

Keynote Address to the NSW Industrial Relations Society

KEYNOTE ADDRESS: NSW INDUSTRIAL RELATIONS SOCIETY

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It is both an honour and privilege to be asked to give a key-note address at this conference. When Joe Catanzariti first contacted me to speak at this conference he gave me a wide berth as to topic but reminded me of my judgment in ***Russell v The Trustees of the Catholic Church*** [2007] NSWSC 104 and suggested that members of the Industrial Relations Society may be more than interested in that topic.

Why, I enquired, would you ever ask a Judge to talk on her or his own judgment? However the real reason became more apparent when I was reminded by him that I had spoken, albeit not in a key-note address, on two prior occasions to the Industrial Relations Society Conference. Once in 1982 and the next time in 1995. He reminded (if I had otherwise forgotten) that on each occasion that I had addressed this Conference there had been, within a few months, both a change in government and a change in the industrial relations legislation. I am still trying to determine whether my addresses were the cause or the effect.

Once reminded of that coincidence I researched the topics of those addresses. The first, in 1982, was ostensibly addressed to the role of the economy in the resolution of industrial disputes, but largely was concerned with taking issue with the treatise of the then Minister for Industrial Relations, that registration of industrial organisations was, itself, a breach of human rights.

The second aspect of the address dealt with the place of unfair dismissal in Australian industrial jurisprudence. This, at a time, when there was no national system for the formal resolution of disputes concerning termination of employment. Such a system was not even in an embryonic form.

When I next spoke to the organisers of this Conference I was expressly requested to deal with the implied rights of mutual trust and confidence and good faith in the contract of employment and where they stood in the current issues being agitated in industrial relations.

As a consequence of the position that I hold, I should preface my remarks with the obvious: none of the following is, or is intended, to be a party political comment. Despite what may seem to be a disingenuous exclusion of a general nature, it is the fact, as I hope you will realise, that my views are probably inconsistent in some respects with both sides of politics and also consistent in some respects with each side of politics.

There are many in Australia at the moment, particularly those of us who were trained in 20th century Australian industrial relations regime who are uneasy about the nature of industrial relations and its direction. Those who have experienced, and there are fewer and fewer of us, the industrial relations process as it existed prior to the mid 1980's would remember a regime the purpose of which was the resolution of individual industrial disputes so as to avoid disputation. In the resolution of those individual industrial disputes national wage cases and centralised wage fixation on an Australia-wide basis were a relatively minor aspect of the operation of the system, a relatively minor aspect of the totality of wage increases and very much an adjunct to what was its fundamental purpose.

Even the early definitions of the term "industrial dispute", which was the source of the arbitration power, at least at a national level, disclosed its central purpose. In the famous (and much misunderstood) definition of Justices Isaacs and Rich in the ***Municipalities Case*** [(1919) 26 CLR 508 at 554], their Honours determined that an industrial dispute occurred when capital and labour cooperated for the satisfaction of human wants or desires and disputed as to the terms of that cooperation.

Essentially, industrial arbitration was concerned with taking out the sources of industrial disputation and therefore dealt with a myriad of issues, necessarily including wages. But because wages were, insofar as they dealt with dislocation of industry, a relative rather than absolute issue, it was individual wages at a work place or individual wages in an industry that were the subject of industrial arbitration far more often than were the movements in minimum wages or general money or percentage increases in wages across the board.

The effect of that on the competence and skill matrix of members of arbitral tribunals, particularly the national tribunal to which I will predominantly refer, was that members of the Commission were generally persons experienced in industry, in its needs and the workings of employers. That is not to say that members of the Commission were derived only from employer bodies. On the contrary, the general rule was they came equally from employers and from unions. But the union officials at the time were persons who, themselves, worked in industry, and at least at some stage at organiser level within the union movement, and well understood the needs of employers and their aspirations. Pre-1983 industrial relations was about an understanding of the other side by each party and an understanding of both sides by the Commission. It involved the resolution of industrial disputes in a way that either or both sides could blame the Commission for whatever result occurred in circumstances where usually each side were neither happy nor unhappy with the result.

From a broader political perspective, one must understand that the resolution of industrial disputes, like the resolution of any dispute between parties, was a recognition of the relative strengths and weaknesses of each of the parties. Industrial disputation occurred when the parties disagreed about their relative industrial strengths and the various arbitral tribunals were independent assessors who measured the relative strength of the parties without, generally, the need for disputation to prove it.

The difficulty with such an approach was that a number of union leaders took the view that some unions ignored the building of union strength either through increased membership or the ownership by the membership of the policies and position of the union itself. Bill Kelty took that view as did those that followed the line, he espoused, on the restructuring of the union movement and the restructuring of industrial regulation.

Another major problem with the individual focus of the resolution of industrial disputes, being a problem at a macro-economic level, was that industrial dispute resolution was effected by the making of an award. Each award applied over and above whatever regulation was already in place; the result being the imposition of layer upon layer of regulation without the removal of unnecessary and restrictive regulation underneath it. There are bizarre examples of the effect of that process. When I first came into the industrial relations arena, the demarcation between shipwrights, on the one hand, and shipjoiners on the other, was, in part, the number of rungs in a ladder; when the ladder had over a certain number of rungs, its construction was the work of shipjoiners and when it had under that number it was the work of shipwrights.

I give that general background because it is necessary to understand it in order to understand where we are now and why we are here.

The length of time available prevents me from dealing with all of the details of the changes that have occurred. But it is fair to say, at least since the advent of the industrial revolution, and, as is disclosed in the judgment in *Russell*, supra, even before that, industrial disputation has been the source of much angst and the regulation of it has been changing. It will ever be so. But the trends in that change that we now observe are reflective of the trends in society itself.

On 5 March 1983, with the election of the Hawke Labor Government, a process was put in train that would dramatically, and in a "revolutionary way" alter the face of industrial relations regulation in this country. Most of it was not implemented until 1988 and thereafter. But the process was commenced almost from the inception of the Hawke/Keating/Kelty axis.

Those changes were aimed at the two fundamental issues referred to above. First it sought, from the union perspective, to restructure unions in a way which diminished the capacity of unions to rely solely on the industrial tribunals for their "strength" and required them to "work for a living". This was done, itself, in two ways. First, centralised wage fixation was given greater weight than had previously been the case and individual rates of pay and conditions of employment, over and above the centralised system, was "relegated" to collective bargaining, without the assistance of the Commission (at least at a formal level). The second attack on "weak" unions was the restructuring of the unions themselves and the amalgamation of unions. This was effected by rewriting the statutory provisions to ease the capacity to amalgamate and to mandate a role for the ACTU in determining when and with whom such

amalgamations occurred.

Thus after the Hawke/Keating/Kelty reforms (and they were predominantly implemented post 1988) a system was in existence which encouraged collective bargaining at an individual employer level but where the award system was relegated to the fixing of a safety net for each individual award. Those awards were restructured to take out the layers of regulation and render employment practices more flexible. Further still, wage rates were married across the board between awards to lay the groundwork for a single classification scale across Australia.

There were a number of consequential and detailed changes, which time prevents me from adumbrating, but one of the major changes was the change in the skill matrix for members of the Commission. Because of the new and fundamentally different vision for arbitral tribunals, selection of its members needed a different matrix of skills. At one level it needed a matrix of skills which involved macroeconomic planning and the resolution of national disputes on wages predominantly on economic grounds. Thus one observed larger and more frequent national wages cases, which resolved the question of centralised wage fixation in circumstances where there was generally agreement between the unions and the government and some infrequent opposition by employer groups. Further the wage and condition regime was augmented by the use of the social contract between the ACTU and the government to increase social wage: hence superannuation, termination change and redundancy, maternity leave etc.

Other than in industries where unions continued to be strong and negotiate wage outcomes through agreement well over national wage standards, the general perception amongst the public was that increases in wages (and benefits from the social wage) were bestowed by the munificence and/or beneficence of government, and not through the work of the trade unions. In a range of ways, this had precisely the opposite effect to that envisaged by those union leaders that sought to diminish the role of weaker unions. It made all unions subject to the criticism that they were relying upon the centralised wage fixation system in order to obtain benefits for their members. There were exceptions: such obvious examples as mining, construction, transport and the waterfront. In these industries, where the unions had generally adapted to the new system (or were already using the system prior to its implementation) wages increased at significant levels over and above anything that had been achieved through the award system that predated it.

But in resolving industrial disputes (to the extent that there were any) the Commission did not, any longer, need to have the detailed understanding of the needs of either the employer or the union. The majority of industrial disputation did not concern wages and conditions but was the facilitation of agreement making and the resolution of unfair dismissal claims. This involved a skill matrix in the Commission which was geared more to generalised notions of fairness and mediation skills, rather than an understanding of the details of the operation of industry.

Once such a system is in place, the industrial tribunals are confined to centralised wage fixation and unfair dismissal in their arbitration role the then structure of industrial tribunals and the whole system was necessarily overly complex.

The other aspect of these changes is that it reflects the changes in society itself brought about, amongst other things, by the nature of the technology revolution and the availability of information.

We now deal with a society that is better informed; I leave for others on another day whether it is, by virtue of that, any wiser.

Into that mix then comes the election of the Howard government in 1996. As early stated, industrial relations, like every legal system, continually changes. But the changes that were wrought by WorkChoices are a development of the themes that are necessarily inherent in the changes wrought by Keating and Kelty. Of course they effect a different balance, and the state of that balance is a matter for politicians not judges. But each of them reflect, as early stated, the changes in society. What is in effect the new system (and leaving aside the differences between the political and industrial parties on the balance or lack of it in the system) is a system which guarantees minimum benefits (or at least some), unfair dismissal remedies for some and otherwise leaves to the individual the resolution of her or his issues in employment. Under the ALP system, pre WorkChoices, the centralised wage fixation system included the capacity for collective bargaining in single businesses as a central plank in the achievement of fairness, while WorkChoices relegates collective bargaining in single businesses as more of a safety valve in those areas where individual bargaining would not, of itself, suffice.

However, what is clear from both systems is that the rights of the individual in the industrial relations

context have moved in the same way as the rights of the individual in society generally. We are, whether we like it or not, a society with a more individual rather than collective focus. The information revolution is part of the reason for that change in focus.

In that way the current debate between the ALP and the government on the future of industrial relations is, in technical terms, almost a non-event. The issue is not, on any rational analysis, a return to pre 1983 industrial arbitration; it is an issue that is confined to the content of the safety net (i.e. what wages and conditions are required for all) and the place of collective bargaining as either a central plank to implement "fairness" or a pressure valve to relieve gross unfairness or industrial strength. The choice between those two alternatives, their social and economic advantages and disadvantages, is a matter upon which I will not and can not comment.

There are some aspects that I will briefly state. Some of them were dealt with more fully in a paper delivered by me, on the effect of WorkChoices in the industrial history of Australia, in August of 2006. The full paper is available on the Supreme Court website. However, in short, other than some criticism of the structure of the WorkChoices changes in terms of its technical structure and its overly complex nature, I took the view that the effect of WorkChoices would be to, over time, diminish the wages of some and increase the wages of others. It would continue the trend that has occurred, at least since 1983, for a widening wages gap in Australia and a less cohesive and congenial social fabric, and otherwise it would heighten the importance of individual contract disputes in the context of industrial regulation. In other words, industrial regulation (or its absence) would create a society and industrial laws which more and more reflected the society and industrial laws that were prevalent in the United Kingdom and the United States. Inherent in such a system is the importance of the contract of employment and the common law.

In some respects (indeed, in most respects) the contract of employment has been underdeveloped in Australian law, because industrial regulation has been the pre-eminent means by which issues between capital and labour (on an individual or collective basis) have been resolved. On an individual basis one has seen the rise, in New South Wales at least, of section 106 of the *Industrial Arbitration Act*, the unfair contracts regime. While initially aimed at groups of employees who (because of the technicalities of their work arrangements) were unable to access general award conditions, the unfair contracts regime has grown to be the play child of highly paid executives and commercial disputes. At least in relation to corporations, such provisions have limited future utility.

With that perhaps lengthy outline of the developments that have occurred and are now implemented in the regulation of industrial relations, I turn to where it currently leaves the situation and where we are likely to proceed.

A good example, under the current regime, is the recently implemented agreement in relation to teachers in independent schools. It bears the hallmarks of all of the attributes of the current system. Employers with better resources were able to offer, across the board, significant increases to teachers and educational staff. Those employers with less resources nevertheless offered increases but not of the same order. The system which implements only safety net wages and conditions, was insufficient to deal with the issues of skilled teachers in short supply and high demand. This is one area where, subject to sufficient funding, wages may well rise under the current system. The difficulty is that such teachers do not mostly have recourse to any individual issue or any issue, generally, relating to their termination.

The other aspect is in the interminable, and ill informed, debate relating to the difference between an AWA and a contract of employment. There is no reason why legislation could not very easily allow a contract of employment to override award conditions. At the moment it is judgments of the Court such as *Ecob v Poletti* (1989) 91 ALR 381 that prevent the aggregation of wages and conditions into a single payment or contractual clause. As most of you would be aware the jurisprudence in *Ecob v Poletti*, and the cases on which it relies some of which are extremely early, date from at least 1924, the most famous of which was *Ray v Radano* [1967] AR 471.

Those decisions were judgments of various courts and/or tribunals to the effect that one could not set off against an award requirement a payment in excess of award requirements in other areas. For example, assuming an employee were paid 50% more than the award required, current authority prevents that excess amount being set off against any underpayment for other conditions. It would be extremely easy for the legislature to reverse the effect of those judgments by providing for a set-off, in relation to salaries (say, those more than \$90,000 per year, for example), such that no claims could be made for underpayment of award rates and conditions unless the totality of the award rates and conditions to which the employee was entitled was greater than the payment effected. The most

obvious example is overtime. It would be very easy for the legislature to reverse the current inability of offsetting payments over the award against the requirement to pay overtime. It may also work with other rates of pay and conditions of employment. One does not need a complicated system for the registration of individual agreements if all that is being sought is to ensure that individual agreements do not effect rates of pay or conditions of employment that are less than the aggregate amount of the value of wages and conditions required by an award. Of course, it does require the legislature to trust judicial officers to be able to calculate the value of the award and the value and/or payments made under such contracts. As best as one can appreciate given the level of detail that has been provided this seems to be the basis for the proposition put forward by the ALP.

It is, in essence, my thesis that the natural progression of reforms first commenced by Keating and Kelly and taken up by the Prime Minister is a movement towards the centralised wage fixation of a uniform rate for workers (or a uniform rate for each level of classification of workers) together with the capacity of courts to resolve individual disputes through the common law. In such a system there may or may not be a place for collective bargaining and its existence or non-existence will depend more on the political will of the government than any departure from the general trend that is occurring in the regulation of employment.

The overly technical and precise nature of the regulation of employment and industrial relations in the past has necessarily meant that the contract of employment has rarely had occasion for development outside of the prescriptions of industrial law. In that sense the very system of industrial regulation has inhibited the development of the law on contract of employment in Australia. Elsewhere employment contracts have been utilised for the imposition of conditions which, in Australia, have been largely dealt with by statutory provisions either relating to unfair contracts or by the system of industrial regulation under which we have operated.

That industrial regulation has inhibited the development in particular of implied terms, the use of estoppel and the use of fiduciary duties on a basis which benefits both employer and employee. I refer and advise the reading of two books: at the legal level, "Employee Protection at Common Law", by Professor Joellen Riley; and at the political level, "The New Progressive Dilemma", by Dr David O'Reilly. That then brings us to the position of **Russell**, supra, in the context of the development of employment regulation in Australia.

The facts in **Russell** are unexceptional but interesting. Mr Russell was employed by the Archdiocese of Sydney and was accused of sexual misconduct with one or more students enrolled at St Mary's College. Mr Russell was the Choir Master of St Mary's. Ultimately the employer found that none of the accusations of sexual abuse of children were proven, or even arguable. However, it found on the balance of probabilities, that Mr Russell walked in on an incident involving another person and three boys and did not either stop that conduct nor report it to his employer. This, the Church found, was a breach of his contractual duty.

The Church came to the conclusion it did as to the facts on the basis of the evidence of a witness called Mr X who was not resident in Sydney. The Church, it was found, had the capacity, without significant cost or inconvenience, to interview Mr X directly but chose to interview him by phone.

It was held that the Church had acted in a way which was a breach of the implied duty of good faith that employers owed employees and employees owed employers. It was also found that the common law implied into this contract of employment a duty that neither party to it would act in a way which would intentionally damage the relationship of mutual trust and confidence that was required in an employment relationship.

Ultimately the Court found that the duties were breached but that damages did not arise or were not available for the breach of it in the circumstances of the matter at hand.

In determining that, in this contract, there were implied duties of the kind mentioned, the Court applied authority in the United Kingdom, and elsewhere, as to the existence of such duties in the common law. The judgment itself traces the history of employment, the necessary aspect that the contract of employment derives from status and in that sense derives from the position of serfdom under Roman law. It traces, briefly, the history of that relationship and the movement from a status based relationship to a contract based relationship.

The judgment also compares the contract of employment with other contracts of a like kind and deals specifically with the need to ensure, in employment, a right to control by an employer (or a right to direct) and a vicarious responsibility of the employer for the acts of the employee. In essence, those two aspects confirmed the appropriateness of implying the terms as has the House of Lords in the UK.

The notion of mutual trust and confidence and a duty not to damage it, and the notion of good faith in employment are neither new nor revolutionary. They have existed for as long as has employment. Indeed on one view it was, at least in earlier times, the basis upon which vicarious liability was derived. However, what the UK courts do in judgments such as **Johnson v Unisys Ltd** [2003] 1 AC 518 and **Malik and Mahmud v BCCI** [1998] AC 21, is to make the duty actionable.

In the particular circumstances before the Court in **Russell**, it was held that notwithstanding that there had been a breach of duty there were no consequential damages that could be recovered. This points to one of the fundamental differences between the use of the common law for the regulation of individual contracts and the use of industrial regulation.

Unfair contracts (and to a lesser degree the award system generally) look at the fairness or otherwise of the result. The common law looks at the reasonableness or otherwise of conduct under the contract. Thus it is whether the employer or employee has conducted itself, himself or herself in exercising rights under the contract in a manner which is capricious, for example, or generally unreasonable, not whether the bargain reached by the parties is itself unreasonable.

It is unlikely, it seems to me, that the implied duties of good faith or the duty not to act in a manner that destroys or damages the relationship of mutual trust and confidence, will often lead to actionable damages. But there are occasions when it may. More often it seems, in a continuing contractual relationship, it may lead to orders of a different kind, that is, orders other than damages.

The forgoing has attempted to look beyond the current debate and trace, in a helicopter view of industrial relations in Australia, the overall development of industrial regulation and where, precisely, judgments such as **Russell** will fit in that continuing development. It seems that common law and equity will now more often be by the tools of industrial practitioners.