

Dispute Resolution: Respecting the Umpire

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Dispute resolution

I congratulate the IRSV on its choice of a theme for the 2011 Convention. Effective dispute resolution is the most vital aspect of an industrial relations system – and indeed of any legal system. There is very little point in promises of ‘rights at work’, or a ‘fair work’ system, if that system doesn’t provide any effective means for resolving the inevitable disputes and grievances that arise in labour and employment relations. We must remember that disputes in our field often require immediate solutions. There is too much at stake to allow an industrial problem – or an employment relationship problem – to fester. We are dealing with people’s lives, and the efficient functioning of our economy. In this field John Donne’s words are so very true: ‘No man is an island.’ Disputes have domino effects.

The theme for the day has a second element: “Respecting the Umpire”. That assumes that in a system of dispute resolution there must be an umpire to apply the rules and settle disputes. I happen to agree with that – although I am not sure that it has been a view shared by everyone in our field over the past 20 or so years of Australian industrial and employment relations policy.

So in these remarks, I’d like to focus on two questions:

1. Do we really *need* an umpire in employment and industrial relations?
2. And if so, what kind of umpire do we need? What role should the umpire play?

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The nature of the game

We have answered those questions differently over the past hundred years or so in Australia, possibly because in the industrial relations arena (if we might keep to our sporting metaphor), we seem to have taken different views of what kind of game we are playing.

Is it an orderly game of cricket, with elaborate rules and protocols, and an ever-present umpire, whose decisions are always – by definition – the right decisions, and to be respected? I like to think that the traditional conciliation and arbitration system that operated up until at least 1993, and to some extent beyond that until 2005, adopted that view. Generally, that system valued the intervention of a specialist tribunal with authority to resolve industrial disputes.

Or is industrial relations a gladiatorial contest between antagonists, where a referee keeps the ring but does nothing to intervene in the battle? This is what enterprise bargaining systems look like, if they permit parties to exercise whatever industrial muscle they can muster, with little fear of any intervention in the public interest. To be fair, we have never quite gone that far in Australian enterprise bargaining systems. We have always legislated to provide some means for breaking bargaining deadlocks when an industrial battle produces too many casualties. The old s 170MX orders made under the pre-WorkChoices *Workplace Relations Act* 1996, and the current ‘workplace determination’ provisions in Part 2-5 of the *Fair Work Act* 2009 are examples.

Or is there necessarily any contest between employers and workers at all? Perhaps the employer and the workers in an enterprise are really all on the same team, and employers are like the selectors, who exert an unfettered discretion about whom to choose, what to pay, and when to dump a player? The ‘high trust’ Human Resources Management model of the modern organization is a benign version of this. Perhaps the experiment with Australian Workplace Agreements between 1996 and 2007 also adopted that view.

I am sure that inspired by the Convention’s impressive venue² we might devise any number of sporting illustrations to support the various theories of industrial and employment relations that have influenced the configuration of our labour laws over the past century.

It is certainly true that the game has changed over the years – not just in our perception, but in reality. The game of industrial relations is no longer universally perceived as a team sport. The global trend over many years towards ‘individualisation and union exclusion’ in

² The Convention was held at the Etihad Stadium in Melbourne.

employment relations has been well-documented.³. As laws protecting the collective rights of unions have diminished, laws creating new rights for individual workers have increased – rights against discrimination, rights against unfair dismissal, rights to request flexible working conditions.

And as the game has changed, so also the role of the umpire has evolved.

Arbitration of interests disputes

In answering the question ‘*Do we really need an umpire?*’ we need to distinguish between two kinds of disputes: disputes over interests (to settle new claims for improvements in pay and conditions) and disputes over existing legal rights. We are always going to need some kind of umpire in a rights dispute. Before considering what kind of an umpire we need for rights disputes, I will first will reflect briefly on the more contentious question of whether we really need an umpire for interests disputes.

Australia’s traditional system of conciliation and arbitration accepted the intervention of an umpire in interests disputes – but following the Work Choices reforms, the role of the umpire diminished considerably.

Professor Willy Brown has written on why third party intervention (in other words – the cricket style umpire) has diminished in industrial relations, at least in so far as interests disputes are concerned. In a book written in honour of Keith Hancock in 2005,⁴ Professor Brown explained that compulsory conciliation and arbitration was a response to industry-wide confrontational bargaining by unions, which could cripple a whole industry, and potentially harm the economy more broadly. There was an imperative for intervention, and so a specialist tribunal to settle disputes was established. But unless unions can organize across a whole industry, the impact of strikes will be limited. While an enterprise is working in a competitive industry, strikes will have less impact on the broader economy. Globalisation means that very few enterprises can now claim any kind of monopoly power. If there is no local competitor, there is likely to be an international one. In a competitive market, where wages above a minimum are set by enterprise bargaining, Governments can afford to leave the parties themselves to reach their own settlements.

³ Deery, S and Mitchell, R (eds) (1999) *Employment Relations: Individualisation and Union Exclusion – An International Study* (Federation Press, Sydney); Conaghan, J (2003) ‘Labour Law and “New Economy” Discourse’ 16 *Australian journal of Labour Law* 9 at 19; Hepple, B and Morris, G (2002) ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’ 31 *Industrial Law Journal* 245 – 269 at 246.

⁴ See Brown, W ‘Third Party Labour Market Intervention in Open Economies’ in Isaacs J and Lansbury R D *Labour Market Deregulation: Rewriting the Rules*, 2005, Federation Press Sydney at pp 191-203.

In its beginnings, even our traditional system of compulsory conciliation and arbitration also refused to intervene in some interests disputes. I have had cause to look into a little of the history of our traditional system of conciliation and arbitration, in the context of a research project I am engaged in with Therese MacDermott at Macquarie University. One very early decision I came across reminded me of the social and economic context in which conciliation and compulsory arbitration developed. *In Re Colliery Deputies & Co (North) Board* [1925] AR 58 was a decision of Beeby J, in the NSW Commission, and it concerned some supervisory staff in the coal industry who wanted an award made to cover their terms and conditions of employment. These radicals were asking to reduce their ordinary working hours from 46 to 44 a week, and were claiming an entitlement to penalty rates for any time worked in excess of these hours, or on Sundays and public holidays. Their application was refused, on the basis that they were men with qualifications and experience, and an ability to negotiate their own terms. Justice Beeby said (at p 64):

“Compulsory arbitration is concerned with remedying grievances, and with protecting workmen from being forced, by economic pressure, into the acceptance of harsh or unjust conditions of employment.

“The Act does not authorize the Court to make employees participants in the profits of their particular employer.

“The court’s function is to prescribe the lowest wage to be paid for a particular calling after surveying the whole industry.”

This decision serves as a reminder that the compulsory conciliation and arbitration model was one designed to fix safety net conditions only. The need for a safety net of decent wages and conditions justified the role of an interventionist umpire, supervising play in the public interest.

The world is not the same now as it was in the 1920s. Over time, trade unionism has declined, in Australia as in other parts of the world, and so has the incidence of strikes. Governments have perceived less need for mandatory conciliation and arbitration in a more harmonious industrial relations climate. We consider it safe now to trust voluntary dispute resolution means for interests disputes. So our present system does not countenance intervention in bargaining disputes, to determine outcomes. The umpire cannot determine the score, unless the players expressly agree to submit to arbitration.

Interestingly enough, parties quite often do agree to submit to arbitration of interests disputes. In an interesting study conducted by Carolyn Sutherland, at Monash University, following the introduction of the old s 170LW of the former *Workplace Relations Act*, it was found that the AIRC experienced a significant expansion in its workload as a private mediator.

Sutherland postulated that this was because industrial parties respected the Commission's established expertise in industrial dispute resolution, and often found it more palatable to accept the decision of a mutually respected umpire than to 'lose face' with their own constituents by agreeing to compromise on an issue themselves.⁵

Even in the Work Choices years (between 2006 and 2008), the AIRC managed a sizeable case load of these kinds of dispute resolution matters. The AIRC's Annual report for the year from 1 July 2008 to 30 June 2009 shows that in the last full year of operation of the *Workplace Relations Act*, the Commission managed 1142 of these kinds of matters.

The *Fair Work Act* also permits parties to apply to FWA to resolve a bargaining dispute under s 240 – and FWA may arbitrate if the parties agree to arbitration. And of course the current system allows intervention in the management of the process of bargaining. Players are obliged to bargain in good faith, and Fair Work exercises corresponding powers to issue bargaining orders to ensure orderly conduct. According to the 2010 annual report, there were 121 good faith bargaining order applications in the year to 30 June 2010. So it would appear that there is still a substantial role for a respected umpire in the present system of enterprise bargaining.

Individual rights disputes

The bigger story in the Annual Reports of the AIRC and now FWA is the number of individual employment disputes that the tribunal now handles. In the year ended 30 June 2010, no less than 13,054 applications were received to deal with terminations of employment. This brings us to a consideration of rights disputes – disputes over the recognition and enforcement of legal rights – and especially the rights asserted by individuals.

The same rising individualism that has diminished the significance of collective industrial disputes over recent decades has brought with it a clamouring demand for the recognition of individual workplace rights. Bob Hepple and Gillian Morris⁶ observing changes in the United Kingdom and Europe in 2002, have noted that rising individualism has generated new pressure on systems of workplace dispute resolution: 'The promise of individual rights has created irreversible demands for their enforcement'. But at the same time, employer lobby groups have argued for reforms that restrict access to the enforcement of individual workplace rights, on the basis that the costs to business enterprise have been too high and have hampered

⁵ Sutherland, C, 'By Invitation only: the role of the AIRC in private arbitration (2005) 18 *Australian Journal of Labour Law* 53.

⁶ Above n 3 at 247.

competitiveness in global markets. The ‘small business exemption’ from unfair dismissal laws in the Work Choices years was an example of a reform addressing these employer concerns.

So how should we respond to these claims? We want fair play, but we don’t want to spend too much money on the game.

The legacy of *Boilermakers*

I have one, extremely heretical suggestion. At the risk of receiving a red card from the constitutional lawyers, I am going to suggest that in our field, if we want to satisfy contemporary demands for the recognition of rights, but by accessible and inexpensive means, then we should seriously consider consigning the *Boilermaker’s* doctrine to the benches.⁷

The *Boilermaker’s* doctrine – put simply – is that only courts can exercise the judicial power of the Commonwealth. This is the doctrine that was said to stand in the way of the ALP’s promises to create a “One Stop Shop” in its Forward with Fairness policy documents, released ahead of the 2007 federal election.

It is the *Boilermaker’s* doctrine that makes the distinction between an interests dispute and a rights dispute so important in our system. Interests disputes can be arbitrated by a body exercising administrative power – so long as we decide to legislate to confer upon a tribunal the power to create new rights. We used to do that in our old system for making industrial awards. But rights disputes – over the application and interpretation of existing legal entitlements – are matters that must be resolved by a court exercising judicial power, unless the parties themselves have contracted to permit some other form of dispute resolution.

Some examples from the Fair Work framework serve as practical examples:

It is the *Boilermaker’s* doctrine that has influenced the distinction in dispute resolution processes between unfair dismissal applications and adverse action applications. Unfair dismissal applications go to FWA where they can be conciliated and if necessary arbitrated by FWA Commissioners. Adverse action complaints are lodged first with FWA, and FWA may hold a conference to attempt to resolve them by conciliation, but if they cannot be resolved they must go to the Federal Court or Federal Magistrates Court.

⁷ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529. For a discussion of the *Boilermakers’* case see G Williams *Labour law and the Constitution*, 1998, Federation Press, Sydney at pp 31-36.

Why is this so? Because we think of an unfair dismissal application as a plea for the creation of a new right to reinstatement, and we recognise that the decision-maker must weigh up the competing interests of employer and employee – and possibly others at the workplace – and before making a decision in the interests of fairness all round. On the other hand, we think of adverse action claims as an assertion of a right to be free of victimization when we are exercising workplace rights, including our rights to participate in the workforce free of discrimination on irrelevant grounds. The decision maker’s role is to determine whether any right has been infringed. And penalties may be ordered against a person in breach of these obligations.

It is the *Boilermaker’s* doctrine that means that disputes over the application or interpretation of clauses in an existing enterprise agreement need to go to a court for resolution, unless the parties have expressly agreed to allow those kinds of disputes to be settled by arbitration. This is why the full bench of FWA’s decision in *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWA 1464 was so important.

Initially, Commissioner Greg Smith decided that Woolworths’ proposed enterprise agreement should not be approved under the Fair Work Act s 185 because the dispute resolution clause in the agreement required that the employer and union representative must first agree before a matter in dispute could proceed to arbitration by FWA.⁸ This meant that either party could prevent a dispute from being resolved simply by refusing to agree to arbitration, so the clause did not provide an effective dispute *settlement* procedure as required by s 186(6).

On its face, Commissioner Smith’s reasoning is persuasive.⁹ The model dispute resolution clause in the *Fair Work Regulations* Reg 6.01 and Sched 6.1 provides a number of steps, culminating in arbitration by FWA. The model clause conforms with the ‘Fair Work Principles’ released by the Department of Education, Employment and Workplace Relations in January 2010, which emphasise that a ‘genuine dispute resolution procedure’ must include ‘the capacity for an independent third party to settle the dispute via a decision binding on the parties’.¹⁰ Commissioner Smith did not say that this necessarily required arbitration by FWA. Another independent party might be nominated by the parties as ultimate arbiter. Both s 186(6)(a) and s 740 of the *Fair Work Act* contemplate that a private arbitrator may be nominated to resolve disputes, so long as that person is independent of the parties. The essential component required by s 186(6) was a *guaranteed* means of settlement. This might

⁸ [2010] FWA 30 at [6].

⁹ The following argument was put in Owens, R, Riley J and Murray J *The Law of Work*, 2nd ed, 2011, OUP, Melbourne at p 627.

¹⁰ [2010] FWA 30 at [43].

not even be arbitration. Parties who agree to settle a dispute on the toss of a coin are still providing a guaranteed means of settlement, even if they are leaving the ultimate result to chance.

The decision was overturned on appeal to a Full Bench (comprised of Giudice P, Acton SDP and Hampton C), on the basis that the new wording in the *Fair Work Act* s 186(6) was not sufficiently different from the wording in the former *Workplace Relations Act* s 170LT(8) to allow a conclusion that the legislature intended to alter the finding in the *Ampol Refineries* case.¹¹ The Full Bench decision was greeted with approval by the Minister at the time, Julia Gillard, and the various employer organizations intervening in the matter.¹² The Minister reiterated that the government's policy did not encompass a requirement that parties must agree to arbitration of disputes over workplace agreements.

With respect, the Full Bench decision and the Minister's applause both fail to address the essential question raised by Commissioner Smith's initial decision: how exactly *are* rights disputes arising from enterprise agreements ultimately to be 'settled', if the agreements contain no clause identifying how deadlocks are ultimately to be resolved? The Full Bench decision stopped short of articulating what must be the only answer to this question: If it is permissible to approve an enterprise agreement that contains a dispute resolution clause that doesn't really promise any ultimate method of dispute resolution at all, then we will find that people with complaints about breaches of enterprise agreement may need to go off to the Federal Court system for a remedy. (Either that or they must tolerate the breach.)

FWA cannot arrogate to itself a role in resolving that dispute, although if workers aggrieved by an employer's refusal to agree to a dispute settlement procedure decided to take the matter into their own hands by taking industrial action, FWA would be obliged order them all back to work, under s 418. (The *Fair Work Act* really does speak in a forked tongue in parts – there is to be no third party intervention to sort out the interpretation of agreements without the consent of the parties, but there is mandatory intervention to close down unprotected industrial action.)

I would suggest that all enterprise agreements should include a dispute resolution clause that requires resort to a compulsory settlement procedure. And I would go further, and suggest that it is time for the *Boilermaker's* doctrine to be sidelined in the industrial relations field.

Here is the thrust of my argument:

¹¹ See *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWAFB 1464 at [36].

¹² Workplace Express, 'Full Bench Rules Against Mandatory Arbitration Requirement', Specialist News, 26 February 2010, at <http://www.workplaceexpress.com.au>.

1. Industrial and employment relations disputes need to be resolved quickly, and inexpensively. FWA, and its forbears, were constituted to provide that kind of service. Except perhaps in the case of urgent interlocutory injunctions, courts don't deal with matters quickly nor inexpensively. I have it on good authority (from the practising lawyers who attend my employment law classes), that it will set you back around \$50,000 to bring an action in the Federal Court.
2. New federal legislation recognizes that disputes ought not to be litigated unless the parties really have attempted every available means to resolve the matter more efficiently. The *Civil Dispute Resolution Act 2011* (Cth) requires parties to take 'genuine steps' to resolve disputes before instituting civil proceedings. 'Genuine steps' includes 'considering whether the dispute could be resolved by a process facilitated by another person including an alternative dispute resolution process'.¹³ Actions brought under the *Fair Work Act* are exempted from this obligation, no doubt because the FWA machinery already exists to encourage parties to conciliate matters.¹⁴ So perhaps it should be mandatory that they do so.
3. The distinction between an interests dispute and a rights dispute in this field is a blurry one in any event. Experienced industrial advocates in this field will tell you that they can sometimes persuade a Commission member to exercise a power under s 217 of the *Fair Work Act* to vary an agreement to remove an ambiguity or uncertainty, when it is arguable that the dispute over ambiguity could easily be construed as a new interests dispute over a matter that the parties have not yet settled. But of course if the matter is construed as a new bargaining dispute, there can be no arbitration without the consent of the parties.
4. And finally, there is a very good reason for believing that employment and industrial disputes are appropriate for non-judicial resolution in any event: the public interest is always on the table in a workplace dispute. As the High Court said in the Takeovers Panel case (*Attorney-General of the Commonwealth of Australia v Alinta Limited* [2008] HCA 2), when the resolution of a dispute requires consideration of policy matters, it is appropriate for parliament to confer the dispute resolution role on a body exercising non-judicial power.

¹³ Section 4(1)(d).

¹⁴ See s 16(d).

A parallel with securities market regulation?

The Takeovers Panel case involved a challenge to the constitutional validity of legislation conferring powers on the Takeovers Panel to regulate the conduct of corporate controllers during hostile takeovers. For example, the directors of a target company might take some action – such as issuing a parcel of securities to a ‘white knight’ – in order to frustrate a hostile takeover bid. This might advantage the directors who wanted to keep their board seats, but disadvantage the interests of shareholders who would miss out on the opportunity of accepting what they may believe to be an acceptable price for their shareholdings. Before the institution of the Takeovers Panel, parties challenging directors’ conduct in such circumstances would need to bring a derivative suit in the Supreme Court, complaining of the directors’ breaches of their fiduciary duty to act in the best interest of the company and for proper purposes. The sheer delay involved in litigating the matter would favour the directors’ position. The Takeovers Panel was instituted to put the resolution of these kinds of disputes into the hands of specially appointed experts in the market for securities. The Panel would convene to determine whether the conduct in question was ‘unacceptable’ and could make orders requiring parties to take steps to remedy the situation – such as divest themselves of any shareholdings acquired as a result of unacceptable conduct. On one view the Panel exercises judicial power, because it issues edicts affecting people’s rights. The High Court held, however, that the Panel plays a supervisory and regulatory function, in the interests of ensuring efficiency and fairness in the market for listed securities.

Isn’t the Fair Work system doing a similar thing for the labour market? The objects of the *Fair Work Act* (in s 3) assert an overarching interest in providing ‘a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians’. Is there any reason why those aspects of the Act which are presently framed as rights disputes – for example, disputes over the interpretation of an enterprise agreement, or disputes about whether a person has suffered adverse action as a consequence of exercising a workplace right – could not also be brought within the scope of that overarching objective? Is there any reason why these interests need to be expressed as hard edged rights, which must necessarily be adjudicated by a judge presiding in a court?

Conclusion

If we were to adopt the view that Fair Work Australia should play the primary role in what we now treat as rights disputes in the system, I think we would find disputes could be resolved more efficiently. FWA could hold compulsory conferences and attempt conciliation. If conciliation failed, FWA could arbitrate the matter, in the interests of ‘equity, good conscience

and the substantial merits of the case without regard to technicalities or legal forms'.¹⁵ This would ensure that impecunious parties could have a dispute resolved. There would still be a role for the courts in judicial review of administrative action, but only on administrative law principles, including on the grounds of manifest legal error. Enforcement of FWA orders would also need to be a matter for courts.

This solution would mean that disputes over the interpretation and application of all of the instruments made under the Fair Work Act would go to the body responsible for approving those instruments in the first place. Is that such a silly idea?

It would also mean that there need not be such a divergence between the processes for resolving unfair dismissals, and the processes for dealing with adverse action claims under the General Protections provisions. The conciliation of adverse action applications could also occur in the shadow of potential compulsory arbitration if the parties could not be persuaded to reach a reasonable settlement of their own.

There is an umpire in these matters. The question is: who should that umpire be? It makes more sense to me that FWA should decide all disputes involving the interpretation and application of the *Fair Work Act*. The sooner a dispute is resolved, the quicker all parties can return to the field. And that surely must be in the best interests of the game.

¹⁵ This is the frame of words typically adopted in the empowerment of industrial tribunals: see *Industrial Relations Act 1996* (NSW) s 163(1)(c) and the former *Workplace Relations Act 1996* (Cth) s 110(1)(c).