Penalties and Trade Union Action: Four Recent Cases

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Abstract

As conflict is the driver of industrial relations, so too are the various mechanisms imposed by the state which seek to limit or control it. In Australia, a key issue has been over where these regulatory settings should be set and how courts should interpret and apply the relevant legislation. Based on a review of four recent and important cases this paper shows that the Federal Court appears to recognise the legitimacy of unions carrying out their role in pursuing the interests of their members despite the quite punitive and hostile federal law. Alternatively, in the cases analysed involving the NSW Teachers’ Federation, the NSW Industrial Court pursued a far less accommodating judicial approach.

Introduction

Remedies and penalties (such as injunctions, damages, fines and deregistration) as a means of securing correct behaviour by the actors is a feature of most (all?) industrial relations systems. Typically, these operate within a context of prescribed rights and obligations: so, for example in Australia, penalties may be applied against those who fail to satisfy requirements to bargain in good faith (i.e. over the determination of interests) or those who do not make wage and other payments according to the relevant industrial instrument (i.e. over the enforcement of rights). A key feature of industrial relations in Australia has been the adoption of industrial tribunals and associated courts whose role in the settlement of disputes and the determination of employment conditions has, inter alia, relied on the allocation of certain powers to compel the parties to act according to the tribunals’ and courts’ principles and decisions. How, and even more fundamentally, whether, these powers should operate is a very considerable part of the long-standing debate over Australian industrial relations. Informing this debate is a complex array of factors which include: contrasting frames of reference over the nature of work especially unitarist, pluralist and more radical perspectives; the role of the state in regulating employment (commonly characterised as protective or market-dominated approaches); obligations arising under International Labour Organisation Conventions and the objectives and power of employers, unions and other institutional parties (see Creighton & Stewart 1994).

The interplay of these factors, forces and ideologies have led to profound changes to the Australian industrial relations system. For instance, and famously, Henry Bourne Higgins’ (1915) article published in the Harvard Law Review asserted that the judicial bodies established by the Conciliation and Arbitration Act (1904) represented

a province for law and order … (in which) the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous process of strike and lockout. Reason is to displace force; the might of the state is to enforce peace between industrial combatants … and all in the interests of the public.

Famously too, the mass industrial action by up to one million workers confronting the jailing of Clarrie O’Shea of the Victorian Tramway and Omnibus Union in Melbourne in 1969 for
contempt of court (he had refused to produce the union’s finance records to enable fines against the union to be collected) led to a general diminution of the effectiveness of the penal provisions of the federal industrial law (Vassilopoulos 1997). Militant voices held that O’Shea’s jailing revealed not so much that the penal sanctions had been misapplied by the courts but rather that the laws were revealed to be the fundamentally undemocratic by denying rights to take industrial action. Pat Clancy, for instance, once NSW secretary of the (then) Building Workers Industrial Union, argued that the tribunals were not a ‘neutral umpire’ and that ‘compulsory arbitration is a pernicious system designed to tie the unions to the capitalist state’ (cited in Vassilopoulos 1997). According to Creighton and Stewart the O’Shea ‘affair’ showed that ‘excessive and insensitive use of enforcement procedures – especially procedures which do not accord adequate respect for workers and unions to take industrial action to protect and promote their interests – may well be counterproductive both in terms of those who seek to use them and in terms of protecting the integrity of the system of which they are part’ (1994, p. 259).

This paper does not provide a general assessment of the use of penalties in contemporary labour law and practice (for a detailed review, see McCrystal 2010); rather, after briefing outlining relevant background information, it analyses the specific application of penalties imposed against unions in four recent cases. The first two are judgements of the Federal Court under the Trade Practices and the Building and Construction Industry Improvement Act 2005 (Cth.) Acts over union action at a gas plant located in Victoria; the third and fourth involve fines imposed on the NSW Teachers’ Federation by the NSW Industrial Court for breaches of non-strike orders of the NSW Industrial Relations Commission. These cases are important because they provide a comparison between the judicial reasoning adopted by the different Courts over the imposition of penalties. The cases have considerable utility in the evaluation of Creighton and Stewart’s (1994) view that, as outlined above, excessive or insensitive use of enforcement procedures may adversely reflect on those that pursue them and even the integrity of the system itself. The cases have been selected too as they reveal significant differences between the judicial instincts of judges in the Federal Court who, when exercising their industrial relations jurisdiction, recognise the considerable constraints imposed on unions when, anecdotally, they ‘go about their business’ and the NSW Industrial Court which, at least in the cases analysed, are far more punitive. That said, it needs to be recognised that the cases discussed in this paper represent a small sample of the decisions of both jurisdictions; accordingly, no generalisations can be reliably made. Similarly, given the significant differences between the federal and state jurisdictions and the cases themselves this reinforces the difficulties in making generalisations.

**A brief overview of penal sanctions post-O’Shea**

The decline in the effectiveness of the penal sanctions following the O’Shea case was offset by the enactment of the secondary boycott provisions in the Trade Practices Act 1974 (Cth.) – sections 45D and E. The new legislation sought to control unions (and, technically, others) by banning boycott action against ‘secondary’ targets. This was made starkly clear when, in 1985, the Federal Court awarded over $2 million in damages and costs against the Amalgamated Meat Industry Employees’ Union for breaching the Trade Practices Act in a case involving the Mudginberri abattoir (in the Northern Territory). Also, the use of common law tort actions against unions – typically for interference with contractual relations, intimidation, nuisance and conspiracy to injure – emerged as a powerful constraint against industrial action during the 1980s. This was exemplified in the 1985 Dollar Sweets case in which damages of $175,000 were awarded against the union (Dollar Sweets Pty Ltd v.
Federated Confectioners Association of Australia [1986] VR383), and in the 1989 pilots’ dispute when $6.3 million in damages were awarded against the Australian Federation of Air Pilots (Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No.2) [1991] 2 VR 636). In response to these actions, Peter Costello the former federal Treasurer commented that ‘some employers may take the lesson when confronted with the next ban: cancel the award, sue the workers, bring in the military...’ (cited in Alexander & Lewer 1998, p. 107).

More recently, the decision of the Australian Industrial Relations Commission (AIRC) not to intervene and terminate the bargaining period in the lengthy and costly dispute between the Construction, Forestry, Mining and Energy Union (CFMEU) at Coal and Allied Operation’s Hunter Valley No 1 mine demonstrated the shift in limiting the extent of state intervention given the advent of enterprise bargaining and the consequent contraction of the AIRC’s dispute settlement and arbitral role. A Full Bench of the Commission determined that

We do not however think that the actions of any party during the battle can be categorised as unfair. The adage “all is fair in love and war” is, we think as much applicable to industrial warfare as to any other type’ (CFMEU v Coal Allied Operations Pty Ltd [1997] 77 IR 142).

This reduced role of the AIRC, at least in managing conflict in accord with the development of enterprise bargaining and its tolerance of protected industrial action (under controlled conditions) needs to offset by other, arguably more than compensatory increases in controls which have become available to the state and employers against unions and workers.

Most recently, the on-going criticism of the extensive, coercive powers provided to the Australian Building and Construction Commission (ABCC) demonstrates the contest over where, using common usage, ‘the balance needs to be drawn’ over the legitimacy of the tactics adopted by labour to collective pursue their interests. Established by the Howard government following the 2003 Cole Royal Commission Report’s findings of ‘lawlessness’ in the industry, the ABCC was given, in Williams’ (2010) assessment, ‘extraordinary power’ – particularly negating the right to silence, secret interrogation and removing the privilege against self-incrimination with failure to comply punishable by up to six months in jail. This is compounded by the stripping away of safeguards such as warrants not being required from an independent judicial officer unlike ‘other bodies which question people’ (ibid.). Williams’ (2010) argues that ‘what is most surprising is this unchecked authority is not directed at serious crime … instead to investigate industrial matters in the construction industry’.

The ABCC has proved to be a diligent litigant. Indeed, as a result of an action initiated by the ABCC, in July 2010 the Federal Court endorsed a proposed settlement between the CFMEU and the Australian Manufacturing Workers’ Union (AMWU) in a jurisdictional dispute over which union would represent workers on the West Gate Bridge upgrade project (Federal Court of Australia [2010] FCA 754 involving the building unions CFMEU, AMWU and union officials Mick Powell, Tony Mavromatis, Gareth Stephenson, Julio Pizarro). The court (Justice Jessup) ordered that the CFMEU pay $858,000 and two of its officials pay $71,000 each; the AMWU $298,000 and an official $27,000 and, that the unions pay $150,000 in costs to the ABCC over 52 breaches of the Building and Construction Industry Improvement Act (Schneiders 2010). The (then) Deputy Prime Minister Julia Gillard, was quoted as saying that the case confirmed ‘the continuing need for a strong cop on the beat in the building and construction industry’ and that it confirmed ‘that anyone who breaks the law will feel its full force’ (Wilson & Hannan 2010).
The ABCC and its powers largely survived the election of the Rudd (ALP) government with the government stating that a new agency would be established but one (and reinforcing the rhetoric) which, as with the ABCC, would be ‘a new tough cop on the beat in building and construction’ (*The Sydney Morning Herald*, 2009). This followed the publication in April 2009 of Justice Murray Wilcox’s report, *Transition to Fair Work Australia for the Building and Construction Industry*, which, *inter alia*, made recommendations to the Rudd government for the replacement of the ABCC with a new autonomous body – to be named the Building and Construction Division (as part of the Office of the Fair Work Ombudsman). Wilcox proposed that the agency would continue the specialist regulation of the building and construction industry initiated by the ABCC (Freehills 2009).

Although not endowed with the remarkable power allocated to the ABCC, nevertheless Fair Work Australia (FWA), the tribunal which replaced the AIRC under the Rudd government’s *Fair Work Act 2009 (Cth.*)*, has considerable capacity to deal with industrial conflict. These include particularly section 418 – Application for an order that industrial action by employees or employers stop, and controls over how industrial action may become protected (see also section 437). The Fair Work Division of the Federal Court was given power to make ‘any order they consider appropriate’ to remedy a breach as well as injunctions to restrain breaches (see, for example, section 421). Speaking at the FWA’s Inaugural Session in July 2009, Sharan Burrow, the then President of the ACTU commented that while ‘particular decisions have attracted criticism, vicious rumour would suggest even from the ACTU’, she was praiseworthy of the ‘respected, indeed, trusted’ institution. Australians, she believed, ‘trust you, they campaigned and voted for fair workplace laws inclusive of an independent umpire’ (Burrow 2009).

Plainly, even as this brief introductory commentary shows, common law and statutory-based controls set significant boundaries over union action in Australia. Notably, the role of the ABCC under conservative and ALP governments provides clear evidence of the pervasive view that, if only for electoral approval, a powerful agency is required to ensure the parties in that industry are forced to be compliant. Equally, as to those outside the building and construction industry, the continued reliance on institutions such as the FWA and the Federal Court makes no break from the past: reinforcing traditions of, to use the hackneyed phrase, a reliance on the agency of an ‘independent umpire’ which is willing to penalise those actors who do not comply.

**Case 1: The ACCC and unions at the Patricia-Baleen gas plant, Orbost, Victoria**

Established in 1995, the Australian Competition and Consumer Commission (ACCC) is required, as its primary responsibility, to ensure that ‘individuals and businesses comply with the Commonwealth’s competition, fair trading and consumer protection laws’ (ACCC n.d.) – most notably those arising under the *Trade Practices Act* (TPA). Apart from an educative role, the ACCC can initiate litigation to enforce the TPA and other legislation particularly to clarify the law, prevent or stop unlawful conduct and to obtain compensation for the victims (ACCC 2002; Schaper & Lewer 2010). So, in fulfilling this responsibility, the ACCC may reach an agreement with a party over an alleged breach of the relevant law and then seek a consent order from the Federal Court approving the proposed penalties – under section 76 of the TPA the court determines the penalty for a contravention of the Act. The maximum penalty prescribed for a breach of section 45D of the TPA is $750,000 per contravention. In making an order, the Federal Court is guided by the principles such as whether the agreement reached between the parties was appropriate in all the circumstances, the deterrence effects, the public interest in the settlement of the litigation and whether the parties understood the
desirability of the proposed settlement. A detailed summary of these principles is set out in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] ATPR 41-993 and, to whether that parties’ proposed settlement is within the permissible range see *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426.

A salient case involving these issues is *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2006] FCA 1730 in which the Federal Court endorsed a consent arrangement between the CFMEU and the Commission whereby the union paid $100,000 in penalties and $15,000 of the ACCC’s costs over a picket and other industrial action at a construction site in Perth in 2004. The union also agreed to undertake a three-year trade practices compliance program in its WA branch; appoint a trade practices advisor and report back to the ACCC within three months as well as annually on the content of the program (CFMEU 2006). The union’s action breached the TPA’s secondary boycott provisions.

In another case, in May 2003 the ACCC initiated proceedings in the Federal Court against three unions – the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), the Australian Workers’ Union (AWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) – involving alleged breaches of the TPA at the Patricia Baleen gas plant in Gippsland, Victoria (*ACCC v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2004] FCA 5). Injunctions, pecuniary penalties and the implementation of a trade practices compliance program were sought by the ACCC. Admitting the allegations, the unions accepted that by mounting picket lines over a three week period (in 2002) they had engaged in unlawful conduct against the company because of its refusal to negotiate certified agreements and because of its decision to employ non-union labour (*ACCC 2003a; ACCC 2003b*).

Each union agreed to pay a penalty of $100,000 and gave undertakings not to engage in similar conduct – described as ‘four year good behaviour bonds’ by an industrial relations newsletter (*Workplace Express*, 2004) – and to publicise their actions in the unions’ journals to members. The ACCC did not seek costs. As well as being in breach of section 45D, the picket was in contravention of an order of the AIRC. The court also made declarations that the unions had contravened the TPA and issued injunctions restraining the unions from engaging in similar future conduct. In a media release, the ACCC Chairman commented that the case served as a “clear warning to unions” and that he welcomed “the court making both injunction and compliance program orders as they may reduce the risk of future contraventions and will ensure the unions better appreciate the effect and scope of the Act” (*ACCC 2003b*).

Justice Gray, who heard the case, made a number of comments about the appropriateness and extent of the penalty. He found that the unions’ action had delayed the completion date of the project and that they lacked any program to ensure compliance with the TPA. These factors, as a result, had tended to increase the penalty. He also determined that the willingness of the unions to reach an agreement with the ACCC reflected the unions’ intentions to minimise their financial exposure if the case had been heard and costs been awarded to the ACCC. Importantly, his Honour stated that ‘It would be going too far to say that the Commission has misused its position as a regulator to overbear the respondents and procure an agreement to penalties of the magnitude that it could not otherwise hope to achieve’ (*ACCC v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2004] FCA 517, 30 April, Annexure A) however, and of particular relevance to this paper, his judgement outlined a number of concerns. His Honour commented that if he had determined the case, he would
have set a penalty ‘considerably lower’ than that agreed to by the parties and considered that, as the penalty was uniform, no attempt had been made to allocate blame between the respondents. He also commented about the role of unions and the nature of the breach of the Act:

The respondents are not profit-making enterprises. They did not engage in the conduct the subject of the proceeding for their own gain, or the gain of their officials. Their overriding concern was no doubt to protect the employees ... from possible exploitation by the negotiation individually of their terms and conditions of employment. The use of a picket is a very traditional means of engaging in industrial action over such an issue. With the exception of a four-hour period on 2 October 2002, access to the site was not blocked. But for the involvement of other enterprises, whose operations on the site in question were hindered by the picket, the events would have been unremarkable ... The respondents are entitled to credit for their cooperation with the Commission and for the saving of public money in relation to the litigation. It is not suggested that any of the respondents has a record of similar contraventions. In these circumstances, to call upon the respondents each to pay such a large sum from their resources, which ultimately come from the pockets of wage-earners, appears to be excessive (ibid.).

None of Justice Gray’s obiter dicta was mentioned in the ACCC’s subsequent media release. Others though were more forthcoming with employer groups suggesting that the FCA’s approach may be unduly tolerant of industrial action. Commentary from the Australian Chamber of Commerce and Industry (ACCI), for example, contended that apart from the judge’s reflection on the agreed penalty (it was ‘contentious to say the least’), the judge’s ‘curious’ reasoning suggested a ‘double standard’: ‘it is hard to see how unlawful union conduct was any different to unlawful conduct engaged by a corporation seeking to act in the interests of shareholders’ (Anderson 2004, p. 8). Later, in a submission to the Productivity Commission, the ACCI continued it complaints about ‘double standards’ and, extending those in its sights, intimated an unwillingness by the ACCC to confront unions over secondary boycotts:

On the basis of this case, business is entitled to conclude that there is a clear and apparent double standard in the application of competition law to unions on the one hand and business on the other. Notwithstanding this decision of Gray J., it is vital that the ACCC act clearly and consistently on all investigations relating to alleged unlawful secondary boycott activities. The ACCC’s past practice seems to have developed a qualified or conditional willingness to move on s45D issues – only where there is a significant impact on competition. This is not a criteria (sic) of 45D – all unlawful secondary boycotts should be investigated by the regulator (ACCI 2004).

For a further discussion of claims that the ACCC is insufficiently involved in section 45D and E actions against unions see Keehn [n.d.].

Case 2: The ABCC and union action at the Patricia-Baleen gas plant

The Patricia-Baleen gas plant in Victoria continued to variously exercise the energies of the AMWU, AWU, CEPU and CFMEU. Following a series of protests, work bans, pickets and other action involving up to forty workers which had occurred over about twenty days between November 2008 and March 2009, the ABCC filed a statement of claim in the
Federal Court alleging the unions had breached section 38 of the *Building and Construction Industry Improvement Act 2005* (Cth.) (BCIIA) by engaging in unlawful industrial action and section 44 by seeking to coerce sub-contractors undertaking the plant’s upgrade to enter into workplace agreements with the unions. Maximum penalties for each contravention of the Act are not insubstantial: $110,000 for an organisation; $22,000 for individuals. This action followed from the ABCC’s intervention in a series of hearings before the AIRC in which, in response to an application by the building contractors at the plant, orders were made to stop the industrial action pursuant to section 496(1) of the *Workplace Relations Act 1996* (Cth.). Commissioner Blair’s order required that, *inter alia*, it had to be handed to or read to each union organiser involved, be displayed on appropriate notice boards at the plant and be sent by express post to each employee involved (*Ausscom Pty Ltd; Primaweld Engineering Pty Ltd; Worley Parsons Services Pty Ltd; GBG Concrete and Constructions v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; The Australian Workers’ Union: [C2008/638] 7 January 2009*).

Subsequent picketing action, in defiance of the orders, led the Federal Court to make interlocutory injunctions restraining the CEPU and its officials from organising industrial action or threatening, coercing or intimidating any employee at the site (Office of the Building and Construction Commissioner, 2009).

The ABCC continued its prosecution taking the unions to the Fair Work Division of the Federal Court seeking pecuniary penalties for breaches of section 44 of the BCIIA (*Hardwick v Australian Manufacturing Workers’ Union [2010] FCA 818, 4 August 2010*). Each of the union respondents admitted the contraventions of the Act and Justice Gordon accepted the monetary penalties jointly proposed by the parties. These were: AWWU $15,000; AWU $14,000; CEPU $11,000; CFMEU $9,000 and for each union organiser, respectively, $5,000; $6,000; $4,000 and $3,500. In making the orders, Justice Gordon noted, *inter alia*, that the conduct was ‘serious’ as there was damage to property and, at certain times, it involved interference with the employees’ ability to access the site. As to the agreed penalties, which Justice Gordon found were at the lower end of the permissible range, the judgement accepted that: the action of the AMWU and the AWU organisers was done without the knowledge of the senior management of the unions; the unions’ early admissions avoided the time and expenses of a trial which, as a consequence, meant that ‘the regulator has resources available to allow it to pursue other suspected contraventions’, ‘the conduct did not result in any significant financial loss to Worley Parsons or any of the sub-contractors and, further, did not cause any of the sub-contractors to actually make union agreements’.

The tone of ABCC’s media release was somewhat less sanguine than Justice Gordon’s decision. The release ignores that the total penalty ($67,500) was at the lower end of the permissible range nor does the release reflect on the impotence of the unions’ action. Instead the ABCC emphasises the conflict:

> The law clearly states that action must not be taken to coerce or place undue pressure on a person to make, vary or terminate an agreement. This action was a considered and organised attempt to achieve that aim … The conduct of the protesters included interference with gate locks, placing logs over the entrance to the site, slashing tyres, and throwing stones at employees entering the site. The pickets were carefully orchestrated, and buses were organised to bring protesters to the site. Police assistance was required on one occasion to ensure vehicles could access the site (Office of the Building and Construction Commissioner, 2010).
This reasoning by Justice Gordon over penalties is similar with that adopted by Finkelstein in *Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2005] FCA 1802*. In that case his Honour fined the union a ‘relatively high pecuniary penalty’ of $25,000; in part, because the union had four prior convictions over breaches of section 170NC of the *Workplace Relations Act (Cth.)* – the section makes it illegal for a person to threaten industrial action with intent to coerce another person to make a certified agreement. The judgment also states that while the union action did cause some losses and costs for employer – ‘the amounts involved were not very great in the general scheme of things’ plus ‘the threatening conduct was short-lived’ and as ‘the contraventions were admitted ... what could have been a lengthy trial’ was thereby avoided (paragraph 15). Principally though, his Honour appears most concerned over the repeated offences by the union and the need for deterrence. He notes that ‘industrial disputes can be tough affairs. There is often open hostility between employers and employees until the dispute is resolved’ (paragraph 1) and, later in the judgement, that there must be regard for the ‘manner in which industrial disputes are fought in this country’ which means ‘it is inevitable that the involvement of organisations such as the union will conflict with the requirements of the *Workplace Relations Act*’ (paragraph 13). The officials, all of whom admitted the breaches, were fined amounts ranging from $1,000 to $400. As to penalties, the judgement is not condemnatory; even quite empathetic to the organisers’ role at a personal level by simply working to achieve good outcomes for their members:

First, each individual engaged in the conduct in his role as a union organiser doing what he thought best for its members, albeit on this occasion pressing the point of negotiations too far. Second, each individual respondent is a first offender. Third, each individual is a working man with dependants, earning just enough to get by and having no surplus funds (paragraph 17).

**Cases 3 and 4: The NSW Teachers’ Federation and the NSW Industrial Court**

This case involves a complex set of events which led to the NSW Teachers’ Federation (NSWTF) being fined twice by NSW Industrial Court (IC). In the first instance, Justice Staff in April 2010 ordered that the NSWTF pay $4,000 after the union admitted that a 24 strike by 4,000 of its members employed in technical and further education (TAFE) had contravened a dispute order issued on 4 February 2010 by the Justice Boland – the President of the NSW Industrial Relations Commission (IRC). Justice Marks in June 2010 in the second instance, held that the NSWTF had contravened an order of the Full Bench of the IRC (Boland J, Sams DP and Grayson DP) made on 1 September 2009 which had refrained the union from taking industrial action. About 2,360 TAFE teachers had held a three hour stop work meeting on 10 November 2009. The union was ordered to pay $7,000. No award for costs was made in both cases. These fines are not insubstantial given that under section 357 of the *Industrial Relations Act 1996* the maximum penalty which may be imposed for a body corporate is (generally) $10,000 for the first day of the contravention ($5,000 for each subsequent day) – an amount which, as explained earlier, is significantly less than that provided by both the *Trade Practices* and *Building and Construction Industry Improvement Acts*.

Very briefly, the background circumstances of the cases involved a determined campaign by the Federation and its members in TAFE over a new award which led, ultimately, with the consent of the parties, to an arbitrated decision by the Commission which was handed down on 15 October 2009. Various described by the NSWTF as ‘appalling’ and likened to introducing ‘Work Choices style changes’, the decision increased teaching hours and
implemented other changes in working conditions to fund pay increases beyond the NSW government’s floor of 2.5 per cent per annum (Edsall 2009).

Before the Commission’s arbitrated decision in October the Federation had mounted action in an effort, unsuccessfully, to have the government at a senior ministerial level agree to their claims. The threat of a strike had led to the application by the government to the IRC for an order restraining the union. The Full Bench’s reasoning for the September 2009 dispute order coalesced around three principles; first, the Federation had agreed to arbitration as a condition to secure the salary increases (12 per cent over 3 years) and was now seeking to ‘subvert the process’; second, that the ‘inexcusable’ industrial action ‘had the potential to be highly disruptive for students and employers’ and, third, that the union was unwilling or unable to accept the Commission’s dispute resolution role. The Full Bench stated, *inter alia*:

[27] Resort by the Commission to the issuing of dispute orders is a rare occurrence. Most disputes are resolved by conciliation, but if that is unsuccessful, by arbitration, usually in the complete absence of industrial action. In 2008 and 2009 the Commission has been able to assist in resolving major wage dispute in the public sector with either no or minimal industrial disruption, despite seemingly intractable positions being adopted by both sides of the industrial relations.

[28] The present dispute, however, is an exception...

[30] The attitude of the Federation in pursuing a course of industrial action in this matter was indefensible, a fact reinforced by the Federation’s weak defence of its position to embark on industrial action ... *(Director General, NSW Department of Education and Training v NSW Teachers Federation [2009] NSWIRComm 147)*.

This reflected an earlier Statement which had been issued by the Full Bench on 17 August 2009 in proceedings over a 24 hour strike the union had authorised for 2 September. The Commission found ‘the situation now prevailing’ as ‘remarkable by reference to any acceptable measure of industrial behaviour’ (paragraph 16) and ‘appears to us incomprehensible that the Executive of the Federation would countenance industrial action in this context’. This was, in summary that the action was ‘against the spirit of the earlier agreement’ i.e. to go to arbitration (paragraph 18) *(Director General, NSW Department of Education and Training v NSW Teachers Federation [2009] NSWIRComm 140)*. The action, in the Commission’s view, was designed to pressure the government to not take the case to arbitration.

Later, as the NSWTF and its TAFE membership organised against the Commission’s arbitrated decision, Justice Boland made general orders on 5 February 2010 refraining the parties from taking of any industrial action flowing from the decision for three months – this was the order which led to the union’s prosecution before Justice Staff. Apart from giving considerable space to justifying the original arbitrated decision, his Honour’s decision sets out the reasons for the dispute orders. It emphasises that the NSWTF chose ‘to thumb its nose at those processes’ (conciliation and arbitration) ‘leaving the Commission no choice but to make dispute orders’ (paragraph 26) and, critically that ‘I would recommend to the Federation that it pause to consider the path it is on and the damage it may cause to its standing as a registered industrial organisation ...’ (paragraph 27). In paragraph 25 he reiterates the theme that while the union had relied on the Commission for ‘many years’ to ‘deliver wage justice for its members, and there can be no doubt that it has been successful in that regard, on this occasion the Federation has decided it does not like the outcome’ and,
significantly, concedes that the union’s pressure had forced the government to unilaterally decide to postpone the implementation of the arbitrated award. He comments that ‘How the Department believes it is open to simply ignore the terms of the Award it so strongly contended for is not apparent ...’ (Director General, NSW Department of Education and Training v NSW Teachers Federation [2010] NSWIRComm 10).

Turning now to the judgements of Justice Staff and Justice Marks; both set out the relevant sections of the Act dealing with contravention of orders of the IRC; review the reasoning of the Commission in making the dispute orders which were subject to the breach; explain the circumstances of the breaches as they are submitted by the parties and, in justifying their decision to fine the Federation, set out the principles from the case law which relate to the imposition of penalties. Without reviewing both judgements in detail, it is important to note that Justice Staff, in quite dispassionate language concludes that the NSWTF had engaged in ‘serious industrial misconduct’ which ‘cannot be left unsanctioned’ (paragraph 38) and which ‘wilfully disobeyed the dispute order made by Boland J.’ (paragraph 51) but equally notes; that the dispute had been settled and suggests that the relatively short duration of the strike (24 hours) meant disruption to the students was minor and was offset by the employees loss of wages. As to the contrition displayed by the Federation – an elemental factor in the assessment of the penalty – the judgement notes that while the federation had ‘not sought to mitigate the breach by an apology or statement of regret’ the Court accepted the union’s admission of its contravention of the dispute order (paragraph 53) (Director General, NSW Department of Education and Training v NSW Teachers Federation [2010] NSWIRComm 44).

The judgement of Justice Marks is less restrained; far more polemical. First, the judgement emphasises the role of the IRC in the statute-based system of dispute resolution and the ‘empowerment of a third party umpire to make binding orders on parties which can be enforced through the mechanism of the State’ (paragraph 14). Second, the judgement alludes to the ‘civilised’ virtues of the system and the potential of no less than “an outbreak of ‘anarchy’ should the NSWTF not comply with an order of the IRC. The judgement states:

The existence of a system such as that established by the Industrial Relations Act, 1996 reflects the sophisticated and civilised approach to dealing with industrial disputation, including differences of opinion which do not necessarily manifest themselves in any industrial action. In any sophisticated and civilised regime that regulates the manner in which persons, and entities that represent them, conduct their affairs, it is necessary to provide an overarching structure to ensure that the regime works in practice. Without such an overarching structure, there would be no means of compelling obedience to authority and this would lead to anarchy (paragraph 15) (Director General, NSW Department of Education and Training v NSW Teachers Federation [2010] NSWIRComm 77).

His Honour’s metaphorical ‘finger waving’ at the union over its perceived unwillingness to comply with the authority of the IRC – a force of law which ‘reflects the will of the legislature’ (paragraph 24) – permeates the judgement. For example, it states that: teachers should understand ‘the need for hierarchical structure of authority’ (paragraph 15); that ‘this type of conduct if committed by a student at a TAFE college would not and could not be tolerated’ (paragraph 17); denies the union’s contention that the stoppage would have had a marginal impact by claiming that ‘I am sure that teachers and students alike would be surprised to learn that there was so much “fat” in TAFE curricula that would easily accommodate the making up of three hours lost time’ (paragraph 19) and ‘given the manner
in which the respondent went about organising the stop work meeting in flagrant breach of the dispute order, this Court can have no confidence that the respondent will not breach any further order if it determines it should act in that way’ (paragraph 27). Also the Court rejected as irrelevant submissions that it should take into account that the dispute had been resolved (paragraph 24) and that while the Federation had entered a plea of guilty the judgement bristles with annoyance over the union’s failure to apologise:

I should state at the outset ... that at no time during the course of the proceedings did the respondent give any hint of apology for its conduct nor did it give any indication of any feelings of remorse or contrition for that conduct. To the contrary, the respondent appeared to be submitting that it was entitled to contravene the dispute order because of the nature of the underlying dispute (paragraph 29).

Conclusion

Courts make decisions based on the submissions and evidence. In some instances the parties are required to make an application to a Court to ratify an agreement in settlement of their claims; a process which still entails the court to make a determination as to the appropriateness of the proposed agreement. In all the cases outlined in this paper the unions admitted to breaches over industrial action which was in contravention either of a statute or an order of an industrial tribunal. In assessing the penalty agreed by the parties or the determination of the penalty for the breaches of the relevant law, both the Federal and NSW Courts applied basically the same principles. These went to, for example, the degree of contrition shown by the offender, the economic affect of the action and the need for deterrence.

The juxtaposition of the cases outlined in this paper show a markedly different approach in the decisions of the Federal Court and the NSW Industrial Court to the Realpolitik of industrial relations. Putting aside that the Federal Court cases required an assessment of the parties’ proposed settlement, both judgements of the NSW Industrial Court (particularly Justice Marks’) are quite unlike those of the Federal Court in that they condemn the legitimacy of unions taking action in the pursuit of the collective interests of their members in a manner which is consistent with pluralist notions of society. Both NSW judges could have, for instance, relied on the Federal Court decisions to find that the Teachers’ Federation was acting according to its members’ interests and instructions and that, in reality, little of consequence occurred as a result of the industrial action. Indeed, in another case, Justice Boland reflected on the appropriateness of penalties against industrial action. In *Bluescope Steel (AIS) Pty Ltd v The Australian Workers’ Union, New South Wales (No 2) [2004] NSWIRComm 145* his Honour cited (at paragraph 18) part of the decision of Justice Finkelstein in *The Age Company Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2000] 103 IR 148*. In that case Justice Finkelstein was required to assess the penalty for a contravention of section 170NC of the *Workplace Relations Act*. The penalties were identical to those prescribed by the NSW *Industrial Relations Act 1996*. Justice Finkelstein commented that ‘in part, the low penalty is a reflection of the fact that it is often only by resort by a union or its members to industrial action, whether lawful or unlawful, that there are improvements in terms and conditions of employment’ (emphasis added). The citation of this case seems to imply that Justice Boland appears to understand that unions in the pursuit of better conditions may be justified in taking potentially unlawful industrial action.
The decisions of the Federal Court discussed in this paper appear to accord with Creighton and Stewart’s (1994, p. 259) contention that courts and tribunals need to recognise and respect the agency of the industrial relations actors. Alternatively, the judgments of the Industrial Court against the Teachers’ Federation suggest an ‘excessive and insensitive use of enforcement procedures’ which ‘may well be counterproductive both in terms of those who seek to use them and in terms of protecting the integrity of the system of which they are part’.

References


1 This paper has been peer reviewed by two anonymous referees