those who were either actively looking for work - but not available in the survey week- or discouraged job seekers). Moreover, there were an

additional 700,000 who were not actively looking for work but who say they would be available to start work within four weeks if jobs became available (ABS 2003). As one leading economist has pointed out, this means that "as many as 2 million people, or 20 percent of the numbers now employed, would like employment or an increase in their hours of work", indicating that "the magnitude of the underutilised workforce suggests there are considerable opportunities to expand employment" (Freebairn 2004).

Fourth, the ABS Household Expenditure Survey for 1998-99 shows the relatively small role played by wages in households on low incomes. Households with incomes in the bottom quintile then received nearly 70 per cent of gross incomes from government pensions and allowances but only about 8 per cent from wages and salaries. With other analysis showing that more than half of low wage earners are located in the top half of household incomes, it is difficult to see any social, let alone economic, rationale for judicial determinations on minimum wages.

Fifth, while a proportion of the work force (perhaps 15 per cent) effectively operates outside the regulatory system, only an estimated 3 per cent (about 250,000) are formally on individual agreements or AWAs. The conclusion of such agreements is subject to regulation and approval by the AIRC when the Employment Advocate has concerns about whether an AWA proposal meets the "no-disadvantage" test[11].

Sixth, while published industrial disputes statistics of working days lost have in recent years generally been at a relatively low level, this cannot necessarily be taken as indicating reduced or low levels of industrial disputation, that is, "disputes" and workplace "disruptions" can (and do) occur without the loss of the ten working days required to qualify as a statistical dispute.

Recent Judicial-Decision Making

When I addressed the Samuel Griffith Society in September 2001 I pointed out that, in the previous year, there had been considerable adverse public commentary in 2000 on various industrial decisions. [12] I had also indicated that some Federal Court judges who had previously had responsibility for cases involving industrial matters appeared to have been moved to other areas and their places taken by those usually known as "commercial" judges.[13] In concluding that this action could be taken as an acknowledgment that some Federal Court judges had gone too far in pursuing the subjective assessments approach, I drew on both the adverse public criticisms and commentaries and the discussions I had had with industrial lawyers and journalists about these adjustments in judicial responsibilities.

I further pointed out in 2001 that a combination of these adjustments of judicial responsibilities and the additional court costs involved in cases at the Federal Court (where, unlike the AIRC, court costs are incurred), appeared to have led to some reduction in the intrusive role of that court and hence in individualised determinations by its judges. At the same time, I had outlined substantial case evidence suggesting that unwarranted interventionism remained and that there had been inadequate responses to

unions' illegal behaviour and to other aggressive action designed to obstruct needed structural changes by businesses.

Looking at the past three-four years, my examination of industrial cases, and discussions with industrial lawyers and industrial experts in business associations, suggests that developments in the Federal Court and the AIRC in regard to industrial cases can be summarised as follows:

First, the reduced interventionism in industrial matters by Federal Court judges has been broadly maintained but remains significant in the case of some judges. It needs to be kept in mind that changed circumstances could again lead to changes in the allocation of industrial cases as between judges.

Second, despite attempts by AIRC President, Justice Guidice, to improve the way in which cases are conducted and decided (including the dressing down of a commissioner who exhibited gross biases),[14] there has been a major increase in such interventionism by the AIRC. Indeed, unions have clearly targeted the AIRC as a receptive body and it has accommodated them; [15]

Third, most of the appointments to the AIRC appear to have continued to be of members of the industrial relations 'club'. Out of 16 appointments since 1996 (excluding the two recent appointments of Senior Deputy Presidents Hamberger and Lloyd), only 4 would probably be regarded as non-clubites. The majority of the 50 or so members of the Commission appear to continue to have club 'philosophies'.

One example of the attitude amongst 'club' members that judicial intervention provides the 'solution' to industrial problems, and that outsiders fail to understand the role the Commission is performing, is reflected in the reported public statements by Justice Munro on his recent retirement. According to Munro there is an 'enormous' lack of understanding in successive governments of the Commission's behind-the-scenes, sleeves-up role. 'I don't want to reflect on individual ministers, but the number who actually know what goes on has been fairly few, and a lot of advisers know even less. The bulk of the work of the Commission for the bulk of the time has not been in reported decisions or in award making, but with getting with the parties and trying to get them to work through problems';[16]

Fourth, there has been a continued judicial (and police)[17] failure to deal adequately with union unlawfulness and thuggery in the industrial area.

The following sections outline some examples of cases where the judiciary can be said to have made decisions or expressed opinions which are either contrary to the deregulatory thrust of both the legislation and the trend of society or which have failed to provide an equal legal (and working) playing field for both employers and employees. It needs to be kept firmly in mind that decisions that are inconsistent, that extend intervention and that fail to enforce the law create considerable uncertainty in business decision-making that will have adverse effects on needed changes in business structure and employment.

Importantly also, while some single judge decisions are over-turned at a higher level, many smaller businesses would be unable to afford appeals.

Failing to Enforce the Law

A vital function of the judiciary is to make decisions that deter the use of violence and maintain an environment in which employers and employees are able to negotiate without fear of physical intimidation. This judicial role should include the prevention of intimidation designed to impose union closed shops.

Several industries have long been heavily subjected to union intimidation, including attempts to force employers to agree to industry wide arrangements and to require union membership amongst their employees. The Royal Commission into the Building and Construction Industry, and subsequent developments, highlighted failures on many fronts in that industry but the judiciary's performance in regard to it must surely be assessed as prominent among them.

The Royal Commission did not refer specifically to the role played by the AIRC in the determination of wages and conditions of employment in the industry. But its findings clearly implied that the performance of the AIRC in that regard could only be seen as extremely poor in interpreting and applying the Workplace Relations Act 1996. The Royal Commission's 25 findings included that there is a 'widespread disregard of, or breach of"… 'the enterprise bargaining provisions…and the freedom of association provisions…of the Workplace Relations Act 1996 (C'wth)';'widespread disregard of the terms of enterprise bargaining agreements once entered into'; 'unlawful strikes and threats of unlawful strikes'; and a 'reluctance of employers to use legal remedies available to them'.[18] The Commission took the view that 'at the heart of the findings is lawlessness… exhibited in many ways. There are breaches of the criminal law…of many provisions of the Workplace Relations Act 1996'.[19]

Indeed, in an address to the National Press Club shortly after Commissioner Cole reported in February 2003, the then Minister for Employment and Workplace Relations pointed out that 'No less an authority than the National Secretary of the Construction Division of the CFMEU has unwittingly admitted that Cole is right. In what was, no doubt, an unguarded moment, John Sutton admitted to a Melbourne newspaper that 'virtually everything we do breaches part of this Act' '.[20] The Minister was also strongly critical of the role played by the AIRC in handling disputes in the industry.[21]

The Royal Commission itself drew particular attention to the serious problems arising from the fact that 'the process of enterprise level bargaining which is contemplated by the Act has been effectively circumvented and displaced by pattern bargaining leading to pattern agreements.' It concluded that these arrangements 'have been detrimental to both workers and employers, to the industry and to the national economy' and recommended that pattern bargaining be prohibited.[22]

By contrast, Deputy President Munro used a judgment to defend Commission processes, claiming 'some ill-informed, poorly researched material was the subject of what I would dismiss as a beat-up by counsel assisting the Royal Commission into the Building and Construction Industry'[23] Perhaps he would also have rejected the statements by Nigel Hadgkiss, the director of the Federal Task Force, to the Senate inquiry that 'lawlessness prevails. There has been no rule of law. To me it is both systemic and endemic'. (Sunday Age, 6 June *2004*). Hadgkiss also reportedly told the inquiry that unions were involved up to their necks in intimidatory behaviour.

This prime example of the failure of the AIRC effectively forced the Government to attempt to establish a separate body to deal with the industrial and criminal situations in the industry.[24] However, Labor's opposition to establishing a special commission to that end has limited the powers of the interim task force established by the Government under the Workplace Relations Act. Even the proposed new powers under legislation negotiated with the Democrats would (if implemented) fall a good way short of the Cole Commission recommendations, which included the need to create new offences.

Another notable recent example of judicial failure to adequately punish or at least deter union thuggery was the surprising June 2004 decision by a Victorian County Court judge to suspend even his one year jail sentence of AMWU member, Craig Johnston, after that leading unionist had pleaded guilty to two counts of affray and one count each of criminal damage and assault when he led a team of unionists on a violent and destructive attack on a labour hire firm in June 2001.[25] While it is not surprising that this decision was appealed as 'manifestly inadequate', resulting in a short jail sentence imposed by the Court of Appeal, why was there a need for such an appeal? It can only reflect the continued moral incapacity of the judiciary to handle union thuggery and harks back to, inter alia, the Hancock report of 1985, which suggested that 'trade unions are, to varying degrees, centres of power: they replace the powerlessness of individual workers with collective strength' and that, as such, they should not necessarily be treated as subject to the law on the same basis as other 'subjects'.[26]

Industrial Action –Widening the Definition

While the 1996 Act (s127) provided the power to stop or prevent industrial action, the Commission's interpretation of what constitutes "industrial action", and how it should be handled, has been costly for employers, excessively interventionist and increasingly one-sided.

Nor has the Commission met the intent of having orders against unlawful union action made 'as quickly as practicable' and then – if not complied with – enforced by the Federal Court. For those who suffer economic damage from strikes, Commission members have in fact been slow to hear s127 applications; have adopted the approach of conciliating union claims that unlawful conduct has not occurred; and have also intervened to determine whether action is protected or unprotected at law. The Federal Court has also tried to re-hear findings made by the Commission and – for a time – even issued anti-suit injunctions to stop the Supreme Courts making orders against unlawful

behaviour at common law if the matter concerned an industrial dispute.[27] In effect, unions have been allowed to use this section to obstruct or make more costly attempted workplace changes by employers.

The widening of the definition of 'industrial action' has now reached the absurd situation where unions have been able successfully to argue that workplace change itself constitutes industrial action. In an alleged case[28] of employer 'disruption', Commissioner Whelan responded to a union 'initiative' by stopping The Age from making workers redundant when it was closing one of its printing plants on the ground that redundancies by an employer could be categorised as 'industrial action'.

According to the Commissioner, 'industrial action is happening….it involves the termination of employees in circumstances which is both a ban on the performance of work by them and a restriction on their ability to perform work…' Whelan readily conceded the union claim that there was an industrial dispute, adding that 'an order will have a practical effect and purpose and may lead to resolution of the underlying dispute.' The Full Bench decided on appeal that terminations of employment did not constitute industrial action, although it left open the question of what changes by management might be regarded as constituting such action.

The Commission has thus widened the interpretation of s127 in such a way as to open up the potential for unions to use it as a mechanism to protest against structural changes by employers and to have the Commission decide on the appropriateness or otherwise of such changes. This is clearly contrary to the intent of S127 of the legislation, which was designed only to be a quick and cheap way for employers to bring an end to industrial action and to give the Commission a role in the process (prior to S127 the process of having resort to the civil courts to obtain an injunction restraining strikes, pickets and bans was regarded as expensive and time-consuming). The idea behind S127 was that the Commission would make an order and, if this required enforcing, the civil court would not judge it necessary to refer the dispute back to the Commission for assessment (as had sometimes happened before S127).

Industrial Action –Extending the Unions' 'Right to Strike'

Judicial decision-making also appears now to allow industrial action to be taken in much wider circumstances than envisaged when the 'right to strike' was first legislated in 1993 by the Keating Labor government under restrictive conditions that were subsequently incorporated in the 1996 Act. The clear intent of those conditions is to limit industrial action to certain circumstances[29], including that it would only be exercisable during the negotiation of agreements but not during their life. However, two Federal Court decisions in the last two years would, but for a recent High Court decision, have indicated few if any limits to strike action.

In the Emwest Case of 2002[30], for example, Justice Kenny decided that protected industrial action could be taken during the term of an enterprise bargaining agreement if the strike was over a matter not contained in the agreement. Despite an express

prohibition on such action in the legislation[31], in August 2003 the Full Court upheld Kenny's decision.

Again, in the Electrolux Case of June 2002[32]a Full Bench of the Federal Court (Wilcox, Branson and Marshall JJ) decided that protected industrial action could be taken over a union demand for any matter so long as the demand is 'genuinely' what the striking party sought. Had this decision stood unions would have been able to engage in industrial action regarding 'non employment matters', including (as in this case) the levying of trade union 'bargaining fees' on non-union members, and would also have removed the intended limitation that the right to strike could only be taken over disputes or demands which concerned industrial matters (matters between employers and employees).

In overturning the Federal Court's decision on appeal,[33] the Full Bench of the High Court provided a clear illustration of the failure of that Court to give effect both to the intent of the legislation and to clear precedents set by two earlier cases. In concluding that 'there is no occasion to depart from those authorities, and every reason to follow them', Chief Justice Gleeson referred to the language used in the Workplace Relations Act in defining the nature of an agreement that may be a certified agreement and rather pointedly added that 'it is hard to think of a clearer case of parliamentary adoption of an expression, with a judicially settled meaning, to be applied in a particular context, than the present'.

Extending The Commission's Arbitration Role

Although the 1993 legislation gave parties to a collective agreement the power to ask the Commission to settle disputes over the application of the agreement, as noted above this power to arbitrate was restricted under the 1996 reforms. Despite this restriction, however, it has largely been able in practice to restore its previous arbitral role in dispute settling.

The Commission has achieved this partly by encouraging the parties to see it as available to meet the requirement that all agreements - whether union collective agreements (s 170 LJ); non-union collective agreements (s 170 LK or individual agreements (AWAs) - must contain a dispute settling clause. Thus, when an agreement has been presented to it for certification, the Commission has strongly encouraged the parties to confer the power of arbitration upon it.[34] Union support for the Commission to have this power has assisted it in achieving the role - and in 'persuading' many employers that giving the Commission such a role is a normal part of an agreement.

Once the parties have provided it with this arbitral role, the Commission has then taken a broad view of how it can exercise that role under the dispute settling clauses, as illustrated in cases such as Qantas Flight Catering[35]and Telstra v CEPU.[36]

In the latter case, Vice President Lawler decided that, provided it was consistent with the dispute settling clause, the Commission could even make orders, and summon documents and witnesses. This view was confirmed by the Full Bench, although it overturned Lawler's decision on other grounds. Again, in AMWU v Holden Limited, [37]

Commissioner Foggo used the dispute resolution power as a basis for issuing orders preventing Holden from continuing with plans to outsource the manufacture of brakes for the export model Monaro and for requiring that the union be provided with documents relating to the outsourcing. The order was subsequently revoked on application by the parties.

This de facto restoration of the Commission's statutory powers to arbitrate, including those that were removed by the 1996 Act, also means that it is in effect able to get around the stipulation in s89A of the Act that industrial disputes are 'normally limited to allowable award matters'. Of course, this restoration is dependent on employers continuing to acquiesce in the Commission being given an arbitral role in the dispute settling clause. But it provides another indication of the way that the Commission has been able to develop approaches that are contrary to the intent of the Act.[38]

Widening the Safety Net and Ignoring Possible Adverse Effects on Employment

Under the 1996 Act the Commission's award-making power is limited to the setting of minimum wages and other conditions of employment – the so-called safety net - and to incorporating in the resultant awards only certain specified 'allowable' matters. When maintaining or adjusting safety net awards, the Commission is required under s88B (c) to have regard to 'the needs of the low paid' and, under s88B (b), to economic factors 'including the desirability of attaining a high level of employment'.

While the Commission has considered at some length economic analysis suggesting that Australia's relatively high minimum wage has adverse employment implications, its decisions and pronouncements on minimum awards have dismissed any such effects as being insignificant or minimal. The Commission has also largely ignored the Second Reading Speech statement that, in order "to encourage agreement-making and meet overall economic objectives", there should be only a "genuine safety net". The following aspects of these decisions/ pronouncements provide a perspective that suggests a body concerned primarily with maintaining its own role rather than acting in a socially or economically responsible manner:

1. Since 1997 the Commission has increased the minimum wage by 34 per cent, well above the rate of inflation[39] and maintaining the highest or second highest minimum wage relative to the average in the developed world;

2. The Commission's decisions have extended the safety net (sic) to approximately 20,000 separate wage rates specified by the award system[40] and ranging up the income scale, resulting in 2004 in the absurd situation of arbitrated 'minimum' award wages in excess of $1000 per week.

3. The Commission appears to take no account of the likely adverse effects of its decisions on the employment prospects of those who are not employed, which include more than those officially unemployed (including the latter there are in fact over 1 million who say they would like a job but do not have one). Indeed,

while acknowledging that its decision in the 2004 case may result in job losses in award reliant industries, the Commission made the surprising comment that: 'It ought now be regarded as well established that the expression 'low paid' in s88B(2) refers to the low paid in employment and does not extend to include the low paid who are not employed.' Following this unexpected pronouncement, the Federal Government introduced legislation – the Workplace Relations Amendment (Protecting the Low Paid) Bill 2004 –designed to require that the Commission take account of the position of the unemployed. But, given the existing legislation's objective of 'attaining a high level of employment', the Government might reasonably have expected the Commission to interpret the legislation as requiring it to take explicit account of the unemployed.

It is thus difficult to avoid the conclusion that the Commission's narrow (in this instance) interpretation of the Act derives from an established culture to address the employment issue in the context of those in work, not seeking work, and to be able to rely on its usual cursory comment along the lines that its decisions are not likely to have significant effects on employment. This raises the question as to whether the position of the unemployed was adequately argued by the Federal Government during the case, let alone why no public comment on the issue was made after it.

The Commission's fall back justification is that it needs to deliver minimum wage increases because 'not all employees are capable of bargaining and bargaining is not a practical possibility for those employees who lack bargaining power'. But even if this justification were accepted, it would surely apply to an even greater extent to those outside employment. On any substantive assessment, the Commission's pronouncements in this area have no basis and are clearly discriminatory against the unemployed.

4. The difficulty of justifying any minimum from a social policy perspective has already been mentioned, viz that more than half of the low paid are in households with above average incomes and that wages account for only 8 percent of incomes of low income households. Even if it were accepted that there is no precise correlation between low wages and low household incomes – as the Commission argues - that would scarcely provide justification for the Commission assuming responsibility for determining a component of social welfare policies that are now both extensive and the responsibility of Parliament. The Commission's defence of its position is yet another indication of its failure to move with the times.

Of course, the Commission can fall back on the legislative requirement to provide a "safety net" and the Government's continuing (and regrettable) support for an annual minimum wage increase. But, given the likely adverse employment effects of having a high minimum and the social policy futility of it, a Commission that was more cognizant of the potential adverse social and economic effects might reasonably be expected to produce increases that are much more moderate and at least below the inflation rate.[41]

Widening the Safety Net – The 2004 Redundancy Case

The most striking example of the recent resurgence of interventionism by the Commission is its decision to widen the safety net even further by agreeing to hear a union claim under s 88B(2) in a redundancy 'test case'[42] – and by bringing down an extraordinary decision on redundancy that applies across the whole workforce. That decision, made in the face of opposing submissions of every industry body, the Federal Government and the State Labor governments of NSW, Queensland and Western Australia, not only ended a 20-year exemption of smaller businesses from severance pay obligations but increased the national scale of severance payments from 8 weeks pay per employee (with 4 weeks notice) to 16 weeks (including the 4 weeks notice), with a maximum of 20 weeks depending on years of service and age (maximum 8 weeks in the case of small business).

The Commission also ignored the failure of unions to observe undertakings given at the previous 'test case' in 1983-84 not to take industrial action to try to increase the standard of redundancy pay then mandated. In practice, unions had subsequently succeeded in 'forcing' larger companies to concede much higher rates of redundancy pay (most of Ansett employee 'entitlements', for example, were redundancy pay).

This use of the 'safety net' provision by the Commission confirms its readiness to interpret the legislation to expand its own social policy agenda and to ignore the potential for adverse effects on employment. As the June 2004 OECD Employment Outlook pointed out, 'in deciding whether to hire new workers, the firm will take into account the likelihood that firing costs will be incurred in the future. Assuming that wages cannot be fully adjusted to compensate for the fact that firms may have to incur firing costs, hiring decisions will be affected' and 'youths, as new entrants into the labour market, and women with intermittent participation spells, will primarily be affected by any reduced hiring'. The July 2004 report by Access Economics to the Business Council of Australia reached a similar conclusion.

The Federal government has submitted legislation to set aside the decision insofar as it concerns small business redundancy obligations. But, again, the Commission has failed to acknowledge that the intent of the existing legislation is to provide a genuine safety net for the low paid, not to provide conditions that extend across the whole workforce.

Bias in Approval of Agreements

The contrast between the Commission's approach to the approval of non-union agreements (under s 170LK) and agreements with unions highlights its interventionist and one-sided attitude in regard to non-union arrangements. Whereas consent arrangements with unions are readily approved, those made directly with staff are subjected to a strict rather than commonsense interpretation of the requirement (section 170LK(4))[43] to give every employee notification that they have the right to be represented in negotiations by a union if they are a union member.

In the April 2004 case Re S J Weir Certified Agreement[44] the Commission's Full Bench ruled that the agreement directly with employees could not be approved despite the notice to employees saying that 'If you are a member of a union you can if you choose to do so require the union to represent you during the bargaining period, however this is not mandatory'. In June in Re St Hilda's Anglican School[45] the agreement for 68 non tuition employees was not approved despite the notice to employees stating 'if you are a member of the union you may wish to discuss the draft agreement with your union representative…if there is a demonstrated need a meeting of affected staff and negotiating representatives will be arranged.' Similarly, in Re Electrical Elite Services[46] the Commission rejected a certification application despite the company notice saying that 'any employee (if you so wish) has the right to be represented by a member of an organisation.'

In effect, employers taking the 'innovative' approach of trying to make agreements directly with staff are not only compelled to spell out union rights - but to do so in a way that requires forensic translation of words in the statute into a dialogue with staff. Here the Commission is not only going beyond the intent of the legislation, viz that 'the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level', but is ignoring general economic and social trends, including the marked reduction in the relative importance of unions in the private sector.

Commercial Disputes

The increasing use by businesses of independent contracting arrangements to avoid industrial regulation has produced not unexpected responses from State Labor Governments, State industrial tribunals and unions designed specifically to extend industrial regulation into contract or commercial arrangements. I draw attention here to only one or two aspects that indicate the extent of resistance to attempts by the business community to enter the forbidden world of reduced regulation.

First, although there is some doubt as to the extent to which in practice it can be made to apply to contractors, s275 of the Queensland Industrial Relations Act, 1999 now purports to give the Queensland Industrial Commission a power to deem independent contractors to be employees.

Second, unions in NSW are seeking orders from the NSW Commission to impose restrictions on the use of contractors, to compel union involvement in decisions to outsource labour or to contract for the performance of work (as well restraints on the hiring of casual staff). The unions have presented this as a test case for 'security of employment' and that is how it is being treated by the Commission.[47]

Third, although the NSW Court of Appeal determined in the Solution 6 case[48] that, under the unfair contracts provision of the NSW Act (s106), the NSW Commission can only consider contracts with an industrial character that are 'closely related to the performance

of work', it is unclear how this will work out in practice. The case was about the sale of shares and there have been suggestions that it is only contracts such as collateral arrangements, share sale deals, sales of businesses, leases and finance agreements that would be excluded from the NSW Industrial Relations Commission's jurisdiction.

However, the judgments in this case (Chief Justice Spigelman, Justices Keith Mason and John Handley gave three separate but supporting judgments) are of particular interest in regard to assessing the capacities of Commissioners to make decisions affecting 'commercial' matters. Spigelman CJ said the legislative power given to the NSW IRC's power to void or vary contracts or arrangements 'does not extend to a provision which has no relationship whatsoever to the performance of work'. 'Specifically, the formula for computation of the purchase price, in my opinion, has no such relationship and the Commission has no power to vary it'. On this basis the Court concluded that the Commission had overstepped its jurisdiction in a manner that was 'patent, plain or clear' and it made the remarkable observation that the Commission had few capacities to determine commercial matters, viz;

> 'The Commission is comprised of judges drawn in large measure from the specialist industrial law bar. Few, if any, of the members of the commission have substantial experience of commerce or of commercial law. Where, as here, relief is sought with respect to matters which do not relate to the performance of work, the Commission is not a 'specialist tribunal' of the kind referred to in the authorities, whose expertise should be accepted by a court with supervisory jurisdiction'.

This observation is not without relevance to the AIRC's capacity to intrude into employer-employee relations, given that they have clear 'commercial' implications that do not seem to be adequately taken into account and that the primary intent of the Federal legislation is for employers and employees to settle employment conditions at the workplace.

'Soft' Treatment of Secondary Boycotts

The Transfield/Patricia Baleen case[49] involved industrial action by unions against the engagement of contractors under Australian Workplace and non-union enterprise agreements (under s 170LK). However, although the unions established a picket, mounted a purported 'community protest' and engaged in secondary boycott activity, they were allowed by the Commission and the Federal Court to ignore orders by those bodies. It was only after unions had inflicted economic damage over several months and engaged in clearly unlawful activity that the Australian Competition and Consumer Commission came in to deal with the situation.

The ACCC concluded that breaches of the secondary boycott provisions of sections 45D and 45E of the Trade Practices Act had occurred and then reached an agreed position with the unions for penalties on each union of $100,000 plus certain processes to prevent future secondary boycott activity. The agreed settlement had to be approved by the Federal Court, in this case under Justice Gray.

As mentioned, some Federal Court judges continue to allow their imbalance of power 'philosophy' to dominate their attitudes. While Justice Gray had little alternative but to approve the agreement, he highlighted this philosophy by taking the opportunity to deliver a scathing assessment of the agreed penalty of $100,000. In his view, despite the maximum penalty being $750,000 under the legislation, this was too far high, particularly as unions do not engage in unlawful conduct for their own gain – but for the gain of their members. Gray J even asserted that the ACCC, in pursuing penalties at that level, had gone close to acting beyond its proper charter as a regulator.

This case provides a clear example of the failure of both the Commission and the Federal Court to enforce the ban on secondary boycotts.[50] The fact that it was necessary to involve the ACCC is another indication of the apparent incapacity of the other two bodies to handle workplace relations, thereby adding to the uncertainty that employers face in making employment decisions.

Union Right of Entry

Under the 1996 Act there is a limited and conditional right of union entry to businesses operating with non-union and/or individual Federal agreements (AWAs).[51] Under State industrial laws such entry is also allowed. However, in BGC Contracting v CFMEU[52] Federal Court judge, Justice French, held that unions could exercise rights of entry under State industrial laws notwithstanding that the employees were employed under federally approved Australian Workplace Agreements.

According to Justice French, there is no inconsistency between the State and Federal laws that would invalidate the State laws through the operation of section 109 of the Constitution … 'the fact that each Act deals with rights of entry is insufficient to demonstrate either direct inconsistency or entry by the State legislature into a field covered by the Federal Act'. It would be surprising if this decision survived an appeal to the High Court.

The CFMEU, the union most 'interested' in rights of entry to 'persuade' non-unionists of the error of their ways, not surprisingly publicly applauded a decision that apparently allows unlimited use of State entry laws. Potentially, it provides an entrée into rights of entry conferred on unions by State industrial relations and occupational health and safety laws regardless of the nature of the employment agreements.

Conclusion

While the judiciary is an important institution of government, this does not mean it should have an unlimited or quasi-policy role or that a reduction of its role in some area constitutes an unwarranted attack on its independence. Moreover, as the Chief Justice himself has implied, the trend in judicial decision-making has potentially damaging implications.

Nowhere is this more evident than in the area of workplace relations. Moreover, the recent record of decision-making outlined suggests that the trend is both worrying and indicates the relevant institutions are out of touch with what is happening in the rest of society. Individuals have an increasing desire to make their own independent employment decisions and have a much increased capacity to do so. The decline in union membership to around 17 per cent of private employees is but one indication of this. Yet the industrial judiciary continues unabated to attempt to make more and more decisions on employer/employee arrangements or at least to prescribe what should be included in those arrangements.

What is the solution in the industrial area? Dennis Rose concluded that 'citizens are entitled to be, and indeed ought to be concerned (and even outraged) by judicial behaviour' of the kind displayed by Justices Deane, Toohey and Gaudron in an important judgment he analysed.[53] One wonders what he might say about some of the judgments in the AIRC or the Federal Court. But the reality in that area is that even a savage critique is likely to have no more than a marginal effect on judicial behaviour.

Another option is to improve the appointments that are made to the relevant institutions and, in particular, to their heads. But while this is certainly something to which priority should be given, it seems unlikely that much improvement could be achieved if the existing institutional and legislative framework is maintained. Lawyers (and others) cannot resist using and 'developing' powers they are given.

The only effective way to achieve a major reduction in the role of the judiciary in workplace relations is for the political arm of government to make a major change in existing institutional arrangements. Closing down the AIRC is probably too large a political step in one go but it should be possible to convert it into a mediatory body with no legal powers of arbitration or intervention. The Advisory Conciliation and Arbitration Service (ACAS) approach in the UK, which is widely used and which unlike the AIRC has established itself as impartial as between employers and employees, has many attractions. A wholesale revision of legislation would also be required.

Finally, whatever institutional changes are contemplated will require a very major political exercise to persuade the community that 100 years of holy grail in industrial relations is more than enough.

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[1] For a more detailed analysis, see Moore, D (1998a).

[2] It is evident that s51xxxv was never intended to be used as the basis for establishing an extensive regulatory system. However, the High Court's decision in the 1914 Builders Labourers Case – *R v Commonwealth Court of Conciliation and Arbitration; Ex parte GP Jones; Ex parte Cooper (1914) 18 CLR 224* – allowed unions to create 'paper' disputes and, over time, this allowed the Federal Tribunal to prescribe a broad range of employment conditions in the process of trying to settle disputes.

[3] A report in the Herald Sun of 26 November 2003, 'Kirby Calls for Judicial Activism', included the following quotation from a lecture by Justice Kirby in England on law-making by judges: 'If there is no

apparent law on a subject, the judge is duty bound to create it, based on past precedents. Citizens need to know and face these realities. So do the bullies who cry judicial activism'.

[4] In his Kingsley Lafferty Industrial Relations Memorial Lecture at the University of Sydney on 23 April 2002, Justice Kirby quoted approvingly a remarkable assertion by Professor Alistair Davidson that the adoption of s51 (xxxv)'effectively put the major issue of social rights on a national scale – the relations between capital and labour - into the hands of a court'. Justice Kirby further indicated that 'where the common law has no exact precedent, where a statute is ambiguous and, in my view, where the Constitution yields competing interpretations, universal principles of international law may be used to resolve the uncertainty'. Justice Kirby went on to praise the NSW Industrial Relations Commission for its decision to 'establish a new equal pay remuneration or equal pay principle intended to provide remedies for gender affected under-valuation of wage and salary rates involving workers in the State of New South Wales under the jurisdiction of the Commission' and for founding its decision squarely on a human rights approach …I am aware of no more explicit recognition by an industrial tribunal in Australia of the significance of international human rights norms for Australian industrial relations law and practice'.

[5] For further discussion of this point, see Moore 2001, 148-152.

[6] Ibid, 152-158

[7] A major example is the series of widely-reported public interviews given in February 1996 during the federal election campaign by Justice Murray Wilcox in which he criticized the Coalition's plans to amend unfair dismissal laws (for further references to Wilcox J, see Forbes, John, '*Just Tidying Up': Two Decades of the Federal Court*, Proceedings of the Tenth Conference of The Samuel Griffith Society, August 1998). Again, in a paper to the XX1st Conference of the HR Nicholls Society in May 2000 (see www.hrnicholls.com.au), leading industrial barrister Stuart Wood presented an analysis of judgments by several Federal Court judges, most notably that of Justice North in the important case of Australian Paper Ltd v CEPU (1998, 81 IR 15), that clearly suggested tortuous interpretations of Section 127 of the Workplace Relations Act designed to render largely ineffective the legislative provisions directed at preventing unlawful industrial action. Wood also pointed out that, although the Industrial Relations Court had effectively been abolished, ten judges of the Federal Court (including a number of ex-union barristers) had largely operated a de facto Industrial Relations Court through the administrative mechanism of the 'industrial' docket system. Justice Gray's comments on the decision by the ACCC in the Transfield/Patricia Baleen case are also relevant –see above under 'Soft' Treatment of Secondary Boycotts.

[8] At 63.5 per cent for 2003-04, ABS participation rate figures show virtually no change since 1995-96 and the data in the 2004 OECD Employment Outlook (which cover only 15-64 year olds) were also unchanged at 73.6 per cent over this period. This OECD data also shows that, out of the 30 OECD countries for which data was published for 2003, Australian participation rates were only 11th highest and employment/population rates were only 10th highest. See also Gregory, R 'Where to Now? Welfare and Labour Market Regulation in Australia', ABL Vol 30, No 1, March 2004. Gregory's paper focuses on what he describes as 'the deep-seated structural problem of low rates of labour market utilization and high rates of welfare take up' (P33).

[9] For a more detailed analysis of the factors influencing employment, see Moore, D 1998a.

[10] According to the Workplace Editor of The Age (28 July, 2004), a 'series of studies', including by the ACTU, suggest that most so-called casual employees, said to now constitute 29 per cent of employment, would prefer to be permanently employed. However, the definition of "casual" used appears to be the same as that used by the ABS, which counts as casual only those who do not have leave entitlements. Some 13 per cent of these are in fact permanently employed.

[11] While this means that such proposals come before the Commission in only a minority of cases, in practice it exercises a not insubstantial influence on the approval process and hence the capacity of employers to conclude AWAs. Thus, in deciding whether a proposal would pass the no disadvantage test, the Employment Advocate has to take account of fact that, as it is a non-union agreement, the Commission will be more deliberative in any assessment that it is asked to make than it would if a union agreement is involved. It is relevant in this context that, under the AIRC's interpretation of its general jurisdiction to conciliate and arbitrate industrial matters, a union can notify a dispute to the Commission when an employer is offering or planning to offer AWAs and the Commission can then make recommendations, and even arbitrate, to order that the employer desist from offering AWAs. In a recent claim brought by a union the Commission did in fact intervene to recommend that the employer desist from its current offer, talk to the union and then ballot employees whether they collectively wanted AWAs to be offered or a union

agreement. In short, the agreement making system introduced in 1993 (union) and 1996 (non union) is a regulated system of agreement making and this system is linked to the regulated award system via the no disadvantage test.

[12] This included an editorial in The Australian Financial Review of 7 February 2000 drawing attention to 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; and the establishment of a panel of specialist industrial relations judges, nearly all former union barristers, and the need to change arrangements that appeared to continue the industrial relations club. Another strong critique was by Mr Richard Dalton of Freehills , who had presented a paper on 29 March 2000 to the Leo Cussen Institute arguing that there had developed 'aggressive industrial action by unions and a lack of rigour by the Federal Court (and to an extent the AIRC) in applying the relevant compliance provisions under the [Workplace Relations] Act'. Dalton went on to specify the problems that had emerged as result of what he politely described as a 'reluctance' of the Federal Court and the AIRC to issue orders/injunctions under Section 127.

[13] In an article in The Age of 12 June 2000 (Contempt of Court) journalist Paul Robinson reported that, before the biannual conference of the Federal Court held in Sydney 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'. He also suggested that, before the conference, 'the court's Chief Justice, Michael Black, allocated extra judges - Justices Ron Merkel, Alan Goldberg and Susan Kenny – to the industrial panel in Melbourne. Soon after the conference, Black appointed two more, Justices Ray Finkelstein and Mark Weinberg. They are now assisting Justices Tony North, Shane Marshall and Donnell Ryan. While speculation exists that Black moved to quell criticism, a court spokesman, Bruce Phillips, said the appointments were made not with a nose to the prevailing political wind, but in view of the practical demands of a rapidly increasing industrial workload'. However, my investigations indicated that the effect of the change was to shift the main responsibilities of Justices North, Marshall, Ryan and Gray to cases not involving industrial relations.

[14] In *Telstra v Edwards*, Print Q6856, 21 October 1998, the Commission (Guidice J, Polites SDP and Cribb C), examined in considerable detail the contention by Telstra that Commissioner Tolley's earlier decision to uphold an appeal against dismissal by an employee of Telstra had 'the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer'. The Full Bench quashed Commissioner Tolley's decision and directing that the matter be re-heard.

[15] For example, Mr Graham Smith of Clayton Utz, commenting in an article in the Australian Financial Review on 2 September 2003 on developments in enterprise bargaining since the 1996 Workplace Relations Act of 1996 (entitled 'IRC Goes Back to its Old Tricks'), suggested that 'at first ..the IRC maintained a hands off approach and unions surrendered many inefficient work practices through EB. But clever use of protected industrial action, pattern bargaining and strategic legal challenges allowed unions to strike back. …The IRC has also undermined the benefits of EAs with a return to arbitration in ways never imagined even, one suspects, by Paul Keating'.

[16] Munro, Justice P. (2004), Interview with Workplace Express, 26 July.

[17] In the context of industrial disputes, the usual policy of police forces is to take only limited, or even no, direct action to deal with violence or intimidation, or the threats thereof, and instead to 'negotiate' with union leaders. This was well-illustrated in the reaction of Victorian Police Association secretary, Paul Mullet, reported in The Age on 28 March 2003 following the release of the reports of the Royal Commission into the Building and Construction Industry, to criticism by the then Workplace Relations Minister, Tony Abbott, that 'State police forces took the same 'indulgent' attitude to industrial law breaking as the community once took towards drink driving … police were reluctant to enforce the law when it came to illegal industrial behaviour'. Mr Mullet was reported as saying that 'police did not want to be seen as strike-breakers or to be used for 'Tony Abbott's workplace relations agenda'. Police are trained in dealing with these issues, and we don't like to be confrontational. We respect the rights of workers as much as they respect what our members have to do'. The Victorian Police Association has an affiliation with the Victorian Trades Hall Council.

[18] Royal Commission Into The Building and Construction Industry, Final Report, Summary of Findings and Recommendations, Volume One, p 5-6.

[19] Ibid,6.

[20] Abbott, T. (MHR) (2003), *Restoring the Rule of Law in the Construction Industry*, Speaking Notes for Address to the National Press Club, 2 April.
[21] Ibid. Mr Abbott argued that 'The construction industry typically conducts itself like this: A certified agreement is in place including an agreed dispute resolution procedure. Unions identify a grievance, often a spurious safety issue. Agreed dispute procedures are not followed and a strike ensues, even though strikes outside 'bargaining periods' are 'unprotected' and theoretically subject to damages orders. At that point, employers often ask the Commission to end industrial action but instead of ordering an immediate return to work because an agreement has been breached, the Commission will typically seek to conciliate on the basis of the 'merits' of the issue. After a couple of days with costs escalating and liquidated damages looming, the employer invariably agrees to rectify the matters alleged and to pay allowances (including pay for days on strike). At this point, the Commission orders a return to work on the basis of the agreed settlement – which lasts only until the union decides on its next move'. The Australian Financial Review reported on 26 March 2004 that Minister Kevin Andrews (the successor to Minister Abbott) had renamed the interim task force as the Permanent Building Taskforce, stating that 'The culture of unlawfulness and thuggery and intimidation still exists in the building industry'.
[22] Ibid, 27-28.
[23] In *Moncrieff Fabrications Labour Services Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, PR925 (at paras 6 and 7).
[24] The proposal was modeled on the NSW Building Industry Task force which was established to deal with a similar failure by the NSW Industrial Relations Commission and NSW police in the NSW industry. For further details, see ' Union Power in Context: Industrial Relations in the Building Industry', Ross Dalgleish, HR Nicholls web site, 1999, which outlines the success of the Task Force from 1993 to 1995, at which time the newly elected Carr Government decided to abolish it.
[25] On hearing the decision Johnston claimed a 'victory for the cause of fighting for workers and the rank and file'. The other 16 unionists involved were released on good behaviour bonds and received fines of only between $1000 and $3000 each.
[26] Report of the Committee of Review of Australian Industrial Relations Law and Systems, (Hancock Report), April 1985, AGPS, Canberra.
[27] In his paper, 'The Death of Dollar Sweets', to the HR Nicholls Society conference in 2000, a leading industrial barrister, Stuart Wood, stated that, as far as he was aware, no application for protected action had been made since the legislation providing for such action without unions also seeking an ancillary anti-suit injunction at the Federal Court. His paper quotes seven cases, including cases in which he had represented clients, involving these types of application.
[28] *AMWU and CEPU v The Age Company Ltd,* (Whelan C, 9 March 2004, Print PR 944258; Guidice J, SDP Harrison, Simmonds, PR946290, 11th May 2004).
[29] The philosophical basis of the right to strike provisions was the so-called internationally recognized right to bargain collectively. However, the legislation envisages that this right should only apply during the period of negotiation of a collective bargain, not during the currency of such a bargain or agreement.
[30] *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing &Kindred Industries Union*, [2002] FCA 61, 6th February 2002, Kenny J; [2003] FCAFC 183, 15th August 2003, (French, Marshall, Von Doussa JJ).
[31] The power to arbitrate was circumscribed under s89A in particular.
[32] *Automotive, Food, Metals, Engineering, Printing &Kindred Industries Union v Electrolux Home Products Pty Limited*, [2002] FCAFC 199.
[33] *Electrolux Home Products Pty Limited v The Australian Workers Union*, [2004] HCA 40.
[34] Industrial lawyers report that it is common practice for the Commission to do this at certification hearings.
[35] *ASU v Qantas Flight Catering Limited*, PR939695.
[36] *Communications, Electrical, Electronic, Engineering, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Telstra Corporation*, PR940569 (Full Bench); CEPU and Telstra PR933892 and PR934321 (Lawler VP).
[37] *AMWU v Holden Limited*, PR944673, 17th March 2004.
[38] While the High Court has approved the exercise by the Commission of 'private arbitration' where an agreement conferred that power on it, the Commission should not assume that this allows it to encourage employers to extend that power to it. Moreover, the Commission has interpreted s 170LW (which

empowers it to settle disputes over the application of an agreement) as allowing it to arbitrate more generally and outside the limits placed by s89A.

[39] The 2004 Safety Net Review (AIRC Full Bench 5th May 2004, Print PR 002004) increased the minimum by 4.2 per cent to $467.40 per week.

[40] This estimate by the Australian Chamber of Commerce and Industry has been put to the Commission in the last two safety net wage cases and has not been rejected by it. Although the Commission aligns classifications of employees as between various awards (such as the relativity between a particular type of shop assistant and a particular type of metal worker), there are a great many classifications in the many hundreds of awards that exist. There are also different wage points set for youths, casuals, and part-timers.

[41] Real minimum rates of pay fell over the twenty years from 1975-76 to 1995-96. See Moore, D. (1998a), p37.

[42] See Redundancy Case, Decision PR32004, Guidice J, Ross VP, Smith C and Deegan C; and Redundancy Case Supplementary Decision PRO62004, Guidice J, Ross VP, Smith C and Deegan C.

[43] The Commission's attitude appears to be that employers should act in accordance with the strict wording of the Act. However, the substantial intent of the Act should also surely be taken into account.

[44] *CFMEU and SJ Weir Pty. Ltd*., PR947609, 7th June 2004 (Full Bench) PR 945564 (Grainger C).

[45] *Re St Hilda's Anglican School* (AIRC Thatcher C., Print PR947966, 14th June 2004).

[46] *Elite Electrical Services (Australia) Pty Ltd*, Certification of Agreement 2003-06 PR 947907.

[47] Secure Employment Test Case C4330 of 2003.

[48] *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW & Ors* [2004] NSWCA 200. In the earlier Mitchforce case (Mitchforce Pty Ltd v Industrial Relations Commission of NSW and Others (NSW Court of Appeal, Spigelman CJ, Mason P, Handley JA [2003] NSWCA) the same full bench had also decided against the NSW Commission having the power to intrude into "commercial" matters.

[49] Transfield/Patricia Baleen Case, Gray J, [2004] FCA 517, 30th April 2004.

[50] The Commission's s17 order was ignored by the unions, as were the injunctions issued by the Federal Court.

[51] The right of entry is to investigate breaches of awards, union agreements or the Act. As most non-union agreements, and many AWAs, have an award underpinning them, unions are able to argue that they need to investigate a breach of the underpinning award.

[52] *BGC Contracting v CFMEU* ,(Federal Court of Australia, French J, 29th July 2004, Matter No. W38 of 2004).

[53] *Leeth v The Commonwealth* (1992), 174 CLR 455.

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