Chapter Six:
Judicial Intervention: The Old Province for Law and Order

Des Moore[1]

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw
And I, my Lords, embody the Law.[2]

Introduction

One cannot help thinking that Justice Higgins must have taken seriously the dictum in *Iolanthe* that "the law is the true embodiment of everything that's excellent, it has no kind of fault or flaw". He certainly echoed Gilbert's Lord High Chancellor's claim to be the embodiment of the law when he made his romantic assertion in *A New Province for Law and Order*[3] that "there should be no more necessity for strikes and stoppages" because:

> "… the process of conciliation with arbitration in the background is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interests of the public".

Of course, this perceived rationale for compulsory conciliation and arbitration has also been promulgated by many others since Higgins, such as former long serving industrial relations Deputy President and economics Professor, Joe Isaac. In 1987 he wrote that:

> "The Great Strikes [of the 1890s] … and the perception and perseverance of a handful of men – liberal-minded and labour-minded – [were] the main active joint agents in the establishment of arbitration ... The Great Strikes changed the climate of opinion. Although the strikes were confined to a small number of industries, they were in economically strategic industries and the strikes lasted a long time. This was unprecedented".[4]

The inclusion in the Constitution of a dispute settling power was certainly very much a response to a period of extended industrial conflict in the 1890s, and the recession that effectively continued through most of that decade. But for those circumstances s.51 (xxxv) might not have scraped the majority of three votes (including two surprise "conservative" supporters) it received at the Melbourne session of the Convention in 1898.[5]

It is pertinent that when, in 1903, liberal Alfred Deakin was debating the establishment of the Conciliation and Arbitration Court, he affirmed that the "object of this measure is to prevent strikes", and even he rejected any idea that legislation should attempt to regulate industrial affairs generally, because Parliament:

> "…. would be incompetent to do so, because of the impossibility of drafting provisions, however well devised, so that they would meet all the contingencies, changes, and difficulties of different industries, which are subject in themselves to continuous alteration".[6]

Indeed, one would be hard put to explain to a visitor from Mars how it has come about that the Commonwealth developed a quasi-judicial system that has intervened comprehensively in employer-employee relations solely on the basis of a specific constitutional power limited to the prevention and settlement of interstate industrial disputes. It is also hard to reconcile the palpable failure of the regulatory institutional arrangements with their continued existence. *The Old Province for Law and Order* must surely cease to be part of the legal system before its centenary in three years time.

My proposition is that various participants in the legal system effectively created the industrial arrangements because of their perception that social interventionism was needed to offset the alleged failure of the labour market to produce "fair" outcomes, and because they saw a role for themselves. Mr Justice Higgins' denigration of bargaining between employers and employees, what he scornfully described as the "higgling of the market place", provided the superficial rationale for wide-ranging judicial and quasi-judicial action. This kind of thinking encouraged self-elected legal politicians to devise a comprehensive, general Commonwealth power to regulate employer-employee relations even though the constitutional base was clearly not intended to provide that power. Moreover, such power-hungry gentlemen persisted with their interventionism despite the fact that Australia continued until fairly recently to have a high rate of industrial disputation under the system, including during the period to 1930 when strikes and lockouts were proscribed, and then during the 1930s recession itself.

The "real" courts approved the interventionism when they allowed a case-hungry Court to accept the unions' clever technique of "creating" an interstate dispute and then submitting it for settlement. The dubious legitimacy of this so-called paper disputes mechanism was not settled by the High Court until the 1914 *Builders Labourers Case,*[7] and when as recently as 1997 it came before that Court,[8] Justice Kirby's separate judgment endorsed such a strategy on the theory that it is "now so deeply entrenched in the long-standing authority of this Court and in Australia's industrial practice that (it) should not be disturbed"!

The Industrial Relations Commission (IRC) (as it now is) has also been allowed to interpret widely the power for preventing and settling industrial disputes. This has extended to the imposition of a broad range of employment conditions, including the fixing of wage levels, on the ground that it would help settle disputes. Even today the Commission presides over twenty "allowable matters" in wage awards. And, according to one experienced authority, the IRC even has a strategy designed to avoid legal challenge through the making of "recommendations" rather than "orders", which are subject to challenge. Unsurprisingly, unions often (mis)use these recommendations to give the impression to members and the media that they are enforceable decisions.

Overall, it is difficult not to characterise the emergence and continuation of the Commonwealth industrial relations system as a prime example of what economists call "capture", that is, an effective takeover by those who perceived social interventionism as a source of power and employment for themselves.

Justice Higgins was a prime captor through his promulgation of the unemployment-producing basic wage in the 1907 *Harvester Case* and provides a classic example of the misguided social interventionism pursued by the legal politicians. Although his superficially compassionate concept of a "living wage" did not have immediate application, it was gradually taken up by State wages authorities and had become widespread by around 1920. Analysis by economic historian Dr Colin Forster suggests that the resultant increase of about 20 per cent in the mandated wage rate at the bottom end of the labour market was a primary cause of the substantial increase in unemployment in the 1920s, particularly amongst the unskilled.[9] It is one of the quirks of history that a decision that helped worsen the situation of the poorest classes continues to be hailed widely as a virtuous one.

My analysis of the history of interventionism in industrial relations matters suggests that the record of the IRC is an extremely poor one when viewed from a broad economic and social perspective.[10] It not only fulfilled the prediction of Sir George Reid at the 1898 Convention[11] that s.51 (xxxv) would encourage the spread of disputes, but its decisions have almost certainly also had an adverse influence on employment and unemployment; and, given the widening in the distribution of earnings within the labour market, they have failed even to deliver the much-touted comparative wage justice. Yet, with its half-sister at the Federal Court, the IRC continues to interpret legislation governing employer-employee relations in a way that makes it much more difficult and more costly for employers to enter into employer-employee relationships, a situation which reduces employment opportunities, particularly at the bottom rung of the employment ladder.

Policies devised within legal institutions influence more than the economic outcome of market place higgling and, in Australia's case, the policies reflected in decisions on employer-employee relations have had a wide-ranging adverse impact on social structures and attitudes. Those familiar with the papers presented to HR Nicholls Society[12] conferences will be aware of the corporatism, anti-individualism and misconceived attempts at egalitarianism that have been inherent in those decisions, reflected in particular in the favourable treatment of unions and the infamous "industrial relations club" label. The gross inequity of many IRC decisions in preventing people from accepting jobs on non-union terms is also readily apparent but has received little attention.

It may be argued that, if the industrial relations system has had such adverse economic and social effects, it was up to the political arm to correct the situation, and that no blame for the poor outcomes should rest on the shoulders of the legal arm. It is certainly relevant that the promulgation by the likes of Justice Higgins of the case for social interventionism by the legal system did permeate deeply into the thinking of the political and other arms of society.

However, in the last twenty years the greater exposure to international competitive forces has led to increasing recognition and not inconsiderable steps, on both sides of the political fence, to limit the potential for adverse economic effects from regulatory decisions on employer-employee relations and to create a more flexible labour market. The need to move away from the centralized award system and allow enterprise bargaining was recognized by Labor in the *Industrial Relations Acts* of 1988 and 1992, albeit in a limited form and offset to some extent by the introduction in 1993 of federal unfair dismissal laws. The setting in 1996 by the Coalition of a low inflation target under a largely independent Reserve Bank has been a major and important shift in the balance of institutional power that now means, in effect, that monetary rather than centralized wages decisions are the prime determinant of inflation. The present Government, led in this area by former Workplace Relations Minister Peter Reith, has also made valiant attempts and some progress in continuing the reduction in the scope for interventionism.

Such action has not been confined to Australia and, for some time now, international economic institutions, notably the IMF and the OECD, have not only endorsed our changes but have recommended they be taken further. The latest OECD survey, for example, politely notes that Australia has moved "towards a largely decentralized and more flexible industrial relations system", but suggests there is a "need for further improvement in the areas of wage-bargaining and employment conditions".[13]

But, while the system that Australia's current generation has inherited still leaves much for the political arm to do to move us from having probably the most regulated set of employer-employee relations amongst developed countries, it would be difficult to detect any significant response from the legal arm to the obvious change in direction. Quite apart therefore from whether, from a legal perspective, the extent of interventionism was justified originally and for the first 80 odd years, there is the more important question of why the legal arm has not responded to the change of direction and the development of a more competitive economic environment (but where social security has been increased to help those unable to obtain employment). This is not to deny that parliamentary authority has existed for the regulation of employer-employee relations, and continues to exist: the question is whether the interpretation of the legislation by the relevant legal authorities has been appropriate, and why the legal arm has apparently continued as though, both economically and socially, unchanged interventionism has been needed.

A legal perspective on interventionism

Of course, the making of law by judges has been continuing for so long that AP Herbert was even prompted to quip (in 1935) that "the Common Law of England has been laboriously built about a mythical figure – the figure of *The Reasonable Man*".[14] But statute law was much more limited then, and we now have reams of statutes and an Acts Interpretation Act requiring that interpretations should promote the purpose or object underlying statutes. So, in changed modern circumstances, what guidance can be obtained from the present Chief Justice of the High Court, Justice Murray Gleeson?

In an article entitled *Individualised Justice – The Holy Grail,*[15] which he wrote in 1995 when Chief Justice of NSW, His Honour noted the growing trend for judicial decisions to be based on individualised or subjective assessments of a case rather than the straight application of general rules. Accompanying this has been a greatly increased attention to detail and additional pressure on the court system to the point where:

> "One cannot help feeling, on occasion, that the kind of truth for which the courts sometimes search is nonexistent, or at least undiscoverable".

The Chief Justice instanced many departures from general rules, and attributed the increased subjectivisation largely to a mysterious beast called "the consequences of what society has come to demand" of the legal system, so that it reflects "the spirit of the times" that sees justice as "much less likely to be met by formal and inflexible rules".

Thus, nowadays a killer who (successfully) uses a defence of diminished responsibility or provocation can escape with a conviction for manslaughter rather than murder. Those who imagine they have a contract may have their actions judged to be unconscionable or unfair or inequitable, thereby preventing the enforcement of an agreement. Indeed, Justice Gleeson even stated that:

> "… we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract".

In tort, there is now a situation where:

> "… the concept of reasonableness is of key importance and the duty owed by one person to another depends so much on the facts of the case…"

and judges and legal commentators have even "noted the tendency of the law of tort to supplant contract". Further, the idea that hearsay is not admissible in evidence is apparently old fashioned if it can be regarded as reliable or even needed.

Notwithstanding these departures from general rules, His Honour was clearly concerned that:

> "There is a balance to be maintained and it is important to note the consequences, for the law and the justice system, of this seemingly irreversible move towards subjectivisation of issues and, also, some constraints to which the process remains subject".

He emphasised the need for consistency so that:

> "… the outcome of cases (should) depend as little as humanly possible upon the identity of the judges who decide them".

Encouragingly, he also saw an "abiding need for predictability and certainty", because it particularly affects the "willingness of people to engage in commercial transactions". And, although not ruling out judicial lawmaking (it must be incremental and involve the development of established principle), he saw a need to avoid judges acting "as *ad hoc* legislators who, by decree, determine an appropriate outcome on a case-by-case basis".

Finally, he suggested a need to recognize that:

> "… there is no general principle of fairness which will always yield a result if only the judge can manage to get close enough to the facts of the individual case…..The law responds to many impulses in addition to the dictates of apparent fairness in individual cases, and these need to be given full weight in any rational development of the law".

It may not be going too far to suggest that AIRC President, Mr Justice Guidice, has effectively acknowledged that the courts and tribunals dealing with the employment relationship are doing exactly what the Chief Justice said they should not be doing! Justice Guidice recently complained about the potential for unfairness that arises because:

> "The uncertainty generated by the mixture of laws which impact on employment relationships in this country constitutes an erosion of freedom and impacts on the quality of our society".

While he disclaimed any criticism of "the basis or continuing need for the various laws" applying to that relationship, he observed that "the very significant increase in the number of judicial, quasi-judicial and administrative bodies to which resort may be had in relation to the various statutory rights and rights of action" meant that "the outcome of particular cases is of very little predictive value in similar cases". And, echoing the Chief Justice's warnings:

> "What is of real concern… is the potential, some may say the fact, for discretionary decisions to be made by individual judges or arbitrators which have no consistent theoretical basis either because they are made in different statutory contexts or because the discretion afforded by the law is too wide".[16]

Since his appointment as Chief Justice of the High Court, Justice Gleeson has had more to say on judicial activism. In an important speech on 2 July, 2000[17] he recognized that many laws gave discretion and that judges have "the capacity, and sometimes the obligation, to exercise qualities of judgment, compassion, human understanding and fairness". At the same time:

> "… in the administration of any law there comes a point beyond which discretion cannot travel. At this point, if a judge is unable in good conscience to implement the law, he or she may resign. There may be no other course properly available".

It would be idle speculation to suggest that these remarks by the Chief Justice may have been prompted by the fact that the High Court had previously taken Federal Court judges to task on several occasions for their interventionist decisions. In a paper to the eleventh conference of this Society in 1999, Dr John Forbes suggested that the over-ruling by the High Court of Federal Court decisions in immigration cases was basically on the ground that those decisions were an unjustifiable usurpation of the functions of other branches of government.[18] To an outsider, the handling by all the courts of immigration claims seems an extraordinary example of excessive interventionism.

In his 2000 Boyer Lectures the Chief Justice also noted "important practical limitations on the capacity of judges to make law", and he acknowledged that:

> "If the Constitution is silent on human rights and freedoms, then it is up to Parliament from time to time to deal with that subject – or not to deal with it – as it thinks fit".

At the same time, he asserted that, once a human rights issue comes before the courts, the protection of the rights and freedoms of individuals and minority groups is "an essential part of the role of the courts". This led to the rather puzzling statement that:

> "One of the most important and difficult issues of current debate … [is the] … working out [of] the principles according to which the will of an elected Parliament that is responsive to popular opinion must bend to the law, as enforced by unelected and independent judges".[19]

Unfortunately, the Chief Justice did not elaborate on why the High Court has made significant subjective judgments in, for example, human rights and other areas. Yet, as Justice Meagher pointed out in January, 1998,[20] although:

> "… there are to be found in the Constitution very few express, or necessarily implied, civil rights…..the High Court has begun reading into the Constitution civil rights which are certainly not overtly mentioned there, nor which are necessarily implied there on any ordinary rules of construction, but which are 'implied' because the current judges of the High Court regard them as indispensable democratic rights".

Justice Meagher noted in particular the High Court's "discoveries" of a right to freedom of communication on matters relevant to political discussion,[21] a new right to equality of legislative and executive treatment, an implied right to a fair trial and a right in certain circumstances to be free of the laws of defamation. In a 1997 lecture Professor Greg Craven was similarly (and more extensively) as critical as Meagher J.[22]

Justice Meagher did not discuss the Court's highly controversial decisions in relation to Aboriginal issues, presumably because they do not read rights into the Constitution *per se*. These decisions clearly reflect emotional interventionism of the highest order. For example, in an article in July, 1993 responding to criticisms that the High Court had been trying to usurp the role of Parliament, a former Chief Justice of the High Court, Sir Anthony Mason, defended the *Mabo* decision on the simple basis that:

> "In some circumstances governments and legislatures prefer to leave the determination of a controversial question to the courts rather than leave the question to be decided by the political process".[23]

Again, in a further article in November, 1993 the Chief Justice even patronized critics of judicial activism as believers in "fairy tales", who are "entirely ignorant of the history of the common law".[24]

In a paper to the fourth conference of this Society in July, 1994, Dr John Forbes has some further analysis of the Lord-High-Chancellor-like behaviour of then Chief Justice Mason. In basing their decisions largely on their assessment of *past* injustice experienced by Aborigines, and their perception of what they judged to be morally appropriate for the nation, the majority judges in *Mabo* effectively adopted the role of an elected government.[25]

All this suggests that, while some judges have significant reservations and concerns about the process and implications of subjectivisation, it appears to have become quite widely accepted that a large section of the judiciary will, when given the opportunity and/or occasion to do so, adjust the balance of decision making to accord with what it perceives to be society's demands. While Chief Justice Gleeson's recent remarks provide some encouragement that there may be a move under way for the legal system to stop looking beyond statutes and their expressed objects, these remarks seem to have had limited effect – and in any case they paid no specific attention to the industrial relations area.

One assumes that Mr Justice Gleeson would feel bound by the 1914 *Builders Labourers Case* and, based on Justice Kirby's recent highly inaccurate description to the Australian Labour Law Association of the "successes" of the conciliation and arbitration arrangements (and his mistaken suggestion that resort to ordinary courts under the common law cannot take the place of the national tribunal system), the High Court already has two strong supporters of interventionism in this area.[26] On this basis, while one might agree with the High Court judge who is supposed to have quipped that the industrial judiciary has been providing "milk bar justice", that justice might nevertheless be said to be consistent with legal theory. It might also be seen as appropriately democratic and reasonable: after all, the judiciary should not be allowed to fall into disrepute by preserving out of date social standards!

But there is another side to the question of the serious underlying problems with judicial intervention in the contractual relationship between employers and employees. If jurisprudence says society's demands should be recognized, why hasn't the legal arm responded to the changing "spirit of the times" regarding reduced labour market regulation?

The legal arm should at least start looking behind the old beliefs and myths in industrial relations and ask itself whether they really require intervention in modern society. It should also acknowledge that interventionism by un-elected officials requires that account be taken of adverse implications, particularly the uncertainty and the adverse effects on employment, which have hitherto gone largely unrecognized.

The solution is surely not simply to rationalize industrial laws and the tribunals exercising jurisdiction, as suggested by Justice Guidice. Judges and commissioners need educating in the social and economic problems arising from industrial interventionism and, until they catch up with modern society, their capacity for exercising discretion needs to be reduced. In the US, the Law and Economics Center at George Mason University, Virginia has been running an economics education program for judges for about twenty years. We need something comparable.

The inequality of bargaining power argument

Such an education process would need to point out that the whole regulatory system is based on completely mistaken perceptions about the employment relationship. It is assumed that there is a major imbalance of bargaining power between employers and employees that would, if allowed free rein, operate against employees, and reduce the rewards they would otherwise obtain from their working relationship with employers. It is unsurprising perhaps that, while this misperception exists, the judiciary takes the view that subjective assessments are needed, in the interests of fairness, to correct the perceived imbalance.

At first glance, it does seem obvious that employers have an intrinsically much stronger position deriving from their greater wealth and their power to hire and fire, albeit much reduced. Yet this notion has been too facilely accepted, and little analysis appears to have been undertaken into whether it corresponds with reality. HR Nicholls Society members are well aware, for example, that sub-contractors who work on building sites, and who actively compete against other "subbies", earn an average annual wage of over $40,000 without any "protection" other than their own bargaining power and trade skills. They work, moreover, in an industry that is one of the most efficient in the world, that is virtually free of disputes between builders and sub-contractors, and that provides no evidence that its trades-people feel "exploited" by what is effectively a free market system.

What the judiciary do not appear to understand is that modern labour markets actually operate within a competitive environment. The demand for and supply of labour is determined in a context where over 1,000,000 businesses compete for the labour services of over 9,000,000 workers, a situation that can scarcely allow the exercise of monopsony power by employers except in certain limited situations. Of course, competition in the labour market is heavily constrained by regulation, but employers do compete between themselves within that context, and they compete for a labour supply that offers only a limited quantity of each of the various different kinds of labour. Indeed, there effectively exists not one single labour market but a whole series.

During a debate I had with former Deputy President of the AIRC, Professor Keith Hancock, at a meeting of the South Australian Economic Society on 30 May, 2000, Hancock conceded that not enough account had been taken of the competition constraint that employers face, but argued that "there remain instances where employers can exert significant bargaining power". He referred specifically to companies such as CRA (which had by then gone out of existence), BHP, Telstra, Patrick Stevedores and Qantas; i.e., he put forward the absurd proposition that these companies are not subject to competitive constraints in the labour market. Hancock also made the equally absurd assertion that "the notion of negotiation at the point of hiring is, in most instances, nonsense".

It is relevant that, in circumstances where the labour market operated in the 1990s under more competitive conditions, the share of national income going to labour remained stable and average real wages increased strongly. This outcome occurred, moreover, despite predictions that labour would experience adverse effects on both employment and real wages from the more competitive environment which businesses had to face from tariff reductions, competition policy and the like.

By contrast, while the considerably higher interventionism in employer-employee relations by government and arbitral and judicial authorities in the 1970s and 1980s led to an initial short, sharp increase in labour's share of national income in the mid 1970s, that was followed by a long, steady decline in that share in an environment where there was only a tiny annual growth in real wages and a relatively small growth in the rate of profit, not to mention higher unemployment. Further analysis of these comparative trends is contained in the Productivity Commission's excellent paper on *Distribution of the Economic Gains of the 1990s*.[27]

This marked contrast in the outcomes under widely different extents of interventionism clearly suggests that more intervention, allegedly on behalf of workers, does not increase the returns on their labour, and certainly does not improve business output and profits. It is not to say, of course, that the labour market operated satisfactorily in the 1990s. Judicial intervention continued apace and, as I have pointed out elsewhere,[28] the reduction in unemployment was due more to the large increase (from 15 to 22 per cent) in the proportion of the working age population on income support payments than to a more competitive labour market. The limited nature of the improvement in the rates of underlying unemployment and employment is being revealed in the current slow-down in economic activity.

Even so, the improvement in labour market performance under more competitive arrangements does provide an additional basis for challenging the inequality of bargaining power argument. And the likely increase in the unemployment rate in the short term can be used to reinforce arguments for reform. It is relevant that the "imbalance of power" arguments now used to legitimize arbitral or judicial intrusion into labour market arrangements have no constitutional or statutory authority. Nor for that matter does H B Higgins' view that labour disputes arose because of the market's incapacity to determine the "just" price for labour services, a mediaeval notion that has no rational basis. Higgins' belief that the "just" price had to be determined judicially, and that any deviation from such a price was an infraction of the natural order, raises a real question as to whether he should have been allowed to continue to hold judicial office.

Interpretation of employment contracts

The second main problem with judicial interventionism in the employment relationship relates to the incapacity of the judiciary to interpret employment contracts. An invaluable draft paper by economist Geoff Hogbin[29] summarising recent thinking by labour economists[30] on employment relationships, and its relevance in the Australian context, highlights the virtual impossibility for third parties to make informed and meaningful judgments on employment contracts, let alone rewrite them *ex post* to the betterment of the contracting parties.

The little recognized reality is that many elements of employment contracts take the form of expectations and understandings that are impossible (or at least prohibitively difficult and costly) to specify in explicit terms. These implied or *relational* terms are, moreover, as important to the satisfactory performance of a contract as the explicit or *formal* terms that are normally the subject of judicial attention. For example, an outside party cannot really observe and accurately assess performance in relation to the amount of physical and mental effort to be devoted to tasks, the required degree of alertness on the job, and the amount of on-the-job training to be provided and undertaken.

In fact, whether an employment contract operates satisfactorily for both employer and employee depends importantly on whether the self-enforcing and in-built incentives work out in practice. These incentives take the form of both "carrots" and "sticks". For example, an employee may be induced to make an extra effort by the promise of a career path (a carrot), or a stick involving a threat of incurring the costs of finding a new job in the event of being fired. Most employers are constrained from making excessive demands on employees by the risk of losing their investments in hiring and training if employees quit. Also, getting a reputation as a "bad employer" makes hiring competent workers more difficult and costly in the future. As performance in relation to such implied terms cannot be independently verified, employment contracts simply cannot be enforced *effectively* by a court. The already-quoted remarks by Alfred Deakin when debating the bill to establish the Conciliation and Arbitration Court are relevant.

The impossibility of fairly enforcing such implicit contractual terms was almost certainly recognized by courts when they allowed employment contracts under common law to evolve into at-will contracts. There is an analogy here with unfair dismissal cases, where courts concentrate on the more readily verifiable issue of fairness of procedures, rather than on the substance of alleged malfeasances. But this indicates an inability to address overall fairness in the employment relationship, as well as creating a situation that is inherently biased against the employer because of the procedural focus. The "at-will" contract in which the employee's right "to quit", at a moment's notice, was balanced by the employer's right "to fire" equally spontaneously, has been subverted through unfair dismissal provisions which, while on the face of them a burden on employers, in reality work against employees, and particularly on people who want to become employees. The costs of complying with these provisions are, in the end, born by employees, consumers, and especially the unemployed.

Earlier this year Rio Tinto Iron Ore Vice President, Sam Walsh, illustrated the difficulties a third party would have in interpreting the trade-offs involved when employers treat employees as individuals in order to maximise their potential to contribute not only to a company's performance but to their own well-being. It is particularly interesting, given that Rio has been a prime target for attack by the union movement for "exploitation" of employees, that Walsh emphasised that:

> "At the core of what we are talking about here is the alignment of employee goals, expectations and behaviours with the goals of the company and the expectations of management …"

and that he also noted, "We are proud of the fact that since 1993 we have not lost any time to industrial disputation".[31]

The inability of courts to effectively enforce employment contracts does not, unfortunately, deter third party adjudication under statutory laws and regulations. But that adjudication tends systematically to undermine the self-enforcing properties of employment contracts, thereby eroding incentives to contribute productive effort to jobs. For example, as adjudicators are simply unable to verify performance with respect to relational terms, and as institutional tradition leads them to favour employees, the existence of unfair dismissal laws has the effect of reducing the penalties employees would normally expect to experience for "shirking". (Shirking is used here as a general term to cover slackness and negligence in all dimensions of effort.) This can be expected to raise the general level of shirking in the workforce, partly because those predisposed to shirk expect to "get away" with more of it, and partly because the morale of more diligent workers tends to be sapped. This loss of morale can be catastrophic in situations such as nursing homes, where the nature of the job is morale-sapping to begin with.

But higher levels of shirking have implications for fairness as well as efficiency. Thus, although *prima facie* it may appear that the cost of a decision to reinstate or compensate a fired shirker falls on the employer, in practice it may well be borne by workers generally. Since in the longer term wages must reflect the net value of workers' contribution to production, employers as a group respond to reductions in productivity and/or to required additional supervision costs by providing lower wages than otherwise for staff generally. The result is that the costs of increased shirking resulting from unfair dismissal laws tend to be borne ultimately by more diligent employees.[32]

Another fairness problem with unfair dismissal laws is their potential adverse effects on matching between employees and jobs. Such effects will occur when workers capable of performing more satisfactorily are excluded because of regulatory impediments to firing. This will likely have negative effects on the welfare of workers capable of forming superior job matches. However, as it is impossible to identify those affected, those dispensing "justice" simply cannot take these negative effects into account.

Equally, the judiciary cannot take adequate account of the likely adverse effect of employment protection regulations on marginal workers. When tribunals are biased against them, employers are much less likely to employ such workers because they fear that firing will be costly if the job-match proves to be unsatisfactory. The Institute of Chartered Accountants spokesman for small business claimed on 20 March, for example, that those he represents are "seething" over the unfair dismissals legislation and that "everyone of them has a horror story".[33] Although such comments may have partly reflected the federal Government's then announced intention to have another try in the Senate to reduce unfair dismissals protection, it was undoubtedly also inspired by the deterrent effects that protection has on employment. Those deterrent effects have recently become so extensive that the statistics on unfair dismissal cases provide no indication of them, because employers frequently make out-of-court settlements even where there is no substantive case rather than incur the cost of allowing the matter to go before a tribunal.

It is ironic that the virtually costless access to tribunals for unfair dismissal claimants, and the consequent encouragement to such claims, became built into legislation after Clyde Cameron's attempt in the mid 1970s to make access easier for claimants against union misbehaviour. Amendments to unfair dismissal laws passed earlier this month attempt to reduce the encouragement in various ways, such as by allowing expanded cost orders to be made against parties who act unreasonably in pursuing, managing or defending claims and by providing penalties against lawyers and advisers who encourage claims where there is no reasonable prospect of success.[34]

It is a consequence of human nature that some employers are heartless and unscrupulous and make unreasonable demands on employees. However, as University of Chicago Law and Economics Professor, Richard Epstein, has pointed out, regulations aimed at achieving perfect justice are frequently counterproductive because they create unintended injustices that outweigh any benefits they might confer. The best protection against exploitation for workers is a freely functioning labour market that allows employees to change jobs if they believe their current employer is treating them unfairly. It is also the most effective way of disciplining employers.

I return to Chief Justice Gleeson's comment that:

> "The justice system is rarely equipped to undertake an exhaustive investigation of the merits of a particular dispute, and only by a fairly strict limitation of issues can courts hope to achieve even an approximate knowledge of the facts of a case".

Although this admission was made in considering the law generally, it is clearly very relevant to cases involving the employment relationship. A tribunal that cannot be apprised of all the facts, and cannot comprehend the significance of important aspects of a relationship, is necessarily unable to make a meaningful assessment of that relationship.

It is particularly worrying that the overwhelming focus of tribunals is on the perceived interests of the great majority of workers with secure jobs (insiders), to the neglect of the adverse effects on the minority of marginal workers and the unemployed. While growing numbers of students of labour markets are now prepared to concede such adverse effects, the judiciary seems yet to reach even the student stage. In short, the intrinsically complex nature of the employment contract provides a powerful argument against judicial intervention.

Recent improvements

The growing concern about excessive interventionism that developed in 1998-99 became a matter of public discussion last year and was followed by some improvement within the legal arm.

Some public criticism

The main public commentary has been:

(i) An editorial in *The Australian Financial Review* of 7 February, 2000 featured worrying aspects of Justice Gray's extraordinary injunction, which prevented BHP Iron Ore pursuing individual agreements because they could involve discrimination against union members. The editorial highlighted:
- The growing tendency for the Federal Court to interpret the *Workplace Relations Act* in ways that help unions pursue their agendas;
- The difficulty this created for even large employers to effect changes needed to improve efficiency, and the likely adverse employment effects;
- The establishment of a panel of specialist Melbourne-based industrial relations judges, nearly all former union barristers, and the need to change arrangements that appeared to continue the industrial relations club.

(ii) Two days later *The Age* published an article by its State political reporter entitled *IR Chaos*, drawing attention to the outbreak of major disputes in the construction, airlines, automotive and manufacturing industries. The article saw this as clearly the start of a determined attempt by unions to undermine the trend to enterprise and individual bargaining and to force a return to industry-wide bargaining.[35]

(iii) That was followed by a paper presented to the Leo Cussen Institute on 29 March, 2000 by Richard Dalton of Freehills arguing that there had developed "aggressive industrial action by unions and a lack of rigour by the Federal Court (and to a lesser extent the AIRC) in applying the relevant compliance provisions under the [*Workplace Relations*] *Act*". Dalton pointed out that certain provisions in the Act designed to limit industrial action had been rendered ineffective because:

- "At times" the AIRC was reluctant to issue orders under Section 127 to stop industrial action, often preferring to grant union applications for adjournments and long conciliation sessions, with employers thus coming under pressure to compromise to obtain a return to work;
- Even when Section 127 orders were issued, the Federal Court showed "a distinct reluctance" to issue an injunction to enforce them, adopting instead an approach that was overly technical and would drag out proceedings. The Court was also "giving primary attention to the unions' and employees' bargaining positions";
- Attempts by employers to obtain protection against industrial action by having recourse to the Victorian Supreme Court were effectively prevented by the Federal Court, which appeared determined to establish a monopoly position as the judicial decision maker in industrial matters.

(iv) The next stage in highlighting concerns about judicial intervention was the paper presented by Melbourne barrister Stuart Wood to the HR Nicholls Society's May, 2000 conference.[36] Wood gave many examples of tribunal decisions on industrial issues and highlighted the fact that many unions simply treated Section 127 orders as having no effect. He pointed out, indeed, that one prominent union official, Craig Johnston, had boasted publicly that: "I've got hundreds of them and I just throw them in the bin".

This paper also noted that, as a consequence of the Federal Court's attitude to Section 127 orders, employers had turned to common law remedies in the Supreme Court. The thrust of Wood's paper was that the Federal Court had attempted to prevent this from happening by granting anti-suit injunctions against the Supreme Court and, for the first time ever, was hearing appeals from the Supreme Court in industrial matters.

Wood also noted that ten of the Federal Court judges, who had been appointed by the previous Labor government and who had been part of the previous Industrial Relations Court, were continuing to operate a *de facto* Industrial Relations Court through the administrative mechanism of the Federal Court industrial docket system. Although he also observed that four "commercial" judges had started to sit on industrial cases "in the last few months", his presentation clearly indicated that unions were continuing to receive preference over employers and the Federal Court was attempting to set itself up as an intermediate appeal court between the Supreme and High Courts in industrial matters.

(v) Another significant development indicating concerns about the Federal Court was an important article on 12 June, 2000 by *The Age*'s industrial correspondent, Paul Robinson.[37] While this article contained some typical *Age*-type misrepresentations and one-sidedness, it made several important revelations, *viz*:

- At the judges' biannual conference in April "some interstate judges expressed concern about the damaging publicity judges in Melbourne were receiving, which they said reflected on the Court as a whole".
- The Chief Justice of the Federal Court had allocated five extra judges – Merkel, Goldberg, Kenny, Finkelstein and Weinberg to the industrial panel. While these extra judges were said to be "assisting" Justices North, Marshall and Ryan to cope with a "rapidly increasing industrial workload", the reality appears to be that those three judges, along with Justice Gray, are largely undertaking other duties. Justice North, for example, appears mainly to be sitting on immigration cases. (There has been no change, however, in the system by which Federal Court cases are assigned to a judge's docket and that judge stays with the case. By contrast, in the Supreme Court a case is assigned to a subject-based list rather than a judge's list.)

- The leading union lawyer, Josh Bornstein, was quoted as accusing certain identities of conducting a campaign against the Federal Court, which is simply "applying the law as it stands". According to Bornstein, this campaign came from:

  > "… a very small but vocal group associated with the HR Nicholls Society. A lot of federal government policy in industrial relations is driven by the HR Nicholls Society and the Institute for Private Enterprise, which is the same as a Labor government taking advice on IR policy from Spartacists!".

- The article attempted to portray as responsible the fining in May by Justice Merkel of union officials Mighell and Johnston for contempt of court in relation to the holding of statewide stop work meetings late in 1999.[38] However, the fine of $40,000 was not only minuscule in relation to the deterrent effects on employment and other damage to business that would have been wrought by these two officials, but was made payable by the garnisheeing of their wages; i.e., the penalty could be met by payment over a period. Importantly, the costs order against the employer considerably outweighed the penalty imposed upon the union.

(v) On 27 July, 2001 Stuart Wood pointed out in an article in *The Australian Financial Review*[39] that, in strongly supporting the existing system in a speech before the Labour Law Association, Justice Kirby had so clearly entered the political arena "that it's hard to differentiate Kirby's speech from Labor policy".

It is doubtless possible to argue that the action taken by the tribunals, as described by Mr Dalton, was consistent with one interpretation of the *Workplace Relations Act* 1996. For their part, Federal Court judges would presumably say that the Act has impelled them to be more interventionist because it made provision for injunctions to be issued under Section 127 and for breaches of the freedom of association requirements. However, the question at issue is how the courts and tribunals use their legislative discretion. For example, it was clearly the intent of the Act to prevent arbitration on bargaining issues during bargaining periods, and to strengthen the compliance provisions to deal with unlawful industrial action. Indeed, in his Second Reading Speech on 23 May, 1996, Minister Reith stated that the intent of the compliance provisions was to give "parties suffering from illegal industrial action….access to effective legal redress, including injunctions and/or damages. Industrial action that continues in breach of such directions from the court will be in contempt of court". It was clear that many judges of the Federal Court interpreted Section 127 in accordance with personal whim rather than give effect to parliamentary intent.

Also, the Federal Court granted anti-suit injunctions, and heard appeals from the Supreme Court on industrial issues, in circumstances in which Parliament had made it clear that the traditional Supreme Court common law remedies were available, and the traditional appeal routes had not changed. This can be seen as part of the Court's strategy not only to favour unions directly but also to establish itself as a major player in industrial issues, and thus favour unions on appeals instead of leaving it to the Supreme Court to hear appeals. To the extent it succeeds, the composition of the Court makes it almost inevitable that it will be interventionist. It would also by-pass the new Courts of Appeal established for Supreme Courts in Victoria and NSW.

How much has interventionism reduced?

The public commentary and the (not unconnected) decision to change the composition of the Federal Court have led to some reduction over the past year or so in judicial intervention, and some attempt to deal more effectively with aggressive union behaviour:

- Unions have reduced their previous attempts to have cases held in the IR capital of Australia. This implies a sidelining of the coterie of former union barristers within the Federal Court that was grossly sympathetic to union positions.

- As the Federal Court has stopped granting injunctions against Supreme Court actions, this suggests that unions have accepted that they have reduced chances of getting anti-suit injunctions. However, this came about only after the public complaints led the Federal Court to introduce a requirement that three judges have to grant a stay of a Supreme Court decision. Moreover, the Supreme Court's bad experience with anti-suit injunctions issued by the Federal Court has made it reluctant to issue orders against strikes and has therefore made it less worth employers' while pursuing strike-restraining applications in that Court. At the same time, by focusing on applications to stop unlawful and violent picketing, employers have reduced the chance of unions being successful with an anti-suit injunction.
- There has also been a significant drop in Section 127 actions asking the Commission to issue an order to stop or prevent threatened industrial action. It is not clear why this has occurred. The reduction in such action may reflect greater union concern that a follow-up Federal Court injunction may be issued requiring observance of a penalty provision. It may also reflect a strategy of presenting a "softer" union image in the lead up to the federal election in the hope that a Labor government will implement re-regulatory measures.
- Despite its timidity, Justice Merkel's $40,000 fine of Mighell and Johnston can at least be seen as an attempt by the Federal Court to discipline militant unions by giving effect to a Section 127 order. (Note, however, that although the dispute was in Victoria and involved Victorian manufacturing unions, the Australian Industry Group demonstrated its confidence in Victorian judges by deciding to seek the Section 127 order in Sydney, where it was granted by Justice Whitlam.)
- The Federal Court now appears somewhat less sympathetic to union applications to prevent the introduction of workplace changes by management. In December it gave the Employment Advocate favourable decisions in two separate cases commenced in March, 1999 and involving threats of industrial action by Queensland unions with the object of preventing the employment of a non-unionist. However, no decision was made on penalties and the CFMEU has appealed against the decision.
- In December the Burnie Port Corporation succeeded in an appeal to the full bench of the Federal Court against a decision by Justice Ryan that the Corporation had contravened the freedom of association provisions by refusing to employ a prospective employee because he would not accept employment under the individual agreements policy that the corporation was pursuing. The Court took the view that the *Workplace Relations Act* 1996 did not prevent an employer from offering one form of employment rather than another.
- In an address to the Industrial Relations Society of New South Wales on 20 March, 2001, the Employment Advocate, Jonathan Hamberger, indicated that, of the nine cases that have gone to the Federal Court (four against employers, four against unions and one against both), only one has been lost by the Advocate, and that is currently the subject of appeal. This part of the legal arm has dealt with over 1,000 freedom of association complaints, with complaints in relation to the right *not* to be in a union outnumbering those in relation to the right to be in a union by about three to one. The great majority of such complaints have been satisfactorily resolved without taking legal action. However, as recently as 24 August, the Federal Court was still intervening in these matters by excluding evidence showing CFMEU intimidation and thuggery.[40]

While the foregoing suggests some improvement in the legal arm's handling of the situation, there remains substantial evidence of excessive interventionism, an inadequate response to aggressive union action and an unsympathetic attitude towards structural reform by business. Thus:

(i) Unions and unionists have continued to be allowed to get away with illegal behaviour and obstruction of needed productivity improvements:

- In Queensland, for example, coal-mining unions successfully flouted court orders earlier this year when strong action was taken against BHP's attempts to improve the efficiency of its coal operations in that State. Such union action may have reflected a fear that BHP would attempt to move to individual agreements in coal as well as iron ore rather than the enterprise agreement being debated. A Supreme Court order for unions to maintain order on picket lines and on coal trains was openly defied by individuals whose reckless behaviour prevented trains from running to the port. An application by BHP to have the protected bargaining period terminated was rejected by the AIRC on the basis that the protected strike action had not been sufficient to threaten the national interest. Finally, after four months of mediation and negotiation under the Commission's direction, it would appear that an agreement will be concluded this month. While reforms have improved productivity by up to 20 per cent, with much of this resulting from reductions in employees (BHP's Queensland workforce has reduced from 4,700 to 2,600 over four years), and while this latest agreement will introduce further reforms, the process has incurred considerable unnecessary costs, including much management time.
- Although in March the Federal Court fined the CFMEU $200,000 for contempt, one can only doubt the effectiveness of fines of this size for such a powerful union, whose officials are prepared to engage in what Justice Kiefel described as "calculated, devious, dishonest and cynical" actions. The fine culminated from an illegal stoppage at five of BHP's Illawarra coal mines in February, 2000 as part of a national strike against BHP's price settlement with Japanese steel mills. When the CFMEU in NSW then extended the strike at the Illawarra mines to 48 hours, BHP obtained a return to work order from the AIRC but employees failed to return, pleading they had not received adequate notice. This was disproved in court and led to the subsequent Federal Court fine. The CFMEU action also needs to be seen in the light of its earlier national coal strike against BHP's alleged failure to achieve coal price increases, which led to the CFMEU's infamous charge of Parliament House, Canberra.
- In industrial action last December, the AMWU led a violent attack against *The Age* that included breaking the paper on the printing presses, pressing emergency buttons to stop the presses, and completely disregarding an injunction issued by Justice Marshall at 12.30 am (it might be noted that *The Age* was dissuaded by the Federal Court from going to the Supreme Court). In the ensuing case,[41] the unions made no attempt to dispute the facts and Justice Finkelstein imposed penalties of $8,000 on one union and $6,000 on another. However, he refused to grant an injunction that would provide the basis for a future contempt action, on the ground that "there is no evidence [of]… a real risk of unlawful industrial action" – but he gave no reasons for that view. Moreover, although he acknowledged the "considerable loss for many people" resulting from the action, his penalties were less than the pathetic maximum of $10,000 (which has apparently never been "awarded"!).
- Last August the CFMEU trashed the National Gallery site in a bout of deliberate destructiveness which was vividly described by Justice Goldberg in the case against the union by Abel Constructions. A Supreme Court injunction has been issued restricting union entry, but the Federal Court trial is still to be held.
- The State Secretary of the Workers First group, Craig Johnston, appears recently to have led a similar trashing expedition against Skilled Engineering in regard to a dispute over contract employment. However, on this occasion police at least responded, with the result that he and some other AMWU officials have been charged with aggravated burglary, riot and affray.

- The blatant repudiation by the CFMEU of agreements made in the Victorian 36 hour construction industry dispute contrasts with the subsequent readiness of the AIRC to approve increased demolition allowances. The industrial and legal tactics during the Victorian Construction Industry 36 hour dispute of early 2000 were a huge success for the union, and its pattern agreements have since been extended outside metropolitan Melbourne. Indeed, according to the Master Builders Association, after the "agreement" the unions continued to conduct aggressive industrial action within the Victorian building industry, and also engaged in pay-backs against companies that (almost uniquely for the industry) joined together to oppose the Campaign 2000 push. Having effectively wasted over $1 million on that opposition, there has naturally been great reluctance by employers to take legal action to curb union militancy. Action by an individual employer would be almost unthinkable. Anecdotal evidence suggests a deterioration in productivity in the Victorian construction industry.
- The best that can be said about the tribunals' treatment of militant action is that employers' access to the Supreme Court to prevent violent picketing, and a somewhat less sympathetic approach to union actions by the Federal Court, appear to have stopped unions achieving all their objectives. But unionists such as Craig Johnston have retained significant media credibility as a spokesman for "the workers" and, when it is used, Section 127 remains relatively ineffective in dealing with militant union action. Some of the "quietness" may reflect a short-term political strategy by unions. Overall, the Federal Court can scarcely be said to have encouraged attempts by business to improve efficiency.

(ii) Considering the last five years as a whole, attempts by "aggressive" unions such as the CFMEU, the AMWU and the CEPU to prevent freedom of association and enforce union restrictive practices, by coercion and intimidation of both employers and employees, have probably become more successful. Importantly, the Employment Advocate's recent report on the building industry[42] indicates that much of the intimidatory kind of union behaviour is "outside the jurisdiction of the Employment Advocate", and that his actions are limited because of "complainants' fear of repercussion". It also asserts that referring to other authorities is ineffective because "they will not be actioned with any priority". This is clearly a reference to the well-known reluctance of police to prosecute as a result of complaints about intimidation, coercion and even violence in the industrial area. For example, in the case of a West Australian CFMEU official who failed to observe the conditions of his right of entry to a particular building project, the Advocate had to take him to court, where he was fined and ordered to pay costs.

The successful flouting by some unions of court orders (which recalls the infamous description of unions in the Hancock Committee report of 1985 as "centres of power" that should not necessarily be treated as subject to the law on the same basis as other "subjects"),[43] presumably reflects an unwillingness by the legal arm to create a "crisis" by confronting the situation and sending union officials to jail and/or making unions insolvent (except in extreme cases, such as the action taken against the Builders Labourers Federation by the Victorian and federal Labor governments in the 1980s, which led to the deregistration of the union but its effective merging with and partial take-over of the CFMEU).

The decision last month by the political arm to establish a(nother) Royal Commission to investigate the building industry[44] confirms that, where unions continue to operate aggressively, there is an acquiescence by the legal arm in an imbalance of bargaining power that actually accords favorable treatment to unions. Such pro-union judicial interventionism also, of course, has adverse effects on law-abiding employers and employees. But what seems to be needed is not another inquiry but action to ensure the law is actually implemented.[45]

(iii) Although Justice Kenny rejected union claims that BHP Iron Ore's[46] individual agreements policy constituted discrimination, it took over a year before Justice Gray's injunction stopping BHP from making further individual agreements was removed. After being assigned the case, Justice Kenny required senior executives to spend considerable time giving evidence about the company's intentions. In effect, she tried to put herself in the position of company executives in order to test whether those executives were genuinely seeking the conclusion of individual agreements for efficiency reasons – "BHP industrial relations management's reasons for introducing the Workplace Agreements (are) a central issue in this case".

The fact that Justice Kenny's judgment ran to 76 pages tells a story: if BHP had to incur what must have been large costs in terms of management time alone, how would smaller companies fare if they have to go through similar procedures in trying to introduce individual agreements? It also indicates the economic burdens that the award regime imposes on companies and workers alike: while companies such as BHP are able to offer substantial increases in remuneration to workers who accept individual contracts, that simply indicates that the award regime is imposing a huge economic burden on all involved in the enterprise. Clearly, the rewards that follow from escape from this régime can be shared between the shareholders and the workers.

The importance of this case is illustrated by the decision of the ACTU to become actively involved, and to make a major effort to persuade those who had not signed individual agreements to hold off decisions pending amendments by the newly elected Western Australian Labor government to that State's industrial legislation. However, in June the AIRC revoked the entry permit to the Pilbara site of an ACTU organizer because, while trying to persuade employees not to sign individual agreements, he failed to observe the entry conditions. Moreover, with Premier Gallop claiming to have brokered a compromise, the State's legislation is now expected to allow individual agreements (to be known as employer-employee agreements or EEAs), albeit presumably involving deterrent-like procedures. In the meantime, although the ACTU's major effort to hold the fort has kept BHP Iron Ore's individual agreements to about 55 per cent of the workforce, the company claims the changes already made should increase productivity by 15-20 per cent.

(iv) Rio Tinto has had a similar experience to BHP Iron Ore in its long running attempts to improve productivity at the key Hunter Valley No. 1 Coal Mine.[47] While the latest AIRC verdict accepted that Hunter Valley No. 1 had established the need to improve productivity and hence to reduce the number of employees, before reaching her decision Deputy President Leary effectively tried to sit in the managers' chairs for 57 days, to hear 51 witnesses and examine 85 witness statements (which were even acknowledged by Ms Leary to have involved "a great deal of time … pursuing evidence which was of little or no relevance"). In what some might see as having an element of pay-back for some of Rio's earlier actions in the Commission, she eventually decided that the method used to lay off 288 employees, which included detailed assessments of performance of individual workers as opposed to the seniority approach demanded by unions, contravened Section 170 CE of the *Workplace Relations Act* 1996 that forbids terminations to be "harsh, unjust or unreasonable".

In effect, the Deputy President reached the absurd conclusion that the company shouldn't use previous performance to determine who should remain at Hunter Valley No. 1, and should re-instate those made redundant over the previous two years (70 of whom have, however, already accepted voluntary redundancy). While it is scarcely surprising that the company has appealed to the full bench (and succeeded in staying re-instatements), the serious aspect of this case is the deterrent and cost effects for businesses that want to improve their productivity.

(v) While the Federal Court's interventionist enthusiasm may have been curbed by the over-turning by the High Court last November of its decision in the St George Bank case, a very fine line of interpretation was involved in deciding whether there had been a "transmission of business" when the bank had created an agency at a chemist. The Federal Court had concluded that the bank had assigned part of its business to the chemist, and that the agent was therefore bound by the relevant banking award, but the High Court said that "it is not correct that it is carrying on banking business. It is carrying on the business of a bank agent".[48] It is not difficult to imagine that businesses would be hesitant in making substantive investment and employment decisions dependent on such judgments.

The scope provided for judicial intervention in the employment relationship, whether by the AIRC or the Federal Court, remains very large. The *Workplace Relations Act* 1996 comprised 536 main sections plus numerous supplementary sections, most requiring judicial interpretation, not the least being the 20 allowable award matters under Section 89 of the Act to which industrial disputes are notionally confined. (While the Government was successful in having the Senate pass legislation on 7 March, 2001 removing "tallies" from the list, the AIRC had already deleted them from the main meat industry award and replaced them with a payment by results system. The Democrats refused, though, to delete union picnic days from 750 awards on the ground that workers would continue to have a day off because such days already have public holidays gazetted by the States!) The question for the legal arm, and the community more generally, is the basis on which it should exercise its interpretation.

Conclusions

It can be argued that the prime responsibility for the extent of third party intervention in Australia in employment relationships lies with the failure of successive governments to address the issue at the political level, and the associated failure of others (particularly the business and academic communities) to actively support the rights of people to manage their own relationships. However, the legal arm must also share a substantial part of the blame, if only because it has promulgated an increasing role for judge-made law in interpreting "what society demands". It has surely failed to recognize the extent of competition in the labour market, the virtual impossibility of making meaningful judgments on employment contracts and the considerable security now provided to those in social need. It has equally failed to pay heed to the objects of statutes as required by the *Acts Interpretation Act*.

The adverse social and economic effects from interventionism in the employment relationship demonstrate the serious problems with the subjectivisation approach. The Chief Justice of the High Court has identified many of the general problems with this approach, but he has not addressed the important industrial relations area and has left open the question of what should be done about the issue. As there seems little prospect that the legal arm will itself take action to reduce interventionism, there is a strong case for reducing by legislative means the discretion that tribunals and courts can exercise in this field. I have published some proposals on this aspect.[49]

There is also the question of the marked contrast between interventionism in the corporate and industrial relations areas. Those thought to have infringed corporate law are pursued and, if caught and convicted, are fined or jailed and the companies they have operated are made insolvent. Some are even barred from operating a business. But, while this is appropriate, there appears to be very limited comparable action in relation to behaviour by unionists/ employees that is either unlawful or deliberately obstructive, and there are few higher penalties for repeat offenders.

The apparently "soft" approach adopted in dealing with such unlawful/obstructive behaviour seems to reflect a fear that, say, jailing a unionist or sending a union insolvent is socially unacceptable while providing the same treatment to a "greedy capitalist" is not. The reluctance of the police side of the legal arm to pursue complaints against intimidation and coercion by unionists is part of this syndrome, and helps explain why Royal Commissions into the construction industry are needed from time to time to bring a temporary halt or easing in criminal behaviour in that industry. There is also a natural reluctance by employers to pursue penalties to the maximum degree.

One way of dealing with this problem might be to create a body to ensure competition in the labour market and to prosecute those who behave unlawfully, just as the Australian Competition and Consumer Commission prosecutes, some would say too readily, anti-competitive behaviour by business in the production and trading fields. The NSW Building Industry Task Force operated successfully for three years in the construction industry and it could provide a model for a body with wider authority.

The recent moderation in the extent of judicial intervention in industrial cases does suggest that expressions of concern from various quarters have produced some response from the legal arm, most notably reflected in the Federal Court's compositional change and the slightly more amenable attitude to employers' attempts to restructure employment arrangements. But even there the picture is mixed, and it seems absurd that compositional changes in a court should be a determining influence. There is certainly a need to reduce the role of the Federal Court.

It remains particularly worrying that an examination of the plethora of industrial cases dealing with the *Workplace Relations Act* 1996 reveals no precedent that would enable one to advise an employer that he could confidently pursue this or that course of action; or, as Justice Guidice put it, "the outcome of particular cases is of very little predictive value in similar cases". To the outsider at least, it seems that ad hocery prevails. Chief Justice Gleeson's "abiding need for predictability and certainty" is nowhere to be found: it has been overwhelmed by the "irreversible move towards subjectivisation of issues".

Finally, particularly if Labor were to attain government in Canberra, there is a further worry that even the recent slightly more moderate Federal Court approach will not last. Labor has already largely adopted the ACTU's industrial relations interventionist agenda and was responsible for many of the aberrant Federal Court appointees. Those who believe that minimal intervention in employment relationships is in the best interests of the community clearly need to explain and proselytize better their arguments that society is not demanding judicial intervention, and that we would all be much better off without it. It seems unbelievable that grown men and women should behave as the participants in this interventionist system have been behaving, and continue to do so. As Dr Johnson said of an acquaintance, "such an excess of stupidity, Sir, is not in nature".

Endnotes:

1. I acknowledge the generous assistance provided for this paper by Dr John Forbes, Mr Ray Evans, Mr Barrie Purvis, Mr Geoff Hogbin and others who prefer to remain anonymous. They are not responsible, however, for my comments and interpretations of judicial intervention.

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6. Deakin, Alfred, *Conciliation and Arbitration Bill* in Committee, *Hansard*, 30 July, 1903, 2863-4. The first attempt to establish the Commission, introduced in 1901, was abandoned; the second led to the resignation of Prime Minister Deakin and a failed attempt by the first Labor Government to have an amended version passed, leading in turn to the resignation of Prime Minister Watson; a bill was eventually passed in December, 1904 under the Reid-McLean administration.

7. *R v. Commonwealth Court of Conciliation and Arbitration; Ex parte GP Jones; Ex parte Cooper* (1914) 18 CLR 224.

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11. Crisp, *op.cit.*.

12. These papers are available on the Society's web site at *www.hrnicholls.com.au*.

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19. Quotes are from various articles published in *The Australian.*

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23. Mason,A, *Chief Justice Defends Ruling as Lawful,* in *The Australian*, 2 July, 1993.

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29. Hogbin, Geoff, *Employment Relationships, Employment Contracts and Earnings*, unpublished mimeo, 2000.

30. Malcomson, James M, *Contracts, Hold-ups and Labor Markets,* Journal of Economic Literature (1997), 35(4) pp.1916-57, especially p. 1917; and Baker, George, Gibbons, Robert and Murphy, Kevin, *Relational Contracts and the Theory of the Firm,* mimeo (1999),Harvard Business School.

31. *Future Success Depends on People*, Sam Walsh, AMMA Conference, Perth, 8-9 March, 2001.

32. While this statement is broadly correct, at least two substantial caveats should be noted. First, where a firm has the capacity to earn economic rents (i.e., returns to special advantages not enjoyed by competitors, such as an unusually rich mineral deposit), union power may be used to capture part of the rent through shirking at the expense of the owners. Second, in non-traded goods industries some of the costs of shirking may be passed on to consumers in the form of higher product prices. Also, the statement does not mean that employers need not be concerned about shirking – an employer who fails to control it at least as well as his competitors will not survive. Rather, in the longer run there tends to be an equal amount of shirking, the level of which reflects the prevailing labour market institutions. Moreover, each employer separately has a financial incentive to gain a competitive advantage by devising employment contracts that reduce the costs associated with shirking.

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34. *Workplace Relations Amendment (Termination of Employment) Act* 2000.

35. See also Wood, Alan, *Menaced by Union Muscle*, in *The Australian*, 14 March, 2000.

36. Wood, Stuart, *The Death of Dollar Sweets*, at *www.hrnicholls.com.au*, May, 2000.

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38. *Australian Industry Group v. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000] FCA 708.

39. Wood, Stuart, *For impartiality's sake, do curb Kirby*, in *The Australian Financial Review*, 27 July, 2001.

40. *Employment Advocate v. Williamson* [2001]FCA 1164 (24 August, 2001).

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44. Abbott, Tony, *Royal Commission to investigate building industry*, Media Release, 26 July, 2001.

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46. *AWU v. BHP Iron Ore Pty Ltd* [2001] FCA 3; *AWU v. John Holland Pty Ltd* [2001] FCA 93; and *NUW v. Qenos Pty Ltd* [2001] FCA 178.

47. Davies, Allan, *Coal Reform – the Hunter Valley No 1 story*, at *www.hrnicholls.com.au*, March, 2001.

48. *PP Consultants Pty Limited v. Finance Sector Union* [2000] HCA 59.

49. See Moore, Des, *op.cit.*.