

The Industrial Relations Commission's Power of Private Arbitration

Justice Giudice

First Annual General Meeting

of the

Australian Labour Law Association

14 November 2001

[1] Thank you for the honour of inviting me to speak at the first Annual General meeting of the Australian Labour Law Association. It is a great pleasure to be here and to see members from so many branches of the profession in attendance. Over the last twenty years the development of labour law, and the closely associated field of labour relations, as distinct areas of legal practice has been rapid and widespread. When I commenced in industrial relations in 1971 there were probably only 5 legal firms in Melbourne with more than one or two solicitors practising full time in labour-related cases. I exclude from calculation the considerable number of firms with large workers' compensation practices. There were two firms specializing in work on behalf of employers and 3 specializing in work on behalf of unions. When I became a mature-aged articled clerk some 7 years later there were only three labour law specialists in the firm I joined and those 3 practitioners did the full range of advice work, Commission appearance work and briefed counsel in the various courts from the Magistrates' to the High Court. The work was demanding, varied, full of human interest, and quite often legally complex. I was fortunate to work for clients in industries as diverse as oil exploration, confectionery manufacture, commercial airline operations, food, bulk shipping, transport, artificial fertiliser manufacture, oil refining, petrochemicals, vehicle manufacture, and many sectors of the retail industry including banking. We usually worked alone although often with counsel. We didn't have the teams which now seem to be available in some firms to prepare documents, draft statements, carry out research and draw submissions.

[2] Of course the growth in labour laws was only just beginning. Section 170, at that time, would still fit on one standard page. Anti-discrimination tribunals were in their infancy. It was not until the early 1990's that the jurisdiction based on individual rights relating to termination of employment commenced to operate at the Federal level. The growth in cases related to the enforcement of individual rights created by statute has led to a great demand for legal and quasi-legal services. It is probably the development of those areas of legal practice which attracted the great numbers of solicitors and barristers which we see in the area today not only in Victoria and New South Wales but in the less populous State capitals such as Brisbane and Perth as well.

[3] The growth in recognition of the importance of individual rights in relation to employment occurred during a period when union membership was declining, at least in the traditional industries. Registered organisations were, and for the most part continue to be, very wary of committing resources to the pursuit of statutory remedies on behalf of individuals. No doubt there were good reasons for this attitude, but nevertheless most of the advice and representation is now provided by lawyers and some independent consultants. I do not suggest that the unions have failed to protect their members' employment, although it is not unusual for unions to use the traditional forms of dispute resolution, such as dispute notification, rather than the specific statutory remedies which are now provided.

[4] In parallel with these developments a significant decentralisation was occurring in industrial relations bargaining. There was a consensus of sorts across the political spectrum

that significant economic benefits could be obtained if collective terms and conditions of employment were determined at the level of the enterprise rather than at industry or national level. Legislation was enacted in 1993 which was designed to make enterprise bargaining the predominant method of varying wages and conditions of employment. That objective received further impetus from the legislative changes of 1996. Those changes confirmed the safety net character of the award system and placed limitations on the matters which could be included in awards. An important result of this decentralization process, and the principle means by which it was achieved, was that the variation of wages and conditions of employment at the enterprise level was to be through agreements and not through formal arbitration. In general terms, the current legislative arrangements give greater emphasis to the Commission's conciliation role than was the case in the past. Along with that development there has been a reduction in the importance of the arbitral role. The Commission's formal arbitral role in collective disputes, by which I mean award-making, is confined to the making and updating of safety net awards, and only in exceptional cases, the imposition of an arbitrated settlement where enterprise bargaining has failed. Arbitration of the latter type usually occurs in circumstances where industrial action is threatening to endanger the life, the personal safety or health or the welfare of the population or part of it, or to cause significant damage to the Australian economy or an important part of it.

[5] The growth in the number of applications for relief in relation to termination of employment has also contributed to the renewed emphasis on conciliation. Conciliation is overwhelmingly the most effective method of resolving such applications. Around 70% of valid claims are settled through the conciliation process. Claims which remain unresolved are, of course, determined in a formal arbitral hearing.

[6] The legislated changes in the Commission's jurisdiction, which I have attempted to describe in a rather abbreviated way, have been fundamental. Not unexpectedly there have also been changes in the way in which the Commission interacts with the industrial parties. The need for conciliation has increased as a result of the development both of the termination of employment jurisdiction and of enterprise bargaining. While the incidence of award-making has reduced, other methods of resolving collective disputes, aside from arbitration as we have traditionally known it, are being utilized with increasing frequency. One such method is the time honoured approach of simply agreeing to accept the Commission's decision on the matters in dispute. The High Court recently elucidated some aspects of the Commission's work in this area in a decision which deals with the legal basis for the operation of dispute resolution procedures in certified agreements.

[7] In 1996 the operators of the Gordonstone coal mine in Queensland entered into an agreement with the United Mine Workers, later to become part of the CFMEU, to govern the terms and conditions to be afforded to the employees at the mine (*Gordonstone Mine UMW Enterprise Agreement 1995* (the agreement)). The agreement was certified by a member of the Commission in accordance with the statutory provisions which permit the Commission to certify an agreement made in an industrial situation. An industrial situation is one which is likely to give rise to an industrial dispute if preventative action is not taken. The agreement contained a provision for mediation and arbitration by the Commission to resolve safety and industrial issues which arose and which could not be resolved by the parties without the Commission's assistance (*cill.21 and 22 of the agreement*).

[8] Several parts of the statutory scheme in force at the time the agreement was certified are relevant. Pursuant to s. 170MC(1)(e) of the *Industrial Relations Act 1988* (IR Act) the Commission was required not to certify an agreement unless satisfied that the agreement

included procedures for preventing and settling disputes about the application of the agreement. Section 170MH of the IR Act dealt with the Commission's role in the settlement of disputes that might arise during the life of a certified agreement. That provision read:

" Procedures in an agreement for preventing and settling disputes between employers and employees covered by the agreement may, if the Commission so approves, empower the Commission to do either or both of the following:

(a) to settle disputes over the application of the agreement;

(b) to appoint a board of reference as described in [section 131](#) for the purpose of settling such disputes." (Industrial Relations Act 1988, s.170MH)

[9] On 27 February 1997 the CFMEU notified the Commission of some 12 issues which it had put in dispute through the dispute settlement procedure. About a month later it notified a thirteenth matter. The CFMEU asked the Commission to determine the matters. The employer objected to the Commission doing so on a number of jurisdictional grounds. It is only necessary to mention one of the grounds.

[10] By s.89A of the *Workplace Relations Act 1996* (WR Act) the Commission's power to deal with an industrial dispute by arbitration or to prevent, settle or maintain the settlement of an industrial dispute by making or varying an award or order is limited to a number of specified matters referred to as allowable award matters. The WR Act came into operation on 31 December 1996. Relevantly, the effect of s.89A is to limit the Commission's award-making power to the 20 allowable award matters (and matters which are incidental thereto and necessary for the effective operation of an award). Section 89A(1) of the WR Act reads:

" Industrial dispute normally limited to allowable award matters

(1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):

(a) dealing with an industrial dispute by arbitration;

(b) preventing or settling an industrial dispute by making an award or order;

(c) maintaining the settlement of an industrial dispute by varying an award or order."

[11] It was clear when the matter came before the Commission in 1997 that despite the coming into operation of the WR Act, s.170MH of the IR Act, the section dealing with the Commission's powers in relation to dispute resolution procedures, continued to operate in relation to agreements certified under that Act. The employer contended, however, that not only does s.89A limit the Commission's ordinary arbitration powers but it also limits the Commission's powers when it is arbitrating pursuant to a dispute resolution procedure in a certified agreement. It was thus contended that because few if any of the 13 issues raised by the CFMEU under the dispute resolution clause were allowable award matters the Commission had no power to resolve them.

[12] The proceedings were referred to a Full Bench of the Commission which in due course dismissed all of the employer's jurisdictional objections. The employer sought relief by way of prerogative writ against the Full Bench. A Justice of the High Court remitted the proceedings to the Federal Court. In due course a Full Bench of that Court dismissed all of the employer's jurisdictional arguments but one. The Court upheld the argument that s.89A

applies to and limits the exercise by the Commission of powers conferred on it pursuant to the dispute resolution provisions in certified agreements. And it was from that Court's decision, not the Commission's decision as the title of the High Court proceedings suggests, that the CFMEU sought and obtained special leave to appeal to the High Court.

[13] The judgment handed down by the High Court on 15 March this year clarified the Commission's powers in relation to dispute resolution procedures contained in certified agreements in a number of respects [*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 75 ALJR 670 (Gordonstone)]. In addition the Court made a number of observations which are relevant to dispute resolution procedures generally. There are three conclusions contained in the Court's reasons which deserve particular emphasis.

[14] The first conclusion is that s.170MH of the IR Act is valid. The Court held that it is incidental to the conciliation and arbitration power for the Parliament to permit parties to an industrial situation to agree on the terms on which they will settle the matters in issue between them conditional upon their agreement having the same legal effect as an award. It is also incidental to that power for the Parliament to give legal effect to agreed procedures for maintaining a settlement of that kind and to authorise the Commission to participate in those procedures. The Court recognized that in participating in those procedures the Commission may make decisions about the legal rights and liabilities of the parties. It rejected the suggestion that the Commission in so doing may be involved in the purported exercise of judicial power. It described the power exercised by the Commission pursuant to a dispute resolution procedure in a certified agreement as a power of private arbitration. It follows from these conclusions that a statutory provision for dispute resolution procedures in an agreement to empower the Commission to settle disputes over the application of the agreement is valid.

[15] In reaching its decision the Court pointed out that there is a significant difference between agreed and arbitrated dispute resolution procedures. The Commission cannot, by arbitrated award require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch.III of the Constitution commits power to make determinations of that kind exclusively to the courts. This does not mean, however, that the Commission may not exercise its arbitral power to provide for dispute resolution procedures at all. The Court gave as an example of the legitimate use of arbitral power for such a purpose provision for the establishment of a board of reference (in the terms permitted by s.131 of the WR Act.).

[16] Section 170MH of the IR Act, the section considered by the High Court in *Gordonstone*, was repealed with effect from 31 December 1996. The present legislative equivalent is s.170LW of the WR Act. That section is in relevant respects the same as s.170MH of the IR Act. It is assumed that for the reasons expressed in *Gordonstone* s. 170LW of the WR Act is also valid. The WR Act also introduced provisions permitting the Commission to certify agreements made under provisions based on the Commonwealth Parliament's power to legislate with respect to corporations. Section 170LW, on its face, applies equally to dispute resolution procedures in agreements certified under those provisions.

[17] The second important conclusion reached by the Court was that the clause in the agreement which provided for dispute resolution procedures was valid. The provision purported to empower the Commission to resolve any '*safety or industrial issue arising*' where the parties were unable to resolve the issue without the assistance of the Commission.

(See *cl.* 21 of the agreement). It is clear that s.170MH limits the matters which the Commission may be empowered to settle to “*disputes over the application of the agreement*”. The provision in the agreement purported to empower the Commission to deal with any unresolved safety or industrial issue. The Court found that a provision for dispute resolution procedures which purports to empower the Commission to settle disputes other than disputes over the application of the agreement is not wholly invalid. Such a provision only operates under the Act, however, to the extent that it empowers the Commission to settle disputes over the application of the agreement. The operation of the agreement beyond that is a matter for the general law.

[18] This conclusion carries with it the necessary implication that the Commission cannot be empowered by provisions in a certified agreement to settle disputes which are not disputes over the application of the agreement. This is because the Commission only has the powers granted to it by the legislature. In the Gordonstone proceedings there was no examination of the 13 issues in dispute in order to ascertain whether each involved a dispute over the application of the agreement. The occasion for such an examination had not arisen in the Commission because the other jurisdictional issues were dealt with as threshold matters.

[19] The third conclusion was that the limitations in s.89A of the WR Act did not affect the exercise of the Commission’s powers pursuant to the dispute resolution procedure in the certified agreement. Section 89(b) of the WR Act provides that the functions of the Commission include, in addition to its functions with respect to conciliation and arbitration of industrial disputes, “*such other functions as are conferred on [it] by [that] or any other Act.*” The limitations on the Commission’s arbitral power in s.89A are only for the purposes specified in s. 89A(1). In settling disputes over the application of the agreement the Commission would not use its powers for any of those purposes but, as allowed by s.89(b), for the purposes specified in s.170MH. The Court also found, among other things, that s.89A(1)(a) and (b) had no application because any dispute at the mine was necessarily a local dispute and therefore lacked the interstate element necessary for the existence of an industrial dispute as defined in the Act.

[20] It is important to recall that the Gordonstone agreement had been made, as the Court found, between parties to an industrial situation. That is, a situation likely to give rise to an industrial dispute. Amendments to the statutory scheme which were made in 1996 considerably broadened the circumstances in which the Commission may certify agreements. Whilst an agreement may still be certified if it is made in an industrial situation, most agreements are now certified under statutory provisions which are based on the Commonwealth Parliament’s power to make laws with respect to corporations. (See ss.170LH to 170LM of the WR Act). Nevertheless many agreements are still certified under provisions based on the power to legislate for the prevention and settlement of industrial disputes, including agreements made in industrial situations. (See ss.170LN to 170LS of the WR Act) Subject of course to any argument to the contrary, it is assumed that the power of private arbitration conferred on the Commission in relation to dispute resolution procedures in agreements certified under provisions based on the power to legislate for the prevention and settlement of industrial disputes also applies to dispute resolution procedures in agreements certified under provisions based on the power to legislate in relation to corporations.

[21] Gordonstone is an important case from a number of points of view. When a party to a certified agreement notifies the Commission of a dispute under the terms of a dispute resolution procedure in an agreement another party to the agreement may, and sometimes does, object to the Commission dealing with the matter. As a result of the decision there are a

number of objections which are no longer available. For example, it can no longer be argued that a dispute resolution procedure is invalid unless it limits the disputes with which the Commission may deal to disputes about the operation of the agreement. One of the most common objections in the past has been that any attempt to resolve the dispute by arbitration would be ineffective being an invalid attempt to exercise judicial power. After *Gordonstone* that argument is also untenable. And, finally, it has been argued that the Commission could only exercise arbitration powers to settle a dispute over the application of an agreement if it could do so consistent with the limitations in s.89A. That objection is unlikely to be available in most cases in the future.

[22] These aspects of the Court's decision are important to the parties who use the Commission because they remove ambiguity from the operation of the system. Because of the nature of our system, based as it is on a Constitution which governs the allocation of powers by the federating states to the Commonwealth, its history is rich with case law involving questions of high principle and fundamental importance to the functioning of the law in our country. Interesting and important as the legal issues involved might be, in industrial relations all considerations are in favour of simplicity and clarity. In a relatively short joint judgment the High Court has done much to smooth the way for the exercise of powers directed at resolving disputes about the application of collective agreements promptly and free of the jurisdictional arguments which have often hampered the exercise of those powers in the past. The problems which occur from time to time in the implementation of dispute resolution procedures are perhaps greater than they should be when it is recalled that such procedures are ones which the parties have freely agreed upon.

[23] While the Commission is increasingly called upon to exercise powers conferred upon it by the parties to certified agreements, there were around 400 applications filed last year, there has also been a steady growth since 1996 in the use of the Commission's powers to make binding recommendations by consent.

[24] The Commission has always been able to make recommendations to parties to industrial disputes and situations and does so quite often. This practice received formal recognition in s.111AA of the WR Act. Where the Commission is exercising conciliation powers in relation to a particular matter, if all parties request the Commission to conduct a hearing and make recommendations about particular aspects of the matter on which they are unable to reach agreement (which may be all aspects of the matter) the Commission must comply with that request. The obligation to conduct a hearing and make recommendations is conditional, however, in that the Commission must only do so if it is satisfied that all the parties have made a genuine attempt to agree and that in addition they have agreed to comply with the Commission's recommendations. Section 111AA does not prevent the Commission from making recommendations in other circumstances. What it does do, however, is enable the parties to a matter which the Commission is attempting to resolve by conciliation to require the Commission to resolve the matter by recommendation provided they agree in advance to accept the outcome. It has not been suggested by anyone that the power to make recommendations is affected by the limitations in s.89A. This provision is increasingly being utilised by parties in a variety of circumstances. It could be described as a fast track private arbitration. Although procedure is largely dependent on the parties' wishes, s.111AA hearings are usually quite short, there is rarely formal evidence and the recommendations are not supported by detailed reasons. On a number of occasions parties have used the provision as an alternative to vary lengthy arbitral proceedings pursuant to s.170MX of the WR Act.

[25] To return to the issues dealt with in Gordonstone, the entire proceedings, almost from their inception, were based on a disagreement about the operation of the dispute resolution procedures in the certified agreement. The decision has clarified a number of the jurisdictional questions which have arisen in previous cases. I would like to encourage the practising lawyers among you to reflect on the important role you play in advising clients and drafting agreements. This is a task which itself requires a certain amount of tolerance for ambiguity. It is not an empty cliché, to say that agreements are usually drafted by non-lawyers. Although professional drafting skills are more frequently called upon these days, in the most difficult negotiations it is usually a question of finding verbal formulations which the parties are comfortable with. Those formulations may differ vastly from those which senior counsel might propose. I can recall a number of occasions on which I was presented with a letter of agreement by a jubilant client only to find, on reading the document, that I could not make head or tail of it. Yet to the parties the document made perfect sense.

[26] No doubt many of you have had experiences like that. As professional advisers we attempt to advise our clients in the best way we can as to the drafting of agreements. That involves getting a clear understanding of what it is that has been agreed to and then expressing that in clear and simple language so as to make the meaning intelligible to a third party, such as an arbitrator, who might be called upon to resolve a dispute about its meaning, or a Court which might be asked to interpret or enforce it. Of course it is not always possible to achieve these objectives but they are worth striving for. It is an unfortunate incident of legal practice that even the best advice is not always accepted, but if the advice is offered when the opportunity presents itself at least the professional obligation has been discharged.

[27] Certified agreements are now the primary determinant of wages and salaries for a very large part of the workforce. In 1994 there were about 1500 applications lodged relating to agreements. In 2001 there were over 10,000 applications and over 7000 agreements were certified. Increasingly parties are exercising their rights to private arbitration provisions in the agreements.

[28] The need for clarity in the drafting of dispute resolution procedures has never been more apparent. Nothing could be more damaging to the underlying industrial bargain than that an agreed dispute resolution procedure should itself become the subject of a dispute when a party attempts to activate it. Where one party objects to the use of dispute resolution procedures, no matter how legitimate the objection might be, the other party usually feels aggrieved that the spirit of the agreement at least, has been breached. I urge you, as professional advisers, to do what you can to ensure that dispute resolution procedures are carefully drafted and effective and that parties understand what they provide.

[29] Of course there are some questions left unanswered by the Court's decision in Gordonstone. You will be relieved to hear that I do not intend to identify them much less to try to answer them. I have a morbid fear of having my speeches quoted back to me. But there always will be unresolved legal issues in our area of the law, as in any other, and while that might be a cause for regret and frustration on the part of lawyers and their clients alike we can at least take comfort in the thought that every legal system being a human creation is well short of perfection.