

Future directions in workplace law – bursting the bubble?

The Hon MJ Beazley AO, President, Court of Appeal¹

- 1 Thank you Justice Walton for the invitation to participate in this forum of dangerous ideas. I come as a relative outsider to workplace and employment law – with the exception of a short stint in the Federal Industrial Court, and the workplace injury tort claims we do, the Court of Appeal is not a fertile field for employment law. In particular, we rarely see cases that require the Court to engage in a substantial way with the industrial relations and workplace law framework. The consequence of those lean pickings is very much a matter of perspective – one view: the Court does not understand what employment law is about. Another: thank god for 'fresh eyes'. Mr Kirk would have had the latter perspective.
- 2 Looking, therefore, mostly from the outside in, I want to posit that workplace and employment law has developed in a 'bubble', within specialist bodies, substantially segregated from other areas of law and often insular from legal principle and legal development in what I will term 'general law areas'. Or at least in courts of general jurisdiction. This latter observation, that is the insular development of legal principle is one that is correctly made in respect of most, if not all, specialist courts.²
- 3 In addressing today's question, I do not propose to deal with the substantive law but will rather focus on the impact of specialist courts and specialisation inherent in the regulatory framework of industrial courts on the development of workplace and employment law.
- 4 It is a trite observation that employment law, conducted, institutionally, separately from other courts, has and will develop its own jurisprudence. That in large measure is a very good thing – it allows specialists, working

¹ I would like to thank my Researcher, Chris Frommer, for assistance with the research and preparation for this paper.

² See, for instance, *Frevcourt Pty Limited v Wingecaribee Shire Council* [2005] NSWCA 107, a case in which principles developed in the Land and Environment Court were overturned in the Court of Appeal.

exclusively in the field of employment, to interpret and apply the laws that are relevant to them in ways that are more consistent with and are more closely tailored to the realities of the contexts in which those laws operate.

5 But there is a risk in specialist jurisprudence developing in isolation and a real possibility that in doing so two basic features of Australian jurisprudence will be offended. First, there is one common law of Australia³ and statutes with common provisions are to be interpreted uniformly.⁴ Secondly, there is the principle of cohesion.

6 By way of example: it cannot be gainsaid that:

- The rules of evidence, if they apply, are largely uniform, certainly between the Commonwealth and New South Wales.⁵
- Principles of natural justice apply in both courts and tribunals.
- The proper approach to statutory construction is governed by the application of uniform principles,⁶
- In particular, the canons of construction which apply in specific contexts, such as the presumption that statutes creating criminal offences are to be strictly construed,⁷ have to a significant extent fallen away.

7 Unless a specialist tribunal is well versed in these general principles, the law as developed in a specialist context can come into conflict with the law as

³ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [135].

⁴ *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492.

⁵ See the *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW). The rules of evidence do not apply in, for instance, the Fair Work Commission.

⁶ On which see, for instance, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 248 CLR 378 at [23]-[24].

⁷ *Beckwith v R* [1976] HCA 55; 135 CLR 569 at 576; *Cassar v New South Wales Crime Commission* [2014] NSWCA 356; 87 NSWLR 683.

determined more generally. When that happens, the general law must prevail. To put this another way, the 'bubble' must burst.

- 8 *Kirk v Industrial Court of New South Wales*⁸ is the textbook example. It needs little introduction. The case concerned criminal proceedings under the *Occupational Health and Safety Act 1983* (NSW), which were prosecuted in the Industrial Court. It was held in the High Court that the Industrial Court had made two errors: first, in its construction of the relevant sections of the Act,⁹ and secondly, in allowing the prosecution to call one of the defendants, Mr Kirk, as a witness, contrary to the *Evidence Act 1995* (NSW), s 17(2). It appeared that these errors were reflective of long-standing practice that had developed in the Industrial Court.
- 9 *Kirk* also provided a forum for the High Court to express its views on specialist courts and tribunals.
- 10 The majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), at [64], in the course of discussing a paper on jurisdictional error by Louis Jaffe,¹⁰ noted that:

"... Jaffe expressed the danger, against which the principles guarded, as being that 'a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned'. It is not useful to examine whether Jaffe's explanation of why distorted positions may develop is right. **What is important is that the development of distorted positions is to be avoided.**" (citations omitted, emphasis added)

(Some see this passage as the resurrection of Jaffe, a Canadian academic of last century, of whom no other Australian administrative or public lawyer had, up to then, heard.)

⁸ [2010] HCA 1; 239 CLR 531. For another example, see *Cochran v Sutton* [2014] NSWCA 185

⁹ Specifically, the *Occupational Health and Safety Act 1983* (NSW), ss 15, 16 and 53.

¹⁰ Louis Jaffe, 'Judicial Review: Constitutional And Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953.

- 11 Heydon J, who dissented in respect of the orders to be made but not the core reasoning, made this comment:

"... a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents."¹¹

- 12 His Honour added:

"Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. ... courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way."

- 13 Two observations may be made about these comments. The first, especially that made by the majority, accepts, at least implicitly, that specialised tribunals have their place. Certainly, there is other judicial authority that would endorse this:

- 14 Indeed, in the recent case of *Toms v Harbour City Ferries*¹², Buchanan J, with whom Allsop CJ and Siopis J agreed, observed that it is an important function of an appeal process, such as that undertaken by a Full Bench of the FWC, which reviews or reconsiders the merits of a case, to "*pursue the legitimate aim of developing and maintaining a consistent and coherent body of principle*". Buchanan J continued, referring to the Full Bench of the FWC, that:

"... an important function of an appeal process which reviews or reconsiders the merits of a case, and its outcome (i.e. an appeal '*on the merits*'), is to pursue the legitimate aim of developing and maintaining a consistent and coherent body of principle. It is not foreign to the appellate process, in the

¹¹ At [122].

¹² [2015] FCAFC 35.

case especially of an industrial tribunal, to supervise the development, coherence and understanding of '*industrial standards*'.¹³

- 15 The principles developed and applied by industrial tribunals, said Buchanan J, are:

"... equally dynamic as any emanating from the courts. Particularly that is so in the case of the leading federal industrial tribunal which (to take only one example) developed and stated wage fixing principles over many years for the purpose of arbitral jurisdiction which were then systematically applied and enforced on appeal without any serious suggestion of jurisdictional error."¹⁴

- 16 The second observation to be made, obvious on its face, is that at the end of the day, the bubble in which specialist tribunals exist cannot be hermetically sealed. The availability of judicial appellate review by courts of general jurisdiction and the principle of cohesion ensures that this is so. It might be said therefore that there is a tension between the value of developing a specialist jurisprudence as supported, for example, by Buchanan J, and a more general conception that similar rights should be afforded in respect of similar issues, even in different contexts. The latter principle, which promotes coherence in the law, should prevail

- 17 The principle of coherence is of considerable importance, both to the development of the common law and to statutory interpretation. In *Miller v Miller*¹⁵, for instance, a case concerning the question of whether a duty of care arose as between parties who had stolen a motor vehicle in contravention of the *Criminal Code* (WA):

"15 ... the central policy consideration at stake is the coherence of the law. The importance of that consideration has been remarked on in decisions of this Court. ... It is a consideration that is important at two levels. First, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts).

¹³ At [7].

¹⁴ At [89].

¹⁵ [2011] HCA 9; see also *Sullivan v Moody* [2001] HCA 59; 207 CLR 562 at [55]-[60].

- 16 Second, and more fundamentally, ... the question is: would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct?" (citations omitted)
- 18 Consider the purported mutual duty of trust and confidence, which was said to be implied as a matter of law in employment contracts until the doctrine was overturned by the High Court in *Commonwealth Bank of Australia v Barker*¹⁶. In that case, which had been commenced in the Federal Court, the respondent contended that the Bank, his former employer, had breached an implied term of trust and confidence by failing to take meaningful steps to redeploy him rather than make him redundant. The implication of such a term in contracts of employment had its genesis in English employment law tribunals exercising statutory powers with respect to unfair dismissals.¹⁷ In Australia, the implied term had found substantial support in lower courts and tribunals, although the position was not uniform.¹⁸
- 19 The High Court unanimously, though with slightly varying approaches, found that such a term was not a feature of employment contracts under Australian law: in short, it did not meet the requirements under the general law for the implication of contractual terms as a matter of necessity.¹⁹ The High Court thus differed from the Full Federal Court, which had found that the requirement of necessity was met by reference to policy considerations relating to contemporary understandings of the employment relationship as involving elements of common interest and partnership rather than conflict and subordination.²⁰
- 20 Importantly, the majority in the High Court considered that "*the complex policy considerations*" invoked by the implication "*mark it, in the Australian context,*

¹⁶ [2014] HCA 32; 253 CLR 169.

¹⁷ At [203].

¹⁸ See *South Australia v McDonald* [2009] SASC 219; 104 SASR 344 at [215]-[226] and the cases cited therein.

¹⁹ See at [37] per French CJ, Bell and Keane JJ; [109] per Kiefel J; and [114]-[118] per Gageler J. On the requirement of necessity generally see *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337.

²⁰ *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 540 at [94]-[95], citing *South Australia v McDonald* [2009] SASC 219; 104 SASR 344 at [231].

as a matter more appropriate for the legislature than for the courts to determine."²¹

- 21 *Barker* thus provides an interesting example of the High Court applying an orthodox approach to the general law of contract, and in doing so overturning a context-specific doctrine which had developed in employment law which some would argue was better tailored to modern social norms. There has been substantial commentary, both for and against, on the merits of the High Court's findings as a matter of policy.
- 22 Putting aside, for a moment, the question of who is best placed to make decisions with significant policy-based elements, *Baker* exemplifies a theme in current High Court jurisprudence in which the Court differentiates between judicially based legal principle on one hand, and those situations which properly fall within the province of the legislature. Importantly for present purposes, it also the diminishing degree to which the regulation of Australian workplaces *can* operate, separately from the broader legal structure.
- 23 On this point it is necessary to return to *Kirk*, and its principal finding that the error of the Industrial Court amounted to jurisdictional error and that its decision was therefore amenable to judicial review notwithstanding a privative clause in the legislation.²²
- 24 The principle underlying the High Court's decisions was that judicial review of courts and tribunals created under State legislation has a constitutional foundation derived from Ch III, commonly referred to as the *Kable*²³ doctrine. I do not intend to add to the weight of scholarship bearing on the technical aspects of that finding. I wish only to emphasise the much-quoted statement of the majority at [99] that, if the relevant privative clause were given effect, the result:

²¹ At [40] per French CJ, Bell and Keane JJ; see also at [118] per Gageler J.

²² *Industrial Relations Act 1996* (NSW), s 179(1).

²³ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

"... would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions". (citations omitted)

- 25 The effect of this finding was to severely restrict if not preclude any legal boundary between specialist courts and tribunals and the courts of general jurisdiction to whose overview they were subject, notwithstanding the attempts by the legislature to limit any that overview.
- 26 A number of other changes have also, in recent times, reduced the extent to which employment law and the general law can operate separately.
- 27 The referral of industrial relations powers to the Commonwealth by the State government in 2009 resulted in the transfer of almost all private sector workers to the Federal industrial relations system, which has a statutory path of appeal or of judicial review to the Federal Court.²⁴
- 28 The implementation of uniform national work health and safety laws in 2012 resulted in most prosecutions in that area being transferred to the District Court.²⁵ Further, in 2013, as a result of the shrinking caseload and membership of the Industrial Court, a statutory pathway of appeal, by leave, was created from a judge of the Industrial Court to the Supreme Court.²⁶ All pricks in the proverbial 'bubble'.
- 29 Attempting to predict what this will mean for the future of law in the workplace, let alone any law is risky – but I will venture the following brief thoughts, to which, I am sure you will be able to add more:

²⁴ The *Fair Work Act 2009*, s 563 provides pathways for both appeals and judicial review applications (depending on the subject matter) to the Federal Court.

²⁵ *Work Health and Safety Act 2011* (NSW), s 229B.

²⁶ *Industrial Relations Act 1996* (NSW), ch 7A, inserted by the *Industrial Relations Amendment (Industrial Court) Act 2013* (NSW).

- 30 First, if a relevant principle or concept is not already entrenched in general jurisprudence, the High Court is unlikely to find it exists. *Barker* exemplifies that.
- 31 Secondly, whilst significant aspects of employment law will be statutorily based, the application of the principles of statutory construction will ensure that employment law does not develop in its own bubble except to the extent that is a feature of any enabling statute.
- 32 Thirdly, conventions will not override basic principles of the general law: *Kirk* is the exemplification of that doctrine.
- 33 Fourthly, the principle of coherence will focus attention on greater consistency between general law principles and principles developed in specialist contexts.