CHAPTER 3

FURTHER DISMANTLING OF INDUSTRIAL LEGAL STRUCTURES

3.1 Since its election in 1996 the Government's workplace reform program includes the covert agenda for the gradual dismantling of the arbitral and judicial apparatus of industrial relations which has been in existence since 1904. Knowledge of this is mostly reflected opinion expressed through organisations like the HR Nicholls Society and the Institute of Public Affairs, whose principal commentators are known to have close connections with leading ministers and the Liberal Party. It has also been indicated by occasional disparaging comments that have been made about the Australian Industrial Relations Commission by the Minister for Employment, Workplace Relations and Small Business.

3.2 Commentary and ministerial sniping aside, the most important evidence of the Government's intentions have been in its legislation. Thus the 1996 Act indicated an antipathy on the part of this Government to the role played by the Commission in governing the relationship between employer and employee. For the first time its discretion to determine the content of awards was limited along with its power to prevent or settle a dispute by making a paid rates award, and limiting the scope of Federal awards.

The Commission

3.3 In the 1999 bill, which remains listed on the Senate Notice Paper, the powers of the Commission were to be further reduced, with restriction on its power to conciliate. That is, the Commission would no longer be allowed to call compulsory conferences with respect to disputed matters unless they were among the allowable matters of arbitration. As one authority advised this Committee at its inquiry into the 1999 bill, the proposal threatened the effectiveness of the Commission's performance as a conciliator.[1]

Section 127

3.4 This bill erodes the powers and standing of the Commission in ways other than those proposed by the Government in its 1999 legislation. This issue has already been referred to in Chapter 1. Several more comments relating to the diminution of the status of the Commission are relevant to this chapter and to the issue of the bill's inherent bias toward the interests of employers. From its former respected status as independent umpire in bringing disputants together, the Commission is reduced under this legislation as a police agency for employers. The bill requires the Commission, under section 127, to make interim orders prohibiting industrial action if it is unable to hear and determine the application by employers within 48 hours. The question of whether industrial action is protected is not relevant to this process. Thus the Commission looses all discretion as to whether it is appropriate, in all circumstances, that a section 127 order be made. It means that employers may not even have to make out a prima facie case that the industrial action is not protected. It is open to

1 Submission No. 15 (1999 bill), Professor Keith Hancock, Evidence, vol 1, p. 91.

unscrupulous employers to engage in tactics intended to make it difficult or impossible for the Commission to deal with applications on their merits within 48 hours.[2]

Cooling-off Periods

3.5 Any greater discretionary power the bill purports to give to the Commission is invalid. Item 12 is an unnecessary provision that claims to give greater discretion to the Industrial Relations Commission to suspend a bargaining period. Under the proposals, if the Commission were to consider that ending industrial action would assist to resolve the dispute (ie. in the employer's terms by weakening the bargaining position of the union) it would be mandatory to suspend the bargaining period.

3.6 The current legislation already allows for the Commission to suspend or terminate a bargaining period if it believes that a party is not genuinely trying to reach an agreement with the other parties. The necessity of the provision is questioned by the ACTU in their submission:

> The effect of the proposed amendment would be almost certainly to suspend the bargaining period in respect of industrial action which would be unlikely to be of an extended nature in any event.[3]

The questionable need for this provision is further reinforced by figures cited by the ACTU on the number of industrial disputes during 1999. Of 713 industrial disputes involving 455,700 employees, only 13 disputes involving 1.44 per cent of employees lasted for five or more days.

3.7 The most effective way that the Commission could deal with protracted disputes is through arbitration. Restoration of the Commission's arbitral powers is supported by union and employer groups alike. During the Committee's inquiries into the 1999 bill, the Ai Group stated its belief that:

> There have been a number of disputes where the option of arbitration might have had an advantage for the parties.[4]

Conclusion

3.8 The International Centre for Trade Union Rights (ICTUR) stated to the Committee its view that the Commission had been reduced in status because its expertise was not respected in those circumstances where, when it should exercise its discretion, it may not. The bill contains the word 'must' in places where it should say 'may'. ICTUR put the view that if the Commission is worthy of retention at all, then its expertise must be respected and those areas where discretion is needed should be retained.[5]

3.9 Related to this is evidence heard by the Committee of severe financial constraints under which the Commission operates. The imposition of a 48 hour timeframe in which to

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2 Additional Information, 'Proposed Changes to the Making of S.127 Orders', ICTUR, 31 May 2000.

3 Submission 18, ACTU, p. 17.

4 Mr Robert Herbert, *Hansard*, 1 October 1999, p. 65.

5 Mr Kevin Bell QC, *Hansard*, 29 May 2000, p. 122.

settle interim orders puts intolerable strain on the human resources of the Commission. The problem is magnified by a reduction in the number of Commissioners from around 60 to 46. This has come at a time of greatly increased workload in Victoria as a result of its handover of industrial relations powers to the Commonwealth. The Committee heard evidence of the Commission hearing cases late at night and at weekends in order to achieve speedy resolution of disputes. Nonetheless there have been criticism of delays by the Commission.

3.10 Such criticism has been answered in one submission:

> No blame can be attached to the Commission for the parlous state of the resourcing of the Commission to carry out its functions. However, as the Government has created a situation of deliberately starving the Commission of adequate resources, it is improper in the extreme for the Government to dictate to the Commission that those applications, which favour employers only should be dealt with in priority to applications which are otherwise made by the Commission, and which have and would deliver real basic Safety Net increase entitlements to employees.[6]

Attempts to Limit the Jurisdiction of the Federal Court

3.11 The Minister's second reading speech introducing this bill into Parliament is notably bland in dealing with section 170MTA. The proposed provisions expressly confer jurisdiction on the Federal Court to determine whether industrial action is protected, and if so, whether the industrial action is covered by the immunity provided by the Act. The amendments also make it clear that the Federal Court's jurisdiction is not exclusive in these matters. In addition, the amendments protect existing rights to pursue common law remedies in response to unlawful industrial action in state supreme courts and would prevent anti-suit injunctions being sought from or issued by the Federal Court.

3.12 While the Government may argue that the Federal Court is not 'sidelined' in the proposed legislation by virtue of subsection 170MTA(1), it is clear that subsections 170MTA(2) and (4) do represent a significant weakening in the power of the Federal Court. Labor senators know this to be deliberate policy; consistent in every way with the intention of the bill to reduce the legal standing of unions in their dealings with employers. The Federal Court has exercised its prerogative, in the normal way of courts, to decide matters on the merits of the case. Inevitably, in view of the unconscionable conduct of a few employers, cases have not always been decided along the lines of what the Government would see as 'merit'.

3.13 This partly explains the sniping which has been reported in the financial press about the record of the Federal Court in handling cases brought before it by employers seeking the enforcement of Commission orders. Other comments have been made by legal practitioners acting for employers. The Melbourne bench of the Federal Court has been singled out for special mention as it is alleged to show particular favour to union interests. Comments from one practitioner were quoted in a submission to the inquiry:

> If a s.127 order is finally issued, the Federal Court has the power to issue an injunction on application to enforce the order if it is being breached (see s.127(6) and (7). In several cases (all cases cited and annotated in the submission) the Federal Court has:

6 Submission No. 8, Shop and Distributive Allied Employees Association, op.cit., p. 16.

- shown a distinct reluctance to grant interim relief;
- adopted an overly technical approach;
- dealt with these applications slowly;
- reheard the 'industrial circumstances' surrounding the breach of the orders as part of its general discretion;
- accepted assurances from the unions' counsel that the unions intend to take protected action in the future; preferred to adopt a conciliatory approach rather than issue interlocutory orders; and,
- given primary attention to the unions' and employees' bargaining position when assessing the issue of balance of convenience.[7]

3.14 The Committee questioned representatives of the International Centre for Trade Union Rights (ICTUR) on the capacity of the Federal Court to do its duty in what they perceive to be a correct way in the light of criticism which the Court had received. ICTUR representative Mr Kevin Bell QC told the Committee:

> …There is quite clearly a public vilification, and there is an unjustified focus upon particular individual members of the Federal Court as if they stood for the whole. I have read the cases referred to in Stuart Wood's submission to this committee which I deplore. If the committee reads those cases, it will see that many members of the Federal Court have been involved in anti-suit injunction cases in the industrial arena. Judges are appointed from across the spectrum in terms of their prior history…The principles of law in this area have been expounded in other contexts - equity jurisdiction and commercial jurisdiction. The law is there for the judges to apply, and they have applied it to the letter. They have been criticised for that, because industrial law is an area that naturally attracts controversy. The Federal Court ought to be defended for applying the law, even in cases where it makes them unpopular. It is unfortunate in the extreme that, rather than defend them, a bill is proposed to limit their powers.[8]

3.15 A rationale for anti suit injunctions is set out in the decision handed down in the Federal Court by Justices Lee and Tamberlin in *Pegasus Leasing Ltd v Cadoroll Pty Ltd*.

> There can be no doubt that it is undesirable to have on foot two parallel streams of litigation in superior courts involving substantially the same issues of fact and law. Such a situation does not necessarily mean that either proceeding, considered individually, can be regarded as vexatious or oppressive. However, the overall consequences of such a situation, unless there is some restraint agreed or imposed, can be oppressive in placing unnecessary and onerous burdens on all parties. There is always the prospect of conflicting findings of fact or law, which can readily lead to a perception of inconsistency or confusion in the administration. These problems could not only arise as a result of first instance determinations but also from appellate determinations that might be pursued in each of the jurisdictions. Moreover, there is the foreseeable waste of resources, time and expense by the

7 Submission No. 27, Mr Stuart Wood, Appendix B, pp. 14-16.

8 Mr Kevin Bell QC, *Hansard*, 29 May 2000, p. 121.

> courts, the parties and witnesses arising for the inevitable duplication of all levels of the proceedings.[9]

3.16 The constitutionality of these limits is open to serious doubt. The power to issue anti-suit injunctions is central to the operation of the Federal Court as a judicial institution and to remove this power would, in some cases, seriously diminish the Court's ability to deal with judicial controversy before it.[10]

3.17 Mr Kevin Bell QC provided evidence to the Committee that:

> The anti-suit injunction power is central to the operation of the Federal Court as a judicial institution. Every superior court in this country possesses that power. The High Court has stated that it is integral to the maintenance of the court's integrity. Without it, the court cannot guarantee in industrial cases its own integrity. Don't abolish it. If you do, you will create constitutional doubts about the operation of the provision because the capacity of the court to protect its own integrity is so central to its operation as a judicial institution that it is doubtful whether or not you can constitutionally attack it.[11]

3.18 The department has indicated to the Committee that it has legal advice in relation to the constitutionality of the bill however, the department is unwilling to provide that advice to the Committee for scrutiny.

3.19 The submission from ICTUR stated that the primary effect of the removal of the Federal Court's capacity to issue anti-suit injunctions would be to substantially to weaken the quality of the protection afforded to industrial parties by the 170MT immunity.

3.20 This point was also made by Mr Toby Borgeest from Slater and Gordon solicitors:

> At present the Court is entitled to review the manner in which the Commission has exercised its existing discretion whether or not to make a section 127 order. With the Commission's discretion removed, the Federal Court will similarly be restricted in the range of matters it is entitled to take into account in determining whether or not to issue a binding injunction. In effect, the only question before the Federal Court, as before the Commission below it, will be whether unprotected industrial action is happening, or is threatened, impending or probable. Without the capacity to assess whether the industrial action is otherwise legitimate, or to consider any of the other matters which may be raised in the exercise of the Commission's existing discretion, the Court can be expected to be compelled far more often to issue binding injunctions backed up by the power to punish for contempt.[12]

As background to this debate the submission notes:

> The use of injunctions in the midst of industrial disputes has been the recourse of employers for more than a hundred years. Notwithstanding the existence of a

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9 Lee and Tamberlin JJ, *Pegasus Leasing Ltd v Cadoroll Pty Ltd* (1996) 59 FRC 152

10 Memorandum of advice from Maurice Blackburn Cashman Lawyers, AMWU supplementary submission, pp. 3-7.

11 Mr Kevin Bell QC, *Hansard*, 29 May 2000, p. 119.

12 Submission No. 49, Mr Toby Borgeest, Slater and Gordon, p. 3-4.

> limited category of protected action, and certainly prior to the introduction of that category in 1993, employers have enjoyed relatively uninhibited access to common law courts to have issued injunctions, supported by power to punish the contempt, and theoretically in aid of underlying actions to recover damages in tort.[13] It is noteworthy that, in the overwhelming majority of actions in which the employers seek and obtain interlocutory relief in the midst of an industrial dispute, the supposed underlying tort action is either never issued, of if issued, certainly never proceeds to trial. The inevitable conclusion arising from this consistent pattern of conduct is that employers have long valued the injunctive relief offered to them by common law courts purely as a tactic in an industrial situation. These tactics have no relation to any desire to actually proceed in an action for damages.[14]

3.21 The alternative approach was canvassed by Professor Keith Hancock in his submission:

> There is, in my submission, a strong case for a single Court to have exclusive jurisdiction with respect to Commonwealth industrial law (subject, of course, to the overriding authority of the High Court). This allows the maximum opportunity for the development of expertise in the area. More importantly, the proposed section is an invitation to litigants to select the courts most likely (in their view) to give favourable decisions. The vice of allowing a litigant to choose between judges is well recognised in all courts, which take steps to ensure that the litigant does not have such an opportunity. Allowing a litigant in a keenly contested industrial matter to exercise such a choice is equally objectionable and equally unfair to the other party.[15]

3.22 The dismantling of the industrial relations system is inconsistent with the recommendations of bodies normally associated with economic conservatism. In 1998, the National Competition Council recommended in favour of the retention of an exemption [paragraph 51(2)(a)] in the Trade Practices Act (TPA) which has the effect of excluding from the reach of the TPA agreements and arrangements between employers and employees that relate to employment conditions:

> The reasons given by the Council for recommending retention of the exemption were:
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> - maintaining the primacy of the industrial relations framework in labour market relations;
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> - compliance with Australia's ILO treaty obligations;

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13 There are, of course, innumerable examples of such injunctions. A notable example from recent years was that of an injunction granted by Mr Justice Beach of the Supreme Court of Victoria at the height of the 1998 waterfront dispute. On 20 April 1998 Justice Beach ordered that certain union officials not participate in a picket line, and that all persons who had participated in the picket line between 8 April 1998 and the date of the order not participate and, most incredibly of all, ordered that 'all persons who participate in the picket line … from the date of this order' be restrained from, among many other things, participating in the picket line. In other words, the Supreme Court had, when approached once again for common law injunctive relief in the midst of an industrial dispute, injuncted the whole world. The injunction issued by Mr Justice Beach was later significantly narrowed by the Court of Appeal.

14 Submission No. 49, Mr Toby Borgeest, Slater and Gordon, p. 4.

15 Submission No. 42, Professor Keith Hancock, p. 3.

- the certainty provided by the exemption in relation to the application of the TPA to employment agreements and arrangements.[16]

The Council had rejected the Government's submission to remove the exemption.

3.23 This bill represents another attempt by the Government to undermine the primacy of the industrial relations framework in labour market relations and, as such, should be rejected.

16 Submission No. 18, pp. 10-11.