

Australian Labour Law Association Paper

'Reflections from Queens Square'

Paper delivered at the ALLA conference on Monday 5 December 2011
by the Honourable Justice Stephen Rothman AM

- 1 The Association has asked Justice Schmidt and me to provide 'reflections from Queens' Square' on industrial relations. On one view, reflections may be the correct word. But the degree to which we, as Supreme Court judges, are involved in industrial relations and/or labour law on a daily basis, is limited. On the other hand, in the top half of our building in Queens' Square, the experience is very different.
- 2 While we do deal with contract of employment issues, we do not deal with the other aspects of labour law. Indeed, we no longer deal with injunctions for industrial action – as, in the new order, these are matters generally dealt with under the federal legislation and are exclusively within the jurisdiction of the Federal Court. Of course, my history has meant that I have maintained a more than causal knowledge of the current regime and the decisions under it.
- 3 I will not in this paper deal with the State System except to make a passing reference to Occupational Health and Safety. I will deal with some difficulties with the current *Fair Work Act* and some perceived lack of imagination by practising lawyers in the area: particularly evidenced by the Qantas dispute.
- 4 Those matters raised publicly include a seeming avoidance of the reality, rather than attempts to deal with that reality.

- 5 I intend to deal in depth with the provisions of s 172 of the *Fair Work Act* 2009 (Cth) (hereinafter “the Act”). Sections 738, 202 and 409 of the Act are each relevant to that thesis.
- 6 Before doing so, I reiterate comments I have previously made that there are some odd features of the Act. Its predecessor, WorkChoices, and the Act that replaced it, were intended, it was said, to deregulate industrial relations. Yet each enactment is over 700 sections in length. Does anyone seriously suggest that effects a deregulated environment?
- 7 Let me make clear, I am not here being critical of the Federal Government, or its predecessors. Australian labour history and its regulation are unique. “Unique” is an overworked term – but here I use it strictly. While the New Zealand system at one stage was similar, the Australian scheme is and was unique. It reflected Australian values (and probably, in the sense that I am using the term, still does).
- 8 Those values are relevantly confined. People performing work are entitled to fair compensation at rates and conditions that provide a living. Those minima do not depend on whether the worker is male or female, or the race, religion, ethnicity or sexuality of the worker. Foreign workers are entitled to the same minimum wages as Australians.
- 9 Beyond the minima, rates and conditions should be fair and reasonable. We do not allow foreign workers to have a lower minimum than Australians.
- 10 But we do not have company unions like Europe. Nor do we have the free market that is in the US.
- 11 Yet we have somewhat slavishly assumed that we should have a free market like the US, when no Australian would countenance the unfairness in wages and conditions that can occur; and the Australian community as a whole, as we have most recently noticed in the Qantas dispute, will not

tolerate the kind of disruptions to services that occurs in the UK and the US while the “free market” works out the relative strengths of capital and labour.

- 12 So, the so-called free-market would not be acceptable to most members of the Australian community, because with it comes the right to strike, the right to pay unfairly and it represents the very antithesis of the “fair go” for which we are famous. Moreover, as earlier stated, the level of dislocation in such systems is simply unacceptable to an Australian community conditioned to the independent determination of fair minimum wages and conditions, and the negotiation of actual rates and conditions above the minima generally without recourse to industrial dislocation or with only minimum dislocation.
- 13 In some respects, as it has been allowed to operate, the scheme for industrial relations under the Act represents the worst of both worlds; as did WorkChoices; the difference being that at least the current Act requires a minimal fairness. At the same time, with a little ingenuity the industrial co-operators – capital and labour – have it within their grasp to have a much more ingenious system – if they want it. In other words, they can have independent resolution to the extent that they want it, and industrial arrangements to the extent those arrangements are desired.
- 14 If my view were correct, while the Act may certainly benefit from amendments, the wholesale criticisms of the scheme under the Act are unwarranted from a technical perspective.
- 15 Having said that, I reiterate that the Act is overly complex and lengthy and there is a need to be more ingenious and flexible – a need for industrial practitioners and tribunals or courts. Further, I am expressing a technical or professional view – not a political one. If governments determine otherwise – that is for them. And I certainly do not express the view of the Supreme Court.

16 I turn to the detail.

First, the proper construction of section 172 of the *Fair Work Act*

17 Leaving aside, for present purposes, the role of Fair Work Australia in the facilitation of "good faith bargaining", the stated legislative purpose in enacting section 172 of the Act is the provision of "a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits": see paragraph (a) of section 171 of the Act.

18 The legislature does not purport to suggest that the provisions of section 172 are promulgated for the purpose of resolving industrial disputes. Rather, the primary purpose of the provisions is the facilitation of agreements. Notwithstanding the stated purpose, there are obvious features of the Act (including issues associated with the making and certification of agreements) that reflect a purpose in the legislature of minimising or avoiding industrial disputes (or disputation or dislocation associated therewith), except industrial action engaged in for the purpose of making or compelling a certified agreement.

19 The express terms of section 172 of the Act require an enterprise agreement to concern itself with four different kinds of matters. They are:

- a) matters pertaining to the relationship between an employer and its employees to be covered by the agreement;
- b) matters pertaining to relationship between the employer and the unions covered by the agreement (which, in the context of this Act, requires, at least, the union to have eligibility for membership of employees to be covered by the agreement);
- c) deductions from wages for any purpose authorised by an employee; and
- d) machinery provisions relating to the operation of the agreement.

- 20 As is obvious from the foregoing, section 172 of the Act expressly allows the subject matters of collective agreements to go beyond "matters pertaining to employers and employees". In doing so, there is a significant expansion of the permitted subject matter of collective agreements from that, which was permitted under WorkChoices (a reference to *Workplace Relations Act 1996 (Commonwealth)* as amended by the *Workplace Relations Amendment (Work Choices) Act 2005*).
- 21 Nevertheless, the prescribed subject matters, which are described in a manner beyond that of pertaining to the relationship between the employer and employee, still involve limitations on the subject matter of an enterprise agreement and it is likely that most of the matters dealt with in such an agreement will be those pertaining to the employer/employee relationship.
- 22 To the extent that section 172 of the Act allows a collective agreement to deal with matters beyond those pertaining to the relationship of employer and employee, some of the problems that arise from previously decided cases have been ameliorated. For example, the reference to deductions from wages would allow an agreement to provide for the deduction from wages of union dues, bargaining agents' fees and the like, provided that the particular employee from whose wages the deduction is to be made has authorised the deduction. This would overcome some of the aspects (but not all of the aspects) of the claim made by the unions that were the subject of the judgment of the High Court of Australia in *Electrolux Home Products Pty Ltd v The Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309.
- 23 Further, to the extent that there may have been some doubt concerning issues, dealt with at first instance by Merkel J, in that matter, such as right of entry and shop stewards' rights, these seem to have been clarified by the promulgation of section 172 (b) and (d) of the Act. The provisions of section 172 of the Act do not expressly deal with issues such as the payment to union members to attend union meetings, when they are

otherwise not rostered for duty with the employer, the utilisation of contractors and many other provisions that have been held to be not matters pertaining to the relationship of employer and employee and, it would seem, are not encompassed within the express terms of paragraphs (b), (c) or (d) of section 172 of the Act: see *Wesfarmers Premier Coal Ltd v AFMEPKIU (No 2)* [2004] FCA 1737.

Matters Pertaining to the Relationship of Employers and Employees

- 24 A full legislative and judicial history of the term "matters pertaining to the relationship of employers and employees" (hereinafter referred to as "industrial matters") is beyond the scope of this paper. It is sufficient for present purposes to remark that industrial regulation at the federal level was largely based, prior to the promulgation of WorkChoices, on placitum 51 (xxxv) of the Constitution, which relevantly referred to "industrial disputes".
- 25 While the broadest definition of "industrial disputes" was later misconstrued and deliberately confined, both judicially and legislatively, the term was held to mean a dispute between capital and labour as to the terms and conditions of their cooperation, when capital and labour are cooperating for the satisfaction of human wants and desires: see *Federated Municipal Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508 at 554, per Isaacs and Rich JJ. While the foregoing definition, as previously stated, was confined to exclude persons not in an "industrial relationship" such as lawyers and doctors (see *Municipalities' Case* at 554), Isaacs and Rich JJ clarified that the legal and medical professions were excluded from the definition, not because of any particular aspect of medical or legal work or because it was not manual labour, but only to the extent that the legal and medical professions require the practitioner to be the sole source of production, i.e. the combined and sole source of both capital and labour: see *Australian Insurance Staffs Federation v Accident Underwriters Association* (1923) 33 CLR 517 at 524.

- 26 Such a definition would include disputes between workers engaged as labour only subcontractors and those that engage them.
- 27 As earlier stated, the breadth of the definition was later significantly qualified and the courts concentrated on the term "industrial" rather than the term "industrial disputes": see *R v Coldham ex parte The Australian Social Welfare Union* (1983) 153 CLR 297. But, for relevant purposes, the legislative confinement of the definition of industrial dispute is far more relevant.
- 28 From the inception of the *Conciliation and Arbitration Act* 1904 (Commonwealth), the term industrial dispute was legislatively defined, relevantly, as a dispute as to "industrial matters". In turn, "industrial matters" was defined as meaning all matters pertaining to the relations of employers and employees (with some additional specificity). But importantly, the restriction on the subject matter related to the industrial dispute from which an award or collective agreement might issue, and did not relate to the subject matter of the award or agreement itself.
- 29 Thus, the courts held that an award could issue, if it were within the ambit of the dispute that had been created, or was relevant, reasonably incidental or appropriate to the matter claimed, or had a rational or natural tendency to dispose of the question at issue: *R v Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch* (1938) 60 CLR 507 at 538; *R v Galvin; Ex Parte Amalgamated Engineering Union, Australian Section* (1952) 86 CLR 34 at 40; *R v. Holmes; ex parte Victorian Employers' Federation* (1980) 145 CLR 68 at 76; *Re Boyne Smelters Ltd; ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 177 CLR 446 at 451.
- 30 The above distinction, while seemingly not directly relevant to the issue of the proper construction of section 172 of the Act, is relevant to the commonsense in limiting the content of collective agreements to matters

pertaining to the relations of employers and employees. In its original context, award clauses were not strictly confined to that subject matter. A claim for the reinstatement of a particular former employee was held, generally, not to be an industrial matter. This finding was based partly upon the proposition that generally such a claim related to individual employees rather than a collective relationship between employees as such. Primarily, the difficulty in treating a claim, for the reinstatement of particular former employees, as an industrial matter is that it pertained to the relationship between a former employer and the individual former employee or employees, but not to the relationship between current employers and employees: *Boyne Smelters*, supra, at 455.

- 31 On the other hand, an order reinstating former employees was considered a valid order made in settlement of a claim relating to wages: *Re PKIU Ex Parte Vista Paper Products Pty Ltd* (1993) 67 ALJR 604. In the above circumstances, a claim for reinstatement was not an industrial matter, but could be the subject of an order (or more accurately a term of an award) that resolved a claim about wages, which claim was clearly an industrial matter.
- 32 On that basis, confining the subject matter of the terms of an award or agreement to matters pertaining to the relationship of employers and employees has the effect of narrowing the possible subject matter of an award or agreement, even as compared to that which was the situation prior to the promulgation of WorkChoices.

Examples Of Industrial Matters pre-WorkChoices

- 33 While the majority of the High Court in *Electrolux* dealt with the construction of the term "pertaining to the relations of employers and employees" (referred to in this paper as "industrial matters") by confirming the construction previously (i.e. pre-WorkChoices) applied, the previous construction is not wholly consistent and, if such situations were now before the courts, may not give rise to the same judgment. Nevertheless,

a smattering of the results of previous constructions may, more than anything else, show the problems associated with a restriction on the subject matter of agreements to industrial matters.

- 34 The High Court has held, to give a few examples, that industrial matters do not include trading hours (*R v Kelly ex parte Victoria* (1950) 81 CLR 64); one person bus operations (*R v Conciliation and Arbitration Commission ex parte MMTB* (1965) 113 CLR 228, see also (1966) 115 CLR 443); deduction of union dues (*R v Portus ex parte ANZ Bank* (1972) 127 CLR 353); prohibitions on the use of independent contractors (*R v Commonwealth Industrial Court ex parte Cocks* (1968) 121 CLR 313); reinstatement, see above; and individual employee disputes (*MTEA v AEU* (1935) 54 CLR 387 and *R v Staples ex parte Telecom* (1980) 54 ALJR 507).
- 35 Arbitral tribunals, dealing with these aspects, have taken, understandably, an even more conservative approach. As part of the resolution of the claim by the trade union movement for standard provisions for termination, change and redundancy, the Full Bench of the Commission determined that it had jurisdiction for the claim, but did not have jurisdiction to require union consultation on new technology! (*AMWSU v BHP*, Print F0870, 14 October 1982, Sir John Moore, President, Madden J and Brown C).
- 36 Lastly, in this short series of examples of industrial matters defined by the courts and/or tribunals, reference needs to be made to the judgment of the High Court in *R v Hamilton Knight ex parte CSOA* (1952) 86 CLR 283, in which the Court held that redundancy and severance pay were industrial matters, but pensions were not. It seems to matter little that the distinction does not withstand scrutiny. It matters even less that pensions are unarguably part of the remuneration of an employee. The rationale of this delineation was that pensions related to former employees (which we must assume refers to the fact that payments are made to former employees, or their families/estates). But so too are termination payments, long service

leave on termination, redundancy pay and all other accrued rights payable after termination.

37 Two aspects of the foregoing, and of the delineation and determination of the meaning of industrial matter, need emphasis. The first relates to the abovementioned determination by the Court as to whether a claim prohibiting the use of independent contractors was an industrial matter. There are few more hotly contested issues than the use of subcontractors. The general perception, often correct, is that subcontractors are used, not simply to supplement labour, but to replace full-time employment and the use of subcontractors is often opposed by unions and their members, because of its effect on full-time employment. The use of subcontractors is often the source of significant industrial disruption. Notwithstanding its effect on employment, the High Court has held that a claim limiting the use of subcontractors was not an industrial matter (see *Cocks ' Case*, supra). On the other hand, the High Court has held that, in some circumstances, the regulation of wages and conditions applicable to subcontractors that may be engaged, or more accurately their employees, is an industrial matter (*R v Moore ex parte FMWU* (1978) 140 CLR 470). A Full Court of the Supreme Court of South Australia applied this latter judgment of the High Court to allow the exercise of jurisdiction in relation to a claim for the regulation of wages and conditions for subcontractors under the building industry award in that State (*R v Industrial Commission of South Australia ex parte MBA* (1981) 26 SASR 535).

38 The second aspect relates to the comment of the High Court in *Vista*, supra. That judgment, except for the use of the term "sham", which Toohey J would not adopt, was a unanimous judgment of the High Court in which the Court discussed its previous judgment in *Caledonian Collieries v Australasian Coal and Shale Employees' Federation [No 1]* (1930) 42 CLR 527. *Caledonian Collieries* considered a protracted dispute leading to the closure of northern collieries in New South Wales and spread to coal mines in Queensland and Victoria. As stated by Gaudron J, with whom the other members of the Court agreed:

"By means that do not appear from the judgments, it was arranged that the New South Wales collieries would reopen with reduced rates of pay. The [union], a federally registered union whose members were employed in each of the three States concerned, opposed the reopening and, when the mines did reopen, they did so in circumstances involving the tragic Rothbury shootings -- an event that has become part of Australian trade union history. Strikes followed in Queensland and Victoria, the miners in those States fearing that if wages were reduced in New South Wales reductions would inevitably follow in the other States. It was held, by majority, that

'to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relations upon some matter which affects or arises out of the relationship'.

...

The statement of principle in the majority judgment ... is unexceptional. But as the dissenting judgement of Isaacs J shows, the factual finding is not one with which all would agree. Even so, the finding was made in a context in which the closure and reopening of the mines and the attempt to impose lower rates of pay were confined to New South Wales." (*Vista*, supra, per Gaudron J, at 608-609).

- 39 I recite the above passage because, more than most, it discloses the fundamental difficulties in the historical approach to the meaning of the term "matter pertaining to the relations of employer and employee". Definition of the term is fraught with uncertainty. Its meaning necessarily changes over time and it has different connotations to different persons. Lastly, it can only be decided, definitively, after the event and it does not deal with some of the major issues with which employers and employees are concerned and over which they ought have the capacity to agree.

Sense in Arbitral Limitations Do Not Translate to Agreements

- 40 Thus far, I have dealt with the restrictions on the term "pertaining to the relations of employers and employees" as decided by the High Court in relation to claims made by unions from which awards have been made. However, the capacity to reach agreement was not so confined, even under the pre-WorkChoices Acts. First, as already stated, a term of an agreement that could be certified by the Commission was required only to

have a natural or rational tendency to resolve a claim about an industrial matter.

- 41 Unless the tribunal was prepared to embark upon a study of each of the terms of an agreement that it was requested to certify, to ascertain the claim or industrial dispute to which it was relevant, the tribunal, generally, accepted (and was required to accept) that the term of the agreement settled or prevented an industrial dispute. No court or tribunal was in a position to determine what a clause in an agreement is "about" without an examination of the issue or issues between the parties, which gave rise to the clause. Thus, as already stated, a clause imposing a requirement on an employer to reinstate certain specified employees, although such a claim would not be an industrial matter, may be "about" wages. Other examples may include the resolution of a wages matter by an agreement relating to the use or non-use of a particular machine or particular equipment. Similarly, the resolution of a dispute concerning a demarcation, structural efficiency or the application of an agreement may be effected by the recognition of a single bargaining unit and/or the limitation on the number of representatives of workers. This example would involve recognition by employees of the representative role of one or more unions (or others) in the negotiation of the agreement and the settlement of disputes arising in relation to the application of the agreement.
- 42 Secondly, in prior statutes there was authority for the tribunal, in the exercise of the conciliation power, to certify terms for the prevention and settlement of matters in issue between the parties and to insert a term for the maintenance of those settlements, including an agreed arbitration provision enabling the tribunal to make binding orders. The Commission could exercise, in the past, and may, under the Act exercise the power of private arbitration upon which the parties agree, even though such a term could never have been inserted in an award made by the tribunal itself. Such a private arbitration clause, contained as it may be in a "settlement of disputes clause", would allow the relevant tribunal to arbitrate any dispute

on any matter, whether or not it pertained to the relations of employers and employees. See the judgment of the High Court in *CFMEU v Australian Industrial Relations Commission* (2001) 203 CLR 644 at [23], [24], [32], [33]-[35].

- 43 The Act also provides (see section 738) for the ability of Fair Work Australia (FWA) to undertake "private arbitration". The Act requires, for the certification of an agreement, that the agreement include a provision that requires or allows FWA, or another independent person, to settle disputes about any matters arising under the agreement and in relation to National Employment Standards (see section 186(6) of the Act). However, the terms of section 738 of the Act do not restrict the jurisdiction of FWA to resolve other disputes. Nevertheless, there is no suggestion that a settlement of disputes clause inserted (and required to be inserted) under section 186(6) is exempt from the restriction that it is confined to the subject matter described in section 172 of the Act.
- 44 Thus, a settlement of disputes clause that requires the union to address its members (and to advise its members not to take industrial action) or otherwise deal with its members may, and probably will, be a clause relating to the relations between the union and its members, and is thereby outside the terms of section 172 of the Act. So too would a clause that required a union to represent its members in any such dispute or in negotiations. Further, if the agreement were purportedly certified in such terms, the whole agreement would be invalid. Such a restriction did not apply pre-WorkChoices.
- 45 It seems inconsistent with sensible policy that an employer and its employees (and the union representing them) can be concerned enough about a subject matter to claim it, negotiate it and agree upon it, yet the agreement on that subject matter is not only unenforceable, but capable of rendering unenforceable every other term of the agreement they may make.

46 The High Court in *Electrolux* made clear that a certified agreement that contains any clause that does not relate or pertain to relations of employer and employee is not an agreement that is capable of being certified under the then Act. That principal would seem to apply to the Fair Work Act.

The Judgment in *Electrolux*

47 The history of the litigation in *Electrolux*, supra, displays, as well as most, significant difficulties associated with the limitations imposed by section 172 of the Act. After a history of employer avoidance of the payment of accrued rights to employees on bankruptcy or transfer of business, the unions involved in the manufacturing industry claimed that employers pay into a trust fund (“Manusafe”) an amount that could be used for the payment of such accrued rights, or some of them.

48 The Commission determined, for reasons that are currently irrelevant, that the claim for Manusafe was not an industrial matter. This decision (*Transfield Pty Ltd v AFMEPKIU*, AIRC, Munro J, 30.8.2001, Print PR908287, [2001] AIRC 879) was, to say the least, controversial. Manusafe was a claim common to all or most claims agitated by the manufacturing unions against individual employers.

49 Within days of the decision of the Commission, Electrolux sought orders, in the Federal Court of Australia, against manufacturing unions, involved in industrial action against it, which unions were engaged in industrial action and seeking, inter alia, payments to Manusafe. Other claims sought were the traditional claims for wages and conditions of employment, but included claims for right of entry and rights of shop stewards, including access to e-mail and photocopying facilities, and also included a claim for a bargaining agent's fee. The hearing of the matter was expedited, interlocutory orders having been made. It was heard in October 2001 and judgment delivered on 14 November 2001. Justice Merkel considered that Manusafe was an industrial matter, as were the claims for right of entry and the claim for rights of shop stewards and all other matters, except the

claim for a bargaining agent's fee: [2001] FCA 1600. The claim for a bargaining agent's fee was found to be a matter upon which the unions were prepared to negotiate (at [5]) and would create a relationship between the employer and employee that would be one of agency ([41]) and was a "substantive, discrete and significant (i.e., in the sense that it is substantial)" claim ([53]).

- 50 On appeal, the Full Court of the Federal Court of Australia determined that each matter in a claim was not required to be an industrial matter and overturned the orders of Merkel J: [2002] FCAFC 199.
- 51 The High Court overturned the Full Court and reinstated the orders of Merkel J. In so doing, the High Court relied upon the historical treatment of the term "pertaining to the relations of employer and employee" and determined that each and every claim pursued by a union for a certified agreement was required to be such a matter, in default of which no certified agreement could issue: [2004] HCA 40; (2004) 221 CLR 309 at [163], inter alia.
- 52 In the High Court, Kirby J. dissented. In so doing, His Honour did not depart from the traditional construction of the term "pertaining to the relations of employer and employee", but adopted a purposive approach to the provisions of the then Act, prescribing the claims that could be made "in respect of" a proposed agreement and the purpose of industrial action. His Honour described his approach as one of "realism". His Honour was, in that description, correct. However, His Honour's dissent does not affect the current issue.
- 53 *Electrolux* has been adopted and applied in subsequent judgments, some of which show even more clearly the inappropriateness of confining agreements in that way. In *Wesfarmers*, supra, French J, a judge of the Federal Court, as he then was, applied *Electrolux*, consistent with the majority reasons, to the effect that industrial action by unions in support of claims was not protected industrial action, because the proposed

agreement included items to which the employer had already or previously agreed, and/or one matter that was held to be not an industrial matter. The unions' claims included the phrase "in addition to the current wages and conditions applying in the workplace", which His Honour held included conditions that were not industrial matters, thereby taking the claim outside one capable of being certified under the Act.

- 54 Further, his Honour considered that the claim for or in relation to the use of contract labour was not an industrial matter and could not form part of any certified agreement. The effect of those findings was that the claims were not claims in respect of a proposed agreement, and the industrial action was not protected. French J rejected the distinction of *Cocks' Case*, supra, in the judgment of the High Court in *R v Moore*, supra (as to which argument, see above).
- 55 However, it is clear that even absent the claim in relation to the use of subcontractors, his Honour would have found that the claims could not give rise to a certified agreement, because the claims included the continuation of conditions, already agreed and applied by the employer, one or more of which was not an industrial matter. (The already agreed matters had been included in prior collective agreements, certified under State legislation and some of them were sought by the employer, and obtained over the objection of the union.)
- 56 His Honour Justice Cowdroy also applied (or purported to apply) *Electrolux* in relation to orders preventing a union from taking industrial action. His Honour considered that a clause (which seems remarkably like the claim for Manusafe), for insurance payments to cover accrued rights on termination of employment, was not an industrial matter: *Australian Maritime Officers' Union v Sydney Ferries* [2009] FCA 231.
- 57 His Honour also considered that the clause relating to income protection was "void for failing to pertain to the relationship between the employer in its capacity as employer and the employee in its capacity as employee"

([25]). First, there is no authority from the proposition that a claim that does not pertain to the requisite relationship is "void", or at least there was none before the judgment of Cowdroy J. The second aspect is that income protection for a current employee can be no different conceptually than workers' compensation insurance. It is insurance for a current employee, provided and paid for by the employer, as part of the remuneration of the employee. It is difficult to understand how such a payment, or how such insurance, does not relate directly to the requisite relationship.

- 58 It seems that the confinement of the subject matter of an agreement that may be certified is related more to the concept of protected industrial action and the perception of what industrial action is legitimate, than a policy prohibition on the issues to which an employer and union (or employees) may agree.
- 59 Immunity is granted under the Act for protected industrial action, as was the case in the predecessors to the Act. The provisions of section 409 of the Act expand the basis upon which protected action may be taken. Leaving aside response action of an employer or employee (or union), protected action may now be taken not only for the purpose of supporting or advancing claims in relation to the agreement, but also for supporting or advancing claims that are reasonably believed to be only about matters permitted by section 172 of the Act.
- 60 This expansion seems to be intended to bring greater certainty to the immunity for industrial action granted by the Act. However genuine that intention, it has not been fulfilled. There is still a significant degree of uncertainty as to the operation of the immunity and another layer of uncertainty occasioned by the reference to reasonable belief. The appropriateness of the level of immunity granted by the Act is beyond the scope of this paper. Unfortunately, the determination of what does or does not pertain to the relationship of employer and employee seems to have been coloured by the existence of the immunity. The judgments seem to reflect that colour.

- 61 There may be sound reason to impose a limitation on an arbitral tribunal, which limitation has the effect of restraining the tribunal from imposing on an employer or union or employees conditions that do not relate directly to the relationship of employer and employee. There seems little logic or sense in prohibiting an employer, its employees and/or a representative union from executing an agreement that they want, and, presumably, they consider best regulates their mutual conduct, regardless of the capacity in which they act for that purpose.
- 62 There are two fundamental ways in which the limitations in section 172 of the Act make no sense whatsoever. Accepting that section 172 of the Act expands the subject matter available to be dealt with in an enterprise agreement from matters solely pertaining to the relationship of employer and employee, the restrictions are still inappropriate and unnecessary.
- 63 Because the subject matter is defined by the clause of the agreement and not that which is necessary, incidental or appropriate for the settlement of a dispute or has a natural or rational tendency to resolve the issues in dispute, the limitations imposed by section 172 of the Act impose a significant limitation on the pre-existing regime (at least as it existed pre-WorkChoices), and implement a restriction on the ability to reach agreements (or have them certified, thereby rendering them binding) that is unnecessary, inconvenient and unwise.
- 64 There is no good reason to disentitle employers and employees (properly represented) from reaching agreement on any matter whatsoever, except those matters that, as a matter of policy, the legislature may wish to prohibit, e.g. discriminatory provisions, compulsory unionism, infringement of human rights, or the like. Further, the restriction on the subject matter of an agreement is inconsistent with internationally accepted standards relating to the right to strike, the right to bargain collectively and the right to be represented by a trade union. It would have been possible for the legislature to allow agreement on any matter, but restrict immunity for

industrial action to such action taken in support of those claims that pertain to the matters described in section 172 of the Act.

- 65 Secondly, the restriction serves no useful purpose. It is a restriction that is difficult to implement and uncertain in operation. It has been shown, at least to the extent that it requires matters to pertain to the relationship of employers and employees, to be a moving feast that has exacerbated workplace tensions, rather than ameliorating them. Further, it has encouraged an approach to workplace relations that is legalistic, formulaic and immature. The courts have, encouraged by the approach in this area, concentrated on form over substance.
- 66 Even the expansion promulgated by section 172 may, if current authority is applied, operate restrictively. The expansion to include the relationship between the employer and the union will, no doubt, be construed to refer to the employer in its capacity as such and not as agent of the union, banker, or any other capacity.
- 67 Ultimately, the restriction serves no purpose and makes no sense. It seems to be a political compromise born of the need to be perceived to be even-handed and which will ultimately restrict the proper regulation of the workplace and the capacity of employers, employees and/or unions to resolve their differences. These restrictions will impede the development of mature industrial relations in Australia and continue the reliance, by parties in the workplace, on the courts and legal manoeuvring. In short, the restriction in section 172 of the Act makes little sense. A restriction to matters pertaining to the relationship of employer and employee would make even less sense.
- 68 Thus it would seem, that an appropriate compromise between the two extremes is to have the ability to reach agreement on any issue affecting the relations between employers, employees or their unions, but to confine protected action to that which is in support of “industrial matters”.

- 69 I should add, lest it be thought otherwise, that in my view the rationale in *Electrolux* as applied in *Wesfarmers* is too restrictive, even on the wording of the current Act.
- 70 I turn next to the so-called lack of flexibility in this legislation. I have already referred to the provisions of s 738 of the Act and the requirement to have a settlement of disputes provision and the ability of FWA to arbitrate any dispute in any manner to achieve any outcome, other than one inconsistent with the Act. It also applies to contracts of employment!
- 71 Yet no one seems to refer during the debate about flexibility to s 738 of the Act. Nor have I seen a reference to the procedure prescribed by s 202 of the Act – namely, the requirement to have a flexibility provision in every enterprise agreement. Such a provision can be an individual arrangement, namely, between employer and one of many employees. I used to call them contracts of employment. The only substantial restriction on such an arrangement, in terms of pay and conditions, is that the employee be better off overall (s 202(4) of the Act) and the arrangement has been genuinely agreed (s 202(3) of the Act).
- 72 Short of undermining maximum conditions, what further flexibility is sought? Or could be?
- 73 The debate is almost wholly hypothetical. The capacity for flexibility currently exists, but requires a flexibility provision in an agreement and therefore requires the industrial parties to reach agreement in the first place. We are back to the narrow nature of the arbitral function.
- 74 The last matter that I mention, only in passing, is the promulgation of the amendments to Occupational Health and Safety. I do not, and would not publicly, enter the debate about the future of the Industrial Relations Commission or the Industrial Court.

- 75 The new Act grants the major jurisdiction to the District Court. Appeals, as you know, will be to the Court of Criminal Appeal. This will be new work for both Courts, and at least in the District Court, it will be very different.
- 76 It is a summary criminal jurisdiction and in the first few years most labour lawyers will be pushing the envelope on the construction of the legislation. I expect a plethora of appeals and for you I expect lots of work.
- 77 Every cloud, as they say...

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