

OBSERVATIONS ON TRADE UNION RECOGNITION IN BRITAIN AND AUSTRALIA[#]

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I INTRODUCTION

The right of workers to be represented by a trade or industrial union in their dealings with employers has been described as a 'fundamental human right'.¹ In Australia, this right has been an inherent feature of the industrial relations system since it received statutory imprimatur upon the establishment of a federal conciliation and arbitration system in 1904. In contrast, the British industrial relations system, at least in the period following the election of the Thatcher Government, has been notable for its failure to accord to unions a legislatively enshrined right of recognition.² To some extent, this anomaly is rectified by the reform proposals enacted in the *Employment Relations Act 1999* (UK) ('the UK Act'). However, these reforms fall short of the recognition rights held by Australian unions.

One purpose of this paper is to outline the union recognition provisions as contained in the UK Act. The British position will then be compared and contrasted with the Australian model, whereby unions are recognised simply by virtue of registration under the federal industrial relations legislation. For this purpose, reference will be made to three of the leading Australian cases on union recognition, which will serve to indicate the extent to which Australian unions have been able to use their registered status to advance and protect their members' interests.

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1 J Hendy and M Walton, 'An Individual Right to Union Representation in International Law' (1997) 26(3) *Industrial Law Journal* 205, 209.

2 For a brief history of union recognition in Britain prior to the *Fairness at Work* White Paper (see below n 3), see Anthony Forsyth, 'Proposals for Statutory Recognition Rights and Implications for Australia' (1999) 12 *Australian Journal of Labour Law* 32, 33-5.

II THE EMPLOYMENT RELATIONS ACT 1999 (UK)

The Employment Relations Bill 1999 (UK) was introduced into the House of Lords on 13 April 1999. It represented the Blair Government's legislative response to the *Fairness at Work* White Paper,³ which in turn acknowledged the Government's desire to rectify the injustice of *Associated Newspapers Limited v Wilson*; *Associated British Ports v Palmer*.⁴ The Bill passed into law later that year, receiving Royal Assent on 27 July 1999.⁵

The Explanatory Notes to the Bill state that, in so far as the union recognition provisions are concerned, the Bill is to provide for

new statutory procedures for the recognition and derecognition of trade unions for collective bargaining, to apply when unions and employers are unable to reach agreement voluntarily, and a requirement for employers to inform and consult unions recognised under the statutory procedure on their training policies and plans.⁶

This is a statutory right for trade unions to seek recognition by employers who decline to voluntarily accept collective bargaining with the representative body of workers.⁷

The process undertaken by a union which seeks to be recognised as representing a bargaining unit⁸ is commenced with an application for recognition.⁹ If the parties are able to agree on both the appropriate bargaining unit and that the union should be recognised to conduct collective bargaining¹⁰

3 United Kingdom, Department of Trade and Industry, *Fairness at Work* (Cm 3968, 1998).

4 [1995] 2 AC 454. In this case the House of Lords held, inter alia, that an employee does not have any right vis-à-vis an employer to have his or her employment relations regulated by the union making representations on his or her behalf. In particular, Lord Lloyd held (at 486C, emphasis added):

In my view, the Industrial Tribunal were entitled to hold that the true purpose of paying the extra to those who signed the new contracts was to persuade as many employees as possible to abandon union representation in wage negotiation. But where does that lead? *Union representation is not something to which as individuals, they were entitled.*

See also John Hendy, 'Comments on three aspects of the White Paper "Fairness at Work": Representation, recognition, industrial action and the individual worker' (Speech presented to the Employment Law Bar Association, London, 30 July 1998) [15]: 'The position after [*Associated Newspapers Limited v Wilson*; *Associated British Ports v Palmer*] in the House of Lords is stated shortly: there is no right for an employee to be represented by a union vis a vis the employer in UK law.'

5 For a more detailed analysis of the UK Act see K D Ewing, 'Freedom of Association and the Employment Relations Act 1999' (1999) 28(4) *Industrial Law Journal* 283; Lord Wedderburn, 'Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition' (2000) 29(1) *Industrial Law Journal* 1.

6 See Employment Relations Bill 1999 (UK) Explanatory Notes, 'Summary and Background', [3]. The full text of the Explanatory Notes to the Bill is available at <<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldbills/048/en/99048x--.htm>> at 25 May 2001.

7 Forsyth, above n 2.

8 The bargaining unit is the appropriate group of workers that the union wishes to be recognised as representing in collective bargaining.

9 *Employment Relations Act 1999* (UK) sch 1, [3].

10 The scope of collective bargaining for the purposes of pt 1 of the Employment Relations Bill 1999 (UK) is established in [2](6)-[2](7). This covers pay, hours, and holidays, as well as any matter which the union and employer agree should be included. However if the Central Arbitration Committee is required

on behalf of the workers who make up the unit, then the statutory recognition procedure comes to an end.¹¹ If, however, an employer does not respond to a union's request or rejects the request, the union can apply to the Central Arbitration Committee ('CAC') to decide the appropriate bargaining unit and whether the majority of workers in that unit support recognition.¹² Once the CAC becomes involved in the process, the Act provides for a number of tests which need to be satisfied before the CAC can proceed with an application for recognition.¹³ Presuming these prerequisites are satisfied, the CAC has a 28 day period in which it can attempt to get the union and employer to reach agreement on the appropriate bargaining unit.¹⁴ If agreement cannot be reached, the CAC is required to determine the appropriate bargaining unit in accordance with prescribed criteria.¹⁵ In circumstances where the bargaining unit so determined is different from that initially proposed by the union, the CAC is required to decide whether at least 10 per cent of the bargaining unit are members of the union and whether a majority of the workers in the bargaining unit would be likely to favour recognition before continuing to process the application.¹⁶

Where the CAC is satisfied that a majority of the workers in the bargaining unit are members of the union making the recognition application, the CAC is empowered to issue a declaration of recognition without the need for a ballot.¹⁷ If, however, a recognition ballot is required,¹⁸ a union will only achieve recognition status if the majority of those who voted support recognition and if at least 40 per cent of the workers constituting the bargaining unit support recognition – undoubtedly a high threshold.¹⁹

Once recognised, the union and the employer are required to try to reach agreement for the conduct of collective bargaining. Where agreement cannot be reached, either party can apply to the CAC for assistance.²⁰ The CAC will then actively try to help the parties reach agreement. However, if this proves unsuccessful, the CAC is required to specify the method of collective bargaining.²¹ Any such imposed method of collective bargaining will have effect as if it were a legally binding contract between employer and union, and can be enforced by an order for specific performance. Furthermore, a failure to comply with such an order can constitute contempt of court.

to determine the method by which collective bargaining should take place under [27](3), that method will only apply to negotiations over pay, hours and holidays.

11 *Employment Relations Act 1999* (UK) sch 1, [9].

12 *Employment Relations Act 1999* (UK) sch 1, [10].

13 See especially *Employment Relations Act 1999* (UK) sch 1, [4]-[8] and [28]-[37].

14 *Employment Relations Act 1999* (UK) sch 1, [15]. The CAC may, however, choose to extend this period.

15 *Employment Relations Act 1999* (UK) sch 1, [12].

16 *Employment Relations Act 1999* (UK) sch 1, [17].

17 *Employment Relations Act 1999* (UK) sch 1, [19]. However, if one of the criteria established in [19](4) is met, the CAC is required to call a secret ballot of members of the bargaining unit.

18 As to the ballot procedure, see *Employment Relations Act 1999* (UK) sch 1, [21]-[24].

19 *Employment Relations Act 1999* (UK) sch 1, [25]. This threshold is controversial: see Peter Wilby, 'The NS Interview: Bill Morris', *New Statesman*, 22 January 1999, 18.

20 *Employment Relations Act 1999* (UK) sch 1, [26].

21 *Employment Relations Act 1999* (UK) sch 1, [27].

John Hendy has characterised the provisions of the then Bill as generally good, but has questioned the adoption of American-style workplace ballots to support union recognition. He makes the point that such a system has resulted in a 'rock bottom' statistic for collective bargaining (18 per cent of all workers), and has also drawn attention to the highly complex recognition mechanism, enforceable not in the Employment Tribunals but only by an application for specific performance in the courts.²²

III THE AUSTRALIAN EXPERIENCE

In contrast to the complex statutory mechanisms contained in the new United Kingdom model, the Australian approach to union recognition is based upon the union being registered as an organisation for the purposes of the federal industrial relations legislation. To understand this procedure one needs to go back to 1904, when the Commonwealth Parliament enacted the *Conciliation and Arbitration Act 1904* (Cth) ('*Conciliation Act*'), a system characterised by Justice Higgins (the father of Australian arbitration) as 'a new province for law and order'.²³

The constitutional underpinning of the *Conciliation Act* is found in s 51(xxxv) of the *Australian Constitution*. This section provides the Commonwealth Parliament with a power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.

A central feature of the *Conciliation Act* was its recognition of the right of associations of employers or employees to be registered and thereby recognised as representing the interests of their members in industrial disputation.²⁴ In enacting these provisions, the Commonwealth Parliament relied not only on s 51(xxxv), but also on the *Australian Constitution's* incidental power located in s 51(xxxix), which gives the Commonwealth Parliament the power to make laws

22 John Hendy, 'Labour and the unions: Good, but not good enough' (1999) 54 *Workers' Liberty* 17 (also at <<http://www.workersliberty.org/wlmags/w154/turights.htm>> at 15 June 2001).

23 H B Higgins, *A New Province for Law and Order* (1922). The *Conciliation Act* remained the primary federal industrial relations enactment for over 80 years until it was replaced by the *Industrial Relations Act 1988* (Cth), which was itself recently replaced by the *Workplace Relations Act 1996* (Cth).

24 The registration provisions were located in the *Conciliation and Arbitration Act 1904* (Cth) pt V, and are now located in the *Workplace Relations Act 1996* (Cth) pt IX. In discussing the history of union recognition in Australia, Frazer, in Andrew Frazer, 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining: A Historical Perspective' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining, Trade Unions and the Law* (1995) 52, 54, has commented that (emphasis added):

From its inception compulsory arbitration has been assumed to require the participation, promotion and regulation of unions as a key element of the system. This involvement rested on two notions: that employees could only be effectively represented (and regulated) by collective entities; and that certain of these entities should be given special status on registering under the system. Once registered, unions became constituted as right-and-duty-bearing legal entities and gained protections and preferences for both themselves and their members.

with respect to matters that are incidental to any powers granted by the Constitution to the Parliament.²⁵

In *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* ('*Jumbunna*'),²⁶ a constitutional challenge was brought against, inter alia, the registration provisions of the *Conciliation Act* on the basis that, in enacting these provisions, the Commonwealth Parliament had exceeded its powers by conferring on registered associations the status of corporations and investing them with the power of holding property and of suing for fees and contributions. Furthermore, it was submitted that as these incidents and powers were inseparable from the scheme of registration which was a vital part of the *Conciliation Act*, the whole enactment was unconstitutional and void.²⁷

Before one can begin to examine why it was that the High Court upheld the validity of the *Conciliation Act's* registration provisions it is important that some of the background to the *Jumbunna* decision be explained, for that background illuminates the fundamental significance of the decision to the union movement in Australia.

One of the consequences of the formation of the Australian federation in 1901 was the abolition of State customs barriers, which in turn led to large amounts of subsidised coal being transported from the State of New South Wales ('NSW') to Victoria. In response to this influx of cheaper coal, Victorian coal mining companies at Jumbunna and Outtrim in Victoria advised that they were going to reduce wages so as to remain competitive with the cheaper NSW coal. This led to the formation of the Victorian Coal Miners' Association ('the Association') and a recognition strike by Victorian coal miners that lasted for 70 weeks. The employers refused to recognise the Association and, defeated, the miners eventually went back to work. However, upon returning to work, those miners who were members of the Association found that they were being dismissed or harassed because of their union membership. The Association therefore applied to the Industrial Registrar of the Conciliation and Arbitration Commission to be registered as a federal organisation.²⁸ The employers responded by challenging the validity of the registration provisions in the *Conciliation Act*.

In essence, what was at stake in the *Jumbunna* case was the very right of Australian workers to be represented by a union in circumstances of industrial

25 Section 51(xxxix) gives the Commonwealth Parliament power to make laws with respect to: 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth'.

26 (1908) 6 CLR 309.

27 Ibid 354.

28 The Association felt that obtaining registration would serve two purposes. First, it would assist in the process of gaining federal award coverage, which would secure their rates of pay. Second, registration would allow the Association to invoke the victimisation provisions of the *Conciliation Act*, which prohibited employers from either dismissing or victimising employees because of their union membership.

disputation.²⁹ In *Jumbunna*, the High Court³⁰ upheld the validity of the registration provisions of the *Conciliation Act* on the basis that they were incidental to the Commonwealth Parliament's powers pursuant to s 51 (xxxv) of the *Australian Constitution*. In so finding, the High Court acknowledged the right of unions (and employer organisations) to become registered under the federal legislation for the purposes of being the recognised representatives of their members' interests.³¹ Justice O'Connor emphasised that if the Commonwealth's conciliation and arbitration power was to be effectively exercised so as to bring about the settlement of disputes, it must be by bringing the power to bear on representative bodies standing for groups of workers.³² In particular, his Honour held that:

The end aimed at by the Act in question here is the prevention and settlement of industrial disputes extending beyond any one State by conciliation and arbitration. It may well be conceded that there is no general power to prevent and settle industrial disputes by any means that the legislature may think fit to adopt. The power is restricted to prevention and settlement by conciliation and arbitration. *Any attempt to effectively prevent and settle industrial disputes by either of these means would be idle if individual workmen and employees only could be dealt with. The application of the 'principle of collective bargaining' not long in use at the time of the passing of the Constitution, is essential to bind the body of workers in a trade and to ensure anything like permanence in settlement. Some system was therefore essential by which powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen, instead of individuals only.* But if such representatives were merely chosen for the occasion without any permanent status before the court, it is difficult to see how the permanency of any such settlement of a dispute could be assured. *Even when the dispute is at the stage when it may be prevented or settled by conciliation, the representative body must have the right to bind and the power to persuade not only the individuals with whom the dispute has arisen, but the ever changing body of workmen that constitute the trade.*³³

By upholding the validity of the registration provisions of the *Conciliation Act*, the High Court recognised the unique status that registration confers on

29 The concept of the industrial dispute is at the heart of the Australian industrial relations system. In particular, the limited constitutional power contained in s 51(xxxv) of the *Australian Constitution* provides the Commonwealth Parliament with the power to make laws in circumstances of interstate 'industrial disputes'. The phrase 'industrial dispute' is defined in s 4 of the *Workplace Relations Act 1996* (Cth) to mean:

- (a) an industrial dispute (including a threatened, impending or probable industrial dispute): (i) extending beyond the limits of any one State; and (ii) that is about matter pertaining to the relationship between employers and employees; or
- (b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a); and includes a demarcation dispute (whether or not, in the case of a demarcation dispute involving an organisation or the members of an organisation in that capacity, the dispute extends beyond the limits of any one State).

The process by which industrial disputes have traditionally been created is somewhat artificial. Traditionally, a 'paper dispute' is created when a log of claims is served by employees on employers in more than one State and that log of claims is rejected. See especially *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Jones* (1914) 18 CLR 224.

30 Constituted by Griffith CJ, Barton, O'Connor and Isaacs JJ.

31 Justice Higgins, writing extra-curially, has said that 'without unions, it is hard to conceive how arbitration could be worked': Higgins, above n 23, 15-16, cited in Frazer, above n 24, 54.

32 *Jumbunna* (1908) 6 CLR 309, 360.

33 Ibid 358-9 (emphasis added).

unions within the conciliation and arbitration system. Put simply, the registration of organisations of employees (unions) provides those unions with automatic recognition by employers and with the means of operating within the Australian industrial relations system.³⁴

A Current Federal Legislation

The process by which unions take on this representative capacity is set out in the *Workplace Relations Act 1996* (Cth) ('WRA'), and can be broken down into four essential steps:³⁵

- (1) the union must file an application for registration;³⁶
- (2) notice of this application is published and is also given to interested parties;³⁷
- (3) interested parties are given an opportunity to object to the registration of the union;³⁸ and
- (4) subject to satisfaction of these conditions, formal registration occurs, that is, the name and union's eligibility rules are entered in the register by the Industrial Registrar of the Australian Industrial Relations Commission ('the Commission').³⁹

Once the registration is approved, the union becomes an 'organisation' for the purposes of the WRA,⁴⁰ which means that:

- (a) it is a body corporate;
- (b) it has perpetual succession;
- (c) it has power to purchase, take on lease, hold, sell, mortgage, exchange and otherwise own, possess and deal with any real property;
- (d) it shall have a common seal; and
- (e) it may sue or be sued in its registered name.⁴¹

The union, by virtue of the status afforded to it upon registration, thereby becomes an integral part of the industrial relations system.⁴² Unlike the model

34 W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials* (2nd ed, 1993) 931. See also *Williams v Hursey* (1959) 103 CLR 30, 52, where Fullagar J commented:

The *Conciliation and Arbitration Act* of the Commonwealth, under which it [a union] is registered as 'organisation', gives to it what I would not hesitate to call a corporate character - an independent existence as a legal person. It is given a personality, which is distinct from that of all or any of its members and which continues to subsist unchanged notwithstanding the changes which are found to occur from time to time in its membership.

35 Creighton, Ford and Mitchell, above n 34, 932.

36 *Workplace Relations Regulations 1996* (Cth) reg 33. The criteria for registration are set out in the *Workplace Relations Act 1996* (Cth) s 189.

37 *Workplace Relations Regulations 1996* (Cth) reg 35.

38 *Workplace Relations Regulations 1996* (Cth) reg 36.

39 *Workplace Relations Act 1996* (Cth) s 191.

40 *Workplace Relations Act 1996* (Cth) s 191(3).

41 *Workplace Relations Act 1996* (Cth) s 192.

proposed under the UK Act, recognition is not dependent upon, inter alia, voluntary agreement with the employer, the results of a secret ballot or the invocation of a statutory procedure by which the union is required to establish that it has 'a reasonable level of support' amongst the employees that it wishes to represent.⁴³

Once registered, a union is bestowed with certain obligations which are designed to ensure that the conciliation and arbitration system operates effectively. In particular, in circumstances where alleged industrial disputation arises, the union is required to notify the Commission of the dispute.⁴⁴ Upon notification of a dispute the Commission is first required to attempt conciliation,⁴⁵ and if that proves unsuccessful, arbitrate to resolve the dispute.⁴⁶ Upon an arbitrated resolution of a dispute an award is made, which the WRA expresses to be binding not only on those persons who were a party to the dispute but also on certain other persons including any successor, assignee or transmittee, whether or not to or of the business or part of the business of an employer who was a party to the industrial dispute.⁴⁷

The WRA has significantly limited the jurisdiction of the Commission to resolve industrial controversies by the traditional mechanisms of conciliation and arbitration. In particular, awards are limited to 20 specified 'allowable matters', and new awards can only specify minimum wage rates (that is, paid rates awards are precluded *in futuro*).⁴⁸ These provisions obviously constrain the role of registered organisations in representing the interests of employees.

Whilst the process of registration confers a right of recognition it should be noted that this right is not unfettered. To this extent, the representative capacity of a union is circumscribed by its eligibility rules and whether those rules encompass the workers who are involved in the disputation.⁴⁹ However, assuming this threshold matter is established, a registered union will, without more, be recognised as being representative of its members' interests.

One object, expressly stated, of the *Conciliation Act* was to 'facilitate and encourage the organisation' of unions of employers and employees, for, as Higgins J said in 1911,

42 See especially Frazer, above n 24, 54 (emphasis added):

By constituting unions as separate legal entities – autonomous, democratically governed and subject to decisions of the arbitration Court – the arbitration system could operate under the assumption that the interests of workers were being represented, while unions would also ensure their members' compliance with court orders and awards. *Hence the basis of compulsory arbitration was inherently collectivist, depending on unions as primary parties whose active participation was essential to the operation of the system.*

43 It should however be noted that, for the purposes of the WRA, an association of employees that wishes to be registered is required to establish that it has at least 50 members who are employees: *Workplace Relations Act 1996* (Cth) s 189(1)(c).

44 *Workplace Relations Act 1996* (Cth) s 99(1).

45 *Workplace Relations Act 1996* (Cth) s 102.

46 *Workplace Relations Act 1996* (Cth) s 104.

47 As to the parties who are bound by an award see *Workplace Relations Act 1996* (Cth) s 149.

48 *Workplace Relations Act 1996* (Cth) s 89A.

49 *Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation* (1990) 171 CLR 216.

without such organisation – at all events on the side of the employees – the arbitration system and the industrial agreements are unworkable ... It may seem very shocking in some quarters, but it is my clear duty, in obedience to the law, to treat unionism as a desirable aid in securing industrial peace.⁵⁰

Given the privileged status afforded to registered unions, important questions arise concerning the extent to which Australian unions have been able to use their registered status to protect and enhance the working conditions of their members. In this respect, reference needs to be made to two decisions of 'great importance in Australian labour law',⁵¹ namely *Burwood Cinema Limited v Australian Theatrical and Amusement Employees Association* ('Burwood Cinema'),⁵² and *Metal Trades Employers Association v Amalgamated Engineering Union* ('Metal Trades').⁵³

In the *Burwood Cinema* case, the High Court was called upon to consider whether an industrial dispute could arise from a claim made by the Australian Theatrical and Amusement Employees Association ('the Theatrical Association') on behalf of its members, both present and future. What was significant about this case was that the demands were made on a number of employers, some of whom did not, at the time the demands were made, employ members of the Theatrical Association, whilst others had obtained declarations from their employees that they were satisfied with the conditions under which they worked.⁵⁴

In *Burwood Cinema*, the High Court held⁵⁵ that the fact that some of the employers did not engage union members was not a reason to reject a finding of industrial disputation. In particular, Isaacs J stated that:

The main question arising in this case is of high importance. It seriously concerns the power of the Commonwealth Arbitration tribunal to settle national industrial disputes efficaciously, completely and justly. *The question is whether, upon the true construction of the Constitution, an employer who employs no union labour whatever can be a party to an 'industrial dispute' with an organisation of employees, or whether by simply refusing to employ a single unionist he can, so far as his industrial operations are concerned, entirely exclude the Federal power.* It is obvious that if he can maintain the latter position the means do not exist anywhere in Australia of preventing or adequately remedying an admitted evil of the first magnitude – the disruption of industry beyond the limits of a State. *If the Commonwealth tribunal, in making awards is compelled to exclude all employers*

50 *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 5 CAR 9, 25; see also *Federated Clerks Union of Australia v Altona Petrochemical Co Pty Ltd* (1973) 150 CAR 387, 392.

51 Creighton, Ford and Mitchell, above n 34, 565.

52 (1925) 35 CLR 528.

53 (1935) 54 CLR 387.

54 However, it should be noted that Webb DP concluded that several employees had signed these declarations out of fear that they would lose their jobs, and that some employers were attempting to engage in unfair competition by evading the award: see *Australian Theatrical and Amusement Employees' Association v Hugh J Ward Theatres Pty Ltd* (1924) 20 CAR 16, 23.

55 By a majority constituted by Isaacs, Powers, Rich and Starke JJ (Knox CJ and Gavan Duffy J dissenting).

*declining to employ unionists, and thereby to leave them free from Federal arbitration as to wages, hours and other conditions of labour, a formidable obstacle exists to awarding terms which are just to the actual parties and to the public, without giving the employers who discriminate against unionists an unfair advantage over their competitors. That in itself must produce inequalities and naturally cause dissatisfaction and instability, and so contribute materially to the disturbance of industrial peace.*⁵⁶

The *Burwood Cinema* decision established that an industrial relationship could exist between a federally registered union and employers who did not employ members of the union when the demands made by the union concerned the relations between its members, present and future, and those employers. As a result, employers could no longer avoid recognising unions or avoid being subject to the federal award system by simply refusing to employ union members.

The question which the *Burwood Cinema* decision left unresolved, however, was whether an industrial dispute could arise when a union brought a claim concerning the employment conditions of persons who were not members of the union. This matter was determined in the *Metal Trades* case, in which four unions served on various employers demands concerning, inter alia, the wages and conditions of employment of persons who were not members of the unions.⁵⁷

In *Metal Trades*, the High Court held⁵⁸ that a union was able to validly create an industrial dispute in relation to the employment conditions of employees who were not members of the union.⁵⁹ In so finding, the High Court further emphasised the extent to which unions are recognised as being an integral part of the industrial relations system. In particular, Rich and Evatt JJ stated:

Nor does the fact that the demand made by the unionists extends to the case of employers who do not employ unionists at all, prevent the creation of an industrial dispute upon the subject matter of the terms and conditions which should be observed by such employers in employing such non-unionists. *In such cases, the union has an equally direct concern in removing the obstacles to the employment of its own members and to the maintenance and protection of the union standard of wages, even though the removal of such obstacle by the granting of the demand will incidentally benefit persons, non-unionists, who are not parties to the dispute but the terms of whose employment by their employers (parties to the dispute) are the subject matter of the industrial dispute.*⁶⁰

56 *Burwood Cinema* (1925) 35 CLR 528, 535-6 (emphasis added).

57 In fact, one of the employers so served did not employ any members of the claimant union.

58 By a majority constituted by Latham CJ, Rich, Evatt and McTiernan JJ (Starke and Dixon JJ dissenting).

59 However, the reverse situation does not apply. That is, an employer cannot create a dispute with a union for the purposes of obtaining an award which binds not only the union and its members but also eligible non-members. This conclusion is based upon the rationale that the union has no relationship with non-members, whereas (in the reverse situation) the employer does have a legal relationship with eligible non-unionists, being a contract of employment. See especially *R v Graziers' Association of New South Wales; Ex parte Australian Workers' Union* (1956) 96 CLR 317.

60 *Metal Trades* (1935) 54 CLR 387, 418 (emphasis added). See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch* (1938) 60 CLR 507, 537-8, in which Dixon J summarised the ratio of the *Metal Trades* decision as follows:

The *Burwood Cinema* and *Metal Trades* decisions reveal the extent to which unions have been able to use their registered status to protect and enhance the working conditions of their members. As a result of the registration process, unions in Australia are recognised as being much more than merely an agent of their members in that they stand in the place of their members and act on their behalf. To this extent, a union, once registered, becomes a representative of the class associated together in the organisations and is 'a party principal', 'not a mere agent or figurehead'.⁶¹

The Australian model of recognition by virtue of registration thereby provides a unique point of contrast to the more limited model of recognition contained in the UK Act. By ensuring that recognition flows automatically from participation in the conciliation and arbitration system the Australian model avoids the complications and limitations that arise under the British system, which requires minimum membership levels, secret recognition ballots and the involvement of both the employer and the Central Arbitration Committee in the recognition process.

It is true that, even without registration, under current federal law an organisation can be a participant in an industrial dispute, an aggregation of employees can enter into a collective agreement, individual work contracts will be recognised and individual employees can make an unfair dismissal claim.

Nonetheless, the advantages of registration are tangible: the right of standing in proceedings before the Australian Industrial Relations Commission (either as a party or intervener) is straightforward; the procedural facility to serve a log of claims, and, hence, create a 'paper' interstate industrial dispute, advantages a registered organisation legally and procedurally; a registered organisation can safeguard its territorial coverage, specified in its conditions of eligibility rule, both by asserting its right to coverage in demarcation proceedings and by objecting to constitutional rule changes or new registration by competitive groups of employees, (although these rights have been diluted to some extent by the 1996 amendments).

Thus the 1958 statement of J H Portus still has substance: 'from being associations tolerated by the state [registered trade unions] have become semi-official associations which are given a part in the making and administration of law'.⁶²

Notwithstanding this, it would be wrong to suggest that the Australian model is a panacea. With the enactment of the WRA, and the general shift towards a

[T]he decision gave effect to a clear principle which was evidently intended to be of far-reaching operation ... The principle upon which the decision rests is that the interest which an organisation of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or non-unionists.

61 See *Burwood Cinema* (1925) 35 CLR 528, 551; *R v Cohen; Ex parte Attorney-General for Queensland* (1985) 157 CLR 331, 336-7, cited in Hendy and Walton, above n 1, 209; see generally *Metal Trades* (1935) 54 CLR 387.

62 J H Portus, *The Development of Australian Trade Union Law* (1958) 115.

more enterprise focused industrial relations system, a number of limitations to the Australian model have begun to reveal themselves. In particular, the traditional recognition rights which served the Australian union movement well when collectivism and the award system predominated have begun to show signs of strain in recent times with the increasing emphasis on enterprise based agreements, individual contracts and the move towards the stripping back of award provisions.⁶³

Recent judgments of the Federal Court raise doubts about whether, in cases where the Court is enforcing freedom of association legislation, it is prepared to require a collective bargaining process as distinct from the negotiation of individual contracts.⁶⁴ It could be argued that these recent decisions give a 'green light' to individual contracts, but they have not yet been tested before the Full Court of the Federal Court or the High Court.

In a 1994 decision, the Australian Industrial Relations Commission was prepared to make an interim award with a view to thwarting an employer's attempts to effectively eliminate the role of registered employee organisations in the employment relationship at the Bell Bay aluminium smelter in Tasmania.⁶⁵ And in a 1996 decision, where Comalco was offering individual contracts at its aluminium operations at Weipa in Queensland, the Commission was prepared to make an interim award requiring the employer to extend to each award employee the terms and conditions applicable to 'staff' contract employees, provided the award employee was prepared to work in accordance with the requirements in the staff contracts.⁶⁶

In the light of the WRA however, some doubt arises as to whether the Commission could or would now apply similar remedies designed to counter the subversion of collective agreements or awards.

In recent disputes involving attempts to diminish the role of unions, some more subtle than others, unions have increasingly looked to the Federal Court rather than the Commission to enforce anti-victimisation provisions which (perhaps inadvertently) tend to protect the continuing representative role of registered organisations. In particular, it is clear that the arbitral powers of the Commission have been truncated. Bargaining periods are encouraged and these can only be terminated (so as to open the gateway to conciliation and arbitration) in specified circumstances.⁶⁷

Amendments to the WRA indicate that whilst unions are entitled to act as bargaining agents in the case of Australian Workplace Agreements ('AWAs'),⁶⁸

63 *Workplace Relations Act 1996* (Cth) s 89A(2) purports to limit the content of awards to 20 allowable matters. See especially *Re Award Simplification Decision* (1997) 75 IR 272.

64 See *Finance Sector Union v Commonwealth Bank of Australia* [2000] FCA 1372 (Unreported, Finkelstein J, 28 September 2000) and *Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3 (Unreported, Kenny J, 10 January 2001).

65 *Re Aluminium Industry (Comalco Bell Bay Companies) Award 1983* (1994) 56 IR 403.

66 *Australian Manufacturing Workers Union v Alcoa of Australia Ltd* (1996) 63 IR 138.

67 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* [2000] 172 ALR 257.

68 AWAs are a form of individual contract of employment. See especially pt VI(D) of the *Workplace Relations Act 1996* (Cth).

they are not entitled to become a party to an AWA.⁶⁹ Moreover, the Act expressly provides for non-union enterprise agreements, whereby an employer may make an agreement with a majority of employees whose employment will be subject to the agreement.⁷⁰ Whilst the WRA requires an employer to inform an employee that if they belong to a union they may request that the union represent them in meetings and conferrals with the employer about the agreement,⁷¹ the union has no right to appear and make submissions before the Commission at the time that approval is sought for the agreement.

The WRA thus represents a challenge to the right of unions in Australia to effectively represent workers' interests. The clear focus of the WRA is to limit the previous collectivist tradition of industrial relations in Australia, in which unions were an intrinsic part of the arbitrated resolution of industrial disputation. The Act expressly provides that the primary responsibility for determining matters affecting the relationship between employers and employees rests with employers and employees 'at the workplace or enterprise level',⁷² and that parties will only be able to resort to arbitration 'where appropriate and within specified limits'.⁷³

Given the attempts (through the WRA) to inhibit the role that unions play in the Australian industrial relations system, it is interesting to compare the approach currently adopted by the Federal Government of Australia with that of the legislature in NSW.

B Current New South Wales Legislation

In contrast to the WRA, the *Industrial Relations Act 1996* (NSW) ('the State Act') expressly recognises the important role that unions play in the regulation of industrial relations. Thus the State Act provides that one of its objects is: '*To encourage participation in industrial relations by representative bodies of employees and employers* and to encourage the responsible management and democratic control of those bodies'.⁷⁴

The provisions dealing with the registration of unions (and employer bodies) under the State Act are located in Chapter 5. These provisions effectively mirror the four-step registration procedure found in the federal WRA.

Once registered, a State organisation⁷⁵ (ie union) enjoys the same privileges of incorporation as are granted to unions under the WRA.⁷⁶ Upon registration, industrial organisations under the State Act have standing to notify the State

69 See especially *Workplace Relations Act 1996* (Cth) ss 107VF, 170VK.

70 *Workplace Relations Act 1996* (Cth) s 170LK(1).

71 *Workplace Relations Act 1996* (Cth) s 170LK(4).

72 *Workplace Relations Act 1996* (Cth) s 3(b).

73 *Workplace Relations Act 1996* (Cth) s 3(h). This is in stark contrast to the statutory regime under the *Industrial Relations Act*, which provided in s 3(d)(ii) that arbitration would be used to prevent and settle industrial disputes 'where necessary'.

74 *Industrial Relations Act 1996* (NSW) s 3(d) (emphasis added).

75 See below n 77.

76 *Industrial Relations Act 1996* (NSW) s 222.

Industrial Relations Commission ('the State Commission') of industrial disputation,⁷⁷ and to participate in the resolution of such disputation.

However, one area where the State Act departs significantly from the WRA is in relation to the role accorded to unions in the processes that lead to the certification of enterprise agreements. In this respect, the State Act establishes a mechanism by which a Full Bench of the State Commission is required to establish principles to be used in determining whether enterprise agreements will be approved.⁷⁸ The State Act ensures that unions are an integral part of this process by providing that they are entitled to be notified of review proceedings and to 'make submissions on the setting or review of the principles for approval'.⁷⁹ Furthermore, in circumstances where an application is made to the State Commission for the approval of an enterprise agreement to which employees (as distinct from a union) are a party,⁸⁰ the State Act provides that such an application cannot proceed until the union which is a party to an award or agreement that then applies to the employees has been notified of the application.⁸¹ Finally, at any subsequent proceedings for the approval of an enterprise agreement a union is entitled to appear 'if its members *or persons eligible to become members* are affected by the agreement',⁸² and there is a limit on the federal concept of 'allowable matters'.

This overview of some of the key recognition provisions of the State Act highlights the extent to which the NSW legislature acknowledges the significant role that the union movement plays in maintaining the viability of that State's industrial relations system. In an era which has seen a growth in moves to decollectivise industrial relations, and an increasing emphasis on enterprise based dispute resolution procedures, the State Act serves as an example (in contrast to the federal WRA) of how it is possible to design a flexible industrial relations system which is capable of allowing unions to continue to play a significant role in the determination of the terms and conditions of workers.

77 *Industrial Relations Act 1996* (NSW) s 130.

78 *Industrial Relations Act 1996* (NSW) s 33. These principles are required to be reviewed at least once every three years: *Industrial Relations Act 1996* (NSW) s 33(3).

79 *Industrial Relations Act 1996* (NSW) s 33(5).

80 The State Act provides that enterprise agreements can be made between: (a) the employer or employers of the employees for whom it is made and one or more industrial organisations representing any of those employees (s 31(1)); and (b) the employer or employers of the employees for whom it is made and the employees at the time the agreement is made (s 31(2)).

81 *Industrial Relations Act 1996* (NSW) s 36(3) and *Industrial Relations (General) Regulations 1996* (NSW) reg 4.

82 *Industrial Relations Act 1996* (NSW) s 34(2)(b).