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Last year I addressed a Young Lawyers Section of the NSW Law Society on the judgment of the High Court of Australia in *Blackadder* [(2005) 79 ALJR 975] and, in passing, remarked that it is impossible to specialise in labour law without understanding the application of contract law, tort law, equity, damages and, at least in the areas of Occupational Health and Safety, criminal law. Because of the confined nature of the paper then being delivered I omitted the necessity to have a working knowledge of economics, politics and organisational theory.

That may sound, depending upon the area in which you now practise, either exaggerated or arrogant, or perhaps both. But a true understanding of all of the ramifications of WORKCHOICES, for employment professionals, requires all of that and more.

The topic allocated to me seemed capable of being a journey through a history of labour regulation, an analysis of the changes promulgated or a discussion of the trends.

The detailed aspects seem well and truly covered by later speakers, so I will seek, as best I can in the time allotted, to give you a "satellite view" of labour law as it did exist and where WORKCHOICES may take it. In doing so, I will try, despite my training, to give more than a "strict lawyers"' overview. I hasten to add that nothing I am about to say is intended to be a value judgment. I take a view in this paper that is different from both major political parties and the entrenched interests of both capital and labour: it is intended to raise issues that seem not to have been raised and to offer food for thought.

Notwithstanding my stated desire to eschew an historical analysis, it is necessary to give some background. I could start with Magna Carta, or the Industrial Revolution. But it is sufficient, and will probably take too long anyway, for my current purposes, to remind you that the Industrial Revolution required the creation of a working-class, which derived from the serfdom that predated it. As a consequence, workers (servants as they were then called) were employed by their masters under arrangements that reflected their derived status.

In the 1800s, until legislative intervention through the Trade Union Acts, collective organisation of workers was, of itself, unlawful and collective action was the commission of one or more torts. Even after the promulgation of the Trade Union Act, which legalised trade unions in the UK and here, the industrial or economic torts rendered any strike, picket, stop work or other action unlawful as a breach of contract, a conspiracy, an inducement to breach contract or intimidation or all of the above. Then came the 1890s, and I hereafter confine my history to Australia and the Colonies.

The industrial agitation during the 1890s was horrific. Too little is taught of our industrial history. But strikers were gaoled, shot and the Australian colonies were as close to revolution as they have ever been. Arbitration Courts and Wages Boards were established by the Colonies and there was a realisation that these disputes could not be handled by any one single Colony.

If industrial disputation was not a major reason for Federation of the Colonies, it certainly was one of the reasons. An industrial power was proposed as early in the Convention Debates as 1891 by C. C. Kingston.

Quick and Garran describes part of the process at page 646:

> "In the Convention of 1898 Mr Kingston's pioneer proposals with reference to this subject were found of great service. By that time political thought had developed and public sentiment had ripened in the direction indicated by him in 1891. At Adelaide Mr H. B. Higgins submitted a subclause 'industrial disputes extending beyond the limits of a State.'
>
> > 'I want simply to give the Federal Parliament a power to establish these courts if it thinks fit. Therefore there will have to be an incidental alteration in the judicature part of the Bill, so as to enable the Federal Parliament to create a court for the purpose. It may be said: "Leave the industrial disputes to the States;" but it is well known that these disputes are not confined, in their evils, to any one State. If there is a shipping dispute in Sydney it is sure to be felt in Melbourne; if there is a coal dispute in Newcastle it is sure to be felt at Korumburra. Any one State is unable to cope with the difficulty.' (H. B. Higgins, page 782)"

And therein lies the cause of the enactment of section 51(xxxv) of the Australian Constitution, which gave the Commonwealth power to make laws for the "peace order and good government of the Commonwealth with respect to. . . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

Reputation and myth have taken hold in Australia and it seems largely accepted that the introduction of compulsory arbitration was accepted by the entire union movement, as being for the benefit of the trade union movement and workers, and was instigated at their agitation. Nothing could be further from the truth.

The trade union movement, with some notable exceptions, saw compulsory arbitration as the shackling of their ability to bargain and fight for higher wages. This attitude persisted, in some unions, e.g. the AMWU, until at least the late 1970s.

Largely liberal minded men and some conservatives introduced compulsory arbitration, to bring about, as it has been termed, "a new province for law and order".

Conservative men like H. B. Higgins, an equity lawyer, formulated the principle that courts (or court like tribunals) could determine, independently of the parties involved, what was fair and workable. The Commonwealth Court of Conciliation and Arbitration would determine what was a fair pay and conditions, fair to both sides, and in so doing, rendered direct action unnecessary.
The rest, as they say, is history.

But it is a history, which has depended on two fundamental and related propositions: that in order to survive, compulsory arbitration had to be fair; and it had to be seen to be fair.

Fairness was described in the now famous words "equity and good conscience": a term derived, indirectly, from the statute of James I in 1606 dealing with the recovery of small debts and the relieving of poor debtors in London (3 James I C15 section II).

Above all it required accepting its legitimacy, which depended upon its institutional integrity.

The Commonwealth Court was given the status, quite deliberately (and, we now know, invalidly) of a superior court of record and the Chief Justice of Australia nominated the judges of the Arbitration Court from amongst the judges of the High Court. While the judges of the High Court were phased out of this role, the Arbitration Court continued its status as the Court until after the *Boilermakers' Case* (1956) 94 CLR 254, when it was split into the Court, for the exercise of judicial functions, and the Commission for regulation of wages and conditions and the settlement of industrial disputes.

The status of the Court and of the Commission could not have been higher, even after 1956. While, again, there has been much myth surrounding the fixing of wages and conditions, it essentially traces back to *Harvester* (1907) 2 CAR 1. Notwithstanding the myths, Harvester was an exercise in *real*

politic - while there was reference to "fair and reasonable" wages, the rate was determined by reference to what was being paid by "reputable" employers for the labourer classification then being considered. That rate then became the "living wage" adjusted after 1912 largely by reference to the consumer price index that was thereafter published.

Eventually higher rates were awarded to take account of economic circumstances, or, for different classifications, on the margin for skill.

While the makeup of minimum wages varied from time to time, the philosophy underpinning it, did not. Work value cases adjusted the margin for skill and eventually the basic wage and margin were abolished in favour of a total single rate for each classification within each award.

I cannot leave this “background-oversimplified” history, without mentioning comparative wage justice. This was a notion which, in its origins, applied, across different awards, a parity principle based upon equal treatment and equal pay for equal work (although not originally for women) and due discrimination to account for differences. While the term was used pejoratively because the practice was abused, as a philosophy it survived, under different names, essentially until today.

All of these principles operated at a formal level. Above the regulated rates, over award payments existed and, for some, market rates applied.

But at the formal regulated level, these principles eventually achieved equal pay for women, for aborigines and "proper discrimination for juniors and apprentices". Of course, at the unregulated over award level, disparity and unequal treatment continued.

The requirements of this formal arbitration system necessitated the recognition, formation and incorporation of Federal unions; the regulation of those unions; and the regulation of the election of offices of unions to represent "the authentic will" of employees. It brought with it penal sanctions, criminal and civil, for conduct perceived to be inconsistent with the authority of the independent tribunal or the operation of the system.

During all this time, there was no recognised federal jurisdiction, which allowed unfair dismissal cases or reinstatement.

The foregoing is, as I said at the outset, a gross oversimplification - a gloss. There are details that would make some of it inaccurate, but, in general, that is the background to the changes that commenced in 1983.

In 1983, the government, together with the ACTU, recognised a fundamental flaw in the above process. Arbitration, by its nature, did not sufficiently recognise social wage at a macroeconomic level and placed regulation on regulation; never, or rarely, removing the layers beneath. Awards became overly specific and straitjacketed employment.

There had grown up, because of the respect for the Commission, an industry of informal arbitration and recommendations: unfair dismissals; over award payments; local issues that were agitated and the like.

The reforms brought about award simplification, benchmark rates, restructuring of both unions and awards to bring about greater flexibility; superannuation; and the centralisation of wage increases, and social wages, achieved generally by agreement between the ACTU and the Government.

It also implemented a formal jurisdiction for unfair dismissals and legalised some forms of industrial action to achieve agreements over and above the simplified, flexible awards created in the new system.

Into this comes WORKCHOICES. WORKCHOICES seeks mainly to address the following items: the alleged distortion of wage rates created by the award system; the alleged unfairness on small employers of the unfair dismissal provisions; and the alleged necessity to protect "individual rights" and allow employers and employees to bargain between themselves on an individual basis.

I shall try, briefly, to deal with each of these issues.

The Federal government, in promulgating WORKCHOICES, described the award system as a process, which distorted wage rates. Of course, the Federal government, in this regard, is correct. The award system first promulgated in 1904 was intended to distort wage rates. The award system was intended to implement fair wages, not market wages. It is a distortion of wage rates, in the same way that the Trade Practices Act is a distortion of consumer transactions. It implements fairness.

Moreover, it implements fairness by a process which itself is fair. That is, the process adopted by the Industrial Relations Commission is one, which requires the observance of the rules of natural justice, including hearing the parties, and a decision-making process, which requires reasons.

A different tribunal and a different process have replaced the wage-fixing jurisdiction of the Industrial Relations Commission. The tribunal, and that process, do not enjoy the past legitimacy of the Industrial Relations Commission and is not required to display the same transparency and accountability.

It is said that this change was necessary for two reasons: efficiency; and the necessity to take account of economic circumstance.

Neither reason withstands scrutiny.

The current Federal government has been selecting members of the Industrial Relations Commission for the past 10 years. It has chosen its current President, and its Vice Presidents. The Commission has for decades, indeed over a century, taken into account economic circumstance. If the Federal government seriously believes that the members of the Commission do not have the expertise to take account properly of economic circumstance, it must only be because the Federal government has selected the wrong people, or given them the wrong framework within which to operate.

Further, if one takes New South Wales, prior to WORKCHOICES, two systems operated, generally without fuss. Now, 4 wage and/or condition regulating bodies operate. The State Industrial Relations Commission continues to operate and regulate wages and certified agreements in all areas of state employment or employment by bodies other than trading or financial corporations. The Industrial Relations Commission still regulates awards, albeit in a more truncated way, the Office of Employment Advocate regulates and oversees agreements and the Fair Pay Commission sets general wage rates. This cannot be a more efficient system of operation than the previous system.

Without the changes made in 1983 and 1988, it would have been difficult, if not impossible, for the Federal government to have made these changes. There are essentially two reasons for this. The first is that the changes made in 1983 and 1988 set wage fixation on a path, which denuded the Australian Industrial Relations Commission of its formal functions in the resolution of individual disputes and gave pre-eminence to the making of agreements over regulation by award. The second reason is that, associated with the circumstances surrounding the 1983 and 1988 reforms, there was a campaign by a number of persons, including senior officers of the trade union movement, to diminish the role of the Commission and produce a trade union movement more independent of the arbitration process. Part of that campaign included steps, which had the effect of denigrating the Commission and undermining its institutional integrity. Moreover, the appointments to the Commission were of persons with an expertise consistent with the role that the Federal government and the ACTU saw the Commission fulfilling. A combination of that changed expertise together with a role that did not include dispute settling meant that the corporate knowledge necessary for the settlement of individual disputes began to disappear and the Commission's usefulness to individual employers and employees, in single business disputes, was minimised.

In the area of unfair dismissal provisions, there is little doubt that the processes were difficult to manage for small employers. But a corporation that employs 100 is not a small employer. Traditionally, 15 is the number of employees regarded as a generally accepted border between small and medium to large employers. While there are difficulties associated with this area, one must bear in mind that prior to the 1988 provisions the Australian Industrial Relations Commission was continually called upon to resolve unfair dismissal claims on an informal recommendation basis. Employers, without compulsion, had chosen to utilise an independent arbitrator to determine these difficult issues.

Further, the restrictions that have been implemented remind one of stories of babies and bathwater. It would have been very easy to implement a system of formal or informal conciliation, at which representation was limited to the employee, her/his line manager and the employer's decision maker, without lawyers, from which either a recommendation or a determination could be forthcoming. This

would have been an inexpensive, effective system, which depended only upon the satisfaction of the decision maker in the Commission, and still allowed the resolution of disputes of this kind without cost.

I turn then to the issue of equal bargaining. As earlier stated, it has been said often that the legislative scheme is intended to encourage individual rights and individual bargaining. I am not here critical of the motives of those who put this forward. But their experience in employment, directly and indirectly, allows them to come to the view that employees have that power. That is not so in the case of the vast majority of employees in Australia. Since we are dealing with a situation that we have not faced for over 100 years, it is worthwhile to examine the attitude taken in the past to such an approach. Justice Higgins, that famous equity lawyer, said:

> In orderly pursuance of the agreement, the Institute gave the proper notice on the 24th November 1896, with a view to getting more satisfactory terms. The shipowners' reply was a menacing letter, sent - not to the Institute, but to each individual employee - asking him whether he was or was not satisfied with existing conditions, for if not he was "jeopardising his position." The attitude taken by the shipowners at this date is another illustration, if one were needed, of the general helplessness of individual employees as against employers. Virtually, the shipowner said to the engineer, “If you are not satisfied, go.” This power of giving or refusing employment – of giving or refusing bread – is a tremendous factor in the bargain, an unfair weight thrown into the scale, like the sword of Brennus; and no one who fails to recognise this position can appreciate properly the forces which have impelled our Australian parliaments to interfere, by wages boards or Arbitration Courts, with contracts between individual employers and employees. The contracting parties are not standing on the same level. The contract is not free.…
> In another case of which this Court has cognisance, this dominant power of an employer, as against an individual employee, has been unconsciously admitted with amusing naiveté by an employer. In place of sending in a proper answer to the plaint, he writes a letter denying any dispute, saying (inter alia): “I have never quarrelled or disputed with a labourer of any kind. . If we can agree, well, we will part; that ends the whole…Love is the power, which will end all struggles, not legislation.” In this case of 1896, I suppose there was not enough love available to end the struggle; for the result of the summary action taken by the shipowners was a cessation of work by the members of the Institute, a stoppage of the industry; and, as the engineers were united in a strong union, the employers were forced to restore the rates of 1890. (*AIME v CSOA* (1912) 6 CAR 95 at 100 –101)

I cannot usefully add to the eloquence of that comment. That which changes, remains the same.

The question that now must be asked is where we go from here?

The existence of industrial regulation, particularly in the area of unfair contracts and termination of employment has had the effect of limiting the development of common law and equity as it applies to contracts of employment. There are a number of examples where this has occurred. Now, there are a number of different issues being agitated in the general courts and developments will occur. One only has to recall the judgment of the High Court of Australia in *Byrne and Frew v. Australian Airlines* (1985) 185 CLR 410. In that case the High Court determined that it was unnecessary to imply a term into a contract because there existed a statutory regime, which covered the same duties and obligations. That is also the basis upon which the English courts limited the reach of the implied terms of mutual trust and confidence, which they have found exist in contracts of employment.

Each of these issues, and no doubt others, will, in the absence of a statutory regime, be agitated before the general courts. The others may include whether the level of damage for a breach of a contract of employment is confined to reasonable notice; the extent of fiduciary duties and obligations that are imposed; and, on the basis of the above citation or a variation of it, an extension of or an application of the doctrine of unconscionability to remedy the special disadvantage faced by employees in bargaining with their employer.

The law, like science, despises a vacuum. If persons are being treated unconscionably, Counsel will argue their cause and some trial judges will uphold the argument. Even if the High Court is ultimately against them, that determination might take five to 10 years to work out.

Speaking of vacuums, the absence of compulsory arbitration does not seem to have affected the incidence of arbitration on industrial issues. The State Commission is reporting increased usage by

trading corporations of its good offices as private arbitrators in individual disputes. Frankly, that seems an obvious development. Why would an employer pay for an arbitrator, when the State provides one for free?

Lastly, I would like to make some comment about the assumption predominantly made by the trade union movement that wages will necessarily fall under the new regime. In order to deal with this issue, it is necessary to understand the effect of the wage fixing process, which I have described.

The benchmark rates set by the Commission put an unskilled labourer at 85% of the tradesperson's rate. Those same benchmark rates place professionals at between 120 and 125% of the tradesperson's rate. The effect on Australia, and its workforce, is that while labourers are relatively expensive, by international comparisons, tradespersons and professionals are relatively inexpensive. When one goes to a typical construction or manufacturing site, as a consequence, one would find, relative to international comparisons, a far greater proportion of skilled labour in the workforce. This is because the arbitration system has the effect of holding down wages in highly skilled areas and in areas of high demand.

Now that the new system has destroyed the capacity to hold down wages, it is just as likely that wages at the unskilled level will, over time, fall, but that wages at the skilled and professional level will rise at rates far greater than has ever been the situation in the past.

Further the Federal government proposals, while weakening unions that depend upon the arbitration system to survive, strengthen the capacity of those unions that have significant support amongst their members and the capacity to negotiate on their behalf.

The history of arbitration has been to create a society in which the wages gap is far less than in other Western democracies. This is at least one of the bases for the egalitarian nature of Australian society and our general relative cohesiveness. In 1983 and 1988 the reforms widened the wage gap significantly. These current reforms will take that process even further.

Such reforms will create a society more like that, which we see in the USA and UK. I suppose this is the result of globalisation. Ultimately it is a choice as to the kind of society that is desired. It would certainly mean that lawyers, doctors, engineers, and others, probably teachers, would earn far more, relatively, than they have in the past. But these are choices that governments are elected to make. You as professionals need to understand the changes that are occurring and the reactions that may arise both in the development of the law and the structure of the society in which we live.

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