COMMENT ON CIVIL DISTURBANCE TO RESOURCES PROJECTS

by H. J. Dixon*

In his paper Neville Martin sets out to examine the limitations upon the rights of citizens to protest against resource projects and the remedies available to the sponsors of such projects. In commenting on that examination, it may be useful to scrutinise in some greater detail what limitations or potential limitations apply to the utilisation of the remedies available to sponsors of such projects. I propose first to discuss some of the practical obstacles which may be encountered where there are breaches of the various statutory provisions designed to prevent civil disturbances which have been canvassed in the principal paper. I then propose to discuss some of the limitations which apply to the civil and Trade Practices Act remedies referred to.

BREACHES OF STATUTORY PROVISIONS

In this category of remedies, Martin has dealt with statutes such as the Tasmanian Police Offences Act 1935, the Summary Offences Act 1953 (S.A.), various other legislative provisions enacted, *inter alia*, to protect the holder of a mining tenement (by making it a summary offence to obstruct or hinder the holder of the tenement in the reasonable exercise of its rights) and provisions under the Crimes Act 1914 (Cth.) directed towards the protection of interstate or overseas trade and commerce. The question which arises is whether an aggrieved project sponsor will be able to obtain immediate protection or relief from the offending conduct contravening legislation of this kind. Is it likely, for example, that the Crown will readily institute proceedings for an injunction requiring the abatement of a public nuisance by obstructing the public's right of enjoyment of passage? I suggest that only in the most exceptional circumstances will such action be taken. On a different front, it appears to me that a resource sponsor or operator which pins its hopes on a proclamation from the Governor-General under section 30J of the Crimes Act 1914 prohibiting a 'serious industrial disturbance prejudicing or threatening trade or commerce with other countries or among the States' is going to be not only disappointed, at least in the short term, but severely prejudiced whilst the offending conduct continues to cause it harm. Particularly in cases where the disturbances have an 'industrial flavour', prosecutions or enforcement of the statutory provisions at the instigation of the police may not prove fruitful. Take, for example, the relevance of section 14B of the Police Offences Act 1935 (Tas.) or its equivalent, section 82B of the Police Act 1892 as amended (W.A.), in the situation where employees enter upon their employer's premises and then refuse to carry out their contracts of employment and remain on the land. There is specific Supreme Court authority to the effect that an employee's entitlement or obligation to be

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upon the premises of his employer during ordinary hours is so that the employee is able to carry out the terms of employment, that is, to perform the work required and that if the employee has no intention of carrying out the work and refuses to do so, the right to be on the premises ceases.[1] Notwithstanding such clear authority one may still find a reluctance on the part of police officers to arrest and remove employees from an employer's premises where they are on strike. In my experience, however, the reluctance may be overcome if an employer in fact terminates the contracts of employment and then seeks to have the offending persons removed from the premises by the police pursuant to these provisions. Such action, of course, may not benefit the resource sponsor from an industrial relations point of view!

I venture to suggest that, in practice, any one or more of these legislative provisions may not provide adequate protection for resource sponsors if the enforcement of the provisions rests entirely in the hands of the authorities charged with that responsibility. It may be said, with some justification, that in certain circumstances there may be a reluctance to launch prosecutions against alleged offenders particularly in situations which are regarded as highly volatile or politically sensitive. In such circumstances, the remedies may be of little assistance to sponsors unless they are prepared to take steps on their own initiative to launch prosecutions or seek the enforcement of provisions in the criminal courts. Many of the statutory provisions referred to, in my view, permit prosecutions on complaints made and prosecuted by resource sponsors themselves. The benefit of this entitlement can be illustrated by reference to an alleged breach of section 30K of the Crimes Act 1914 which, in broad terms, prohibits conduct which interferes with interstate trade and commerce or trade and commerce with other countries without reasonable cause or excuse. The effect of section 30K is also illustrated by reference to the High Court decision of *R v. Archdall and Roskruge; Ex parte Carrigan and Brown*[2] mentioned by Martin in which two union secretaries had successfully been charged with the offence of having without reasonable cause or excuse by boycott hindered the Commonwealth from providing provisions and maintenance of lighthouses through the vessel SS *Cape York*. The withdrawal of labour for the particular vessel constituted a boycott. It is not difficult to see that the definition of 'boycott' adopted by the High Court[3] could apply in other circumstances.

A prosecution for an offence of this kind which can be initiated and pursued by the aggrieved party should therefore overcome any reluctance on the part of the authorities to act which may be encountered by a beleaguered operator. This entitlement, for example, appears to be available pursuant to section 13 of the Crimes Act which clearly expresses the intention that offences under the relevant sections are to be dealt with

1 *Geoffrey George Highway v. Alan James Cunningham* unreported, W.A. Supreme Court, 16 July 1982.
2 (1928) 41 CLR 128.
3 *Ibid.* 136 *per* Knox C.J., Isaacs J., Gavan Duffy J. and Powers J.

summarily at the instance of any person.[4] In a similar way, the Summary Offences Act 1953 (S.A.), and the Mining Act 1971 (S.A.). the Police Offences Act 1935 (Tas.), the Police Act 1892 as amended (W.A.) create summary offences; the Acts themselves do not preclude the aggrieved mining company or developer from prosecuting a complaint. I am aware, for example, that this has been done by a resource sponsor. Prosecutions were launched by the mining operator, a joint venture, in the State of Western Australia where it was alleged that its tugboats were 'occupied' or seized by employees who refused to get off or allow the employer to use the vessels to berth ships and hence export its mined product. The prosecutions were withdrawn prior to the hearing after employees and their respective unions agreed to 'continuity of supply' provisions to ensure that shipping would not in the future be interfered with even for industrial purposes.[5]

Further potential limitations on the effective use of such remedies, even at the instigation of the resource sponsor, may be time delays and the absence of any real deterrent effect. Prosecutions may take some time and, even if successful, convictions may not necessarily deter further breaches of the particular provisions on the part of determined protestors or employees or ex-employees embroiled in a dispute with the target operator. In those circumstances the resource sponsor would have to look to the civil and Trade Practices Act remedies for injunctive relief as well.

LIMITATIONS ON THE USE OF COMMON LAW REMEDIES

Before looking more carefully at the potential limitations which exist in relation to these remedies I wish to make some comments on the breadth or scope of the various remedies. They are, I suggest, available in respect of a much wider range of conduct than has until recently been accepted. There is now recognition that there is a *tort of interference with the trade or business of another, by unlawful means.* This tort, the *genus* of the economic torts has a significant role to play in protecting the interests of sponsors of mining projects. The specific torts such as intimidation, inducing breach of contract and conspiracy discussed by Martin are then more appropriately categorised as species of the wider general tort or 'genus tort'. Recognition of the tort of interference with the trade or business of another person came in the House of Lords in *Merkur Island Shipping Corporation v. Laughton and Others.*[6]

In the *Merkur* case a ship was by contract time chartered to a charterer. The terms of that contract required the captain of the ship, acting on behalf of the owners, to 'prosecute his voyage with the utmost despatch' and required the charterers to provide and pay for towage into and out of

4 Section 4 of the Acts Interpretation Act 1901 provides that 'offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless contrary intention appears in the Act, be indictable offences'

5 In this dispute damages claims were also instituted against the individuals concerned on the grounds of, *inter alia*, alleged interference with the contractual relationships between the joint venture partners and their customers.

6 [1983] 2 All ER 189 (HL).

berths when the ship docked. Under the terms of the charter, hire was not payable to the ship owners in the event of time being lost because of a labour dispute (*force majeure*). The ship docked at Liverpool Harbour to load and was black banned by the International Transport Workers Federation (ITF) because it believed that the crew were being paid below the rates approved by it. The ITF then persuaded the tug men employed by the tug company which was to take the ship out of berth to refuse to operate the tugs. This had the result that the ship was unable to leave the port. The tug men's refusal to take the vessel out was a breach of their contracts of employment with the tug company. The contract (time charter) between the owners and the charterers specifically provided that in the event of loss of time due to boycott of the vessel in any port or place by shore labour or others or arising from the terms and conditions on which the members of the crew were employed, payment of hire would cease for the time thereby lost. Therefore, once a ban had been imposed on the vessel and the tug crews withdrew their labour in breach of their contracts of employment the charterers were not obliged to pay to the ship owners the hire charges. There was, therefore, in the strict sense no breach of contract although the parties were prevented from earning income from the vessel during the period of dispute. The court, nonetheless, found that the interference with the performance of the contract was actionable. It was held that ITF did induce or procure the tug employees to break their contracts of employment (an unlawful act) 'with the intent' to interfere with the contractual arrangement between the ship owner and the charterer. Moreover, there was endorsement for a previous view[7] to the effect that interference which extended to a case where a third person prevented or hindered one party from performing his contract, even though it be not a breach, would not be acceptable conduct. An injunction was accordingly granted restraining the ITF from engaging in the conduct complained of.

The Court of Appeal in New Zealand in *Van Camp Chocolates Limited v. Aulsebrooks Limited*[8] held that this wider tort

> is a recognised tort in New Zealand, although its boundaries will receive closer definition as cases emerge, and we see insufficient reason for discarding a judicial remedy which from time to time may be useful to prevent injustice.[9]

The court went on to hold that 'the essence of the tort is deliberate interference with the plaintiff's interests by unlawful means'.[10] In Australia, too, there has been some recognition of the existence of this tort. In *Sid Ross Agency Pty. Ltd. v. Actors and Announcers Equity Association of Australia*[11] Else-Mitchell J., in an application to strike out certain portions of a statement of claim, held by reference to some earlier English authority that

7 As expressed by Lord Denning M.R. in *Torquay Hotel Co. Ltd. v. Cousins* [1969] 1 All ER 522.
8 [1984] 1 NZLR 354.
9 *Ibid.* 359.
10 *Ibid.*
11 [1970] 2 NSWR 47.

> a right of action is available to a person who suffers damage as a result of interference by another with his trade or business by unlawful means and that this may be so even though the interference does not entail the procurement or inducement of an actual breach of contract.[12]

The New South Wales Court of Appeal[13] when dealing with the case endorsed the existence of this remedy although not in specific terms. It seems, therefore, that predictions such as those expressed by the commentator J.D. Heydon in 1975[14] to the effect that there were few signs, if any, of any development towards the extension of liability of the tort of interference with contract were not borne out by the developments in the courts.

Unlawful conduct remains an essential element of the tort. What then will amount to the unlawful means which is not tolerated by the civil courts? Lord Denning M.R. in *Torquay Hotel Co. Ltd. v. Cousins* stated:

> I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does procure or induce any actual breach of contract.[15]

It may be said, that in typical fashion the term 'an act the defendant is not at liberty to commit' is such a general form of prescription that its major advantage is that it leaves sufficient scope for more development if required. The phrase is, however, not of great benefit if one is seeking to establish exactly what element of unlawfulness is required to ground an action based on this tort.[16]

The difficulties which may arise in adopting a wide interpretation to the requisite unlawful element and the likely approach to be adopted by the courts is, I suggest, illustrated to some degree in *Lonrho v. Shell Petroleum (No. 2)*. In that case the House of Lords examined, *inter alia*, the development of the law to determine whether a stage had been reached where

> a contravention of a particular statutory prohibition by one private individual makes him liable in tort to another private individual who can prove that he has suffered damage as a result of the contravention[17]

even though the legislation was not enacted for the benefit of a specific class of individual or did not create a public right (*i.e.* a right to be enjoyed by all subjects who wish to avail themselves of it). The facts of the case were complex, but for the purposes of the particular examination undertaken it is, I believe, sufficient to indicate that Lonrho was seeking to recover damages from the defendants on the basis that the defendants had during the period of 'UDI' and contrary to the provisions of the U.K.

12 *Ibid.* 52.
13 [1971] 1 NSWLR 760.
14 'The Future of Economic Torts' (1975) 12 UWAL REV 1, 5.
15 [1969] 2 Ch. 106, 139.
16 See for example the concern expressed by Hazel Carty in 'Intentional Violation of Economic Interests: The Limits of Common Law Liability' [1988] LQR 250, 267.
17 [1982] AC 173, 187.

legislation, the Southern Rhodesia (Petroleum) Order 1965, continued to supply oil to Rhodesia. This resulted in a loss of revenue for Lonrho from the use of a pipeline which, but for UDI, it could utilise to supply oil to Rhodesia. The examination of the law by the House of Lords in *Lonrho* included consideration of the Australian High Court judgments in *Beaudesert Shire Council v. Smith*,[18] a case, said Lord Diplock, which appeared to recognise the existence of 'a novel innominate tort of the nature of an 'action for damages on the case' available to 'a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another'. His Lordship proceeded to say this:

> It is clear now from a later decision of the Australian High Court in *Kitano v. Commonwealth of Australia* (1974) 129 CLR 151 that the adjective 'unlawful' in the definition of acts which give rise to this new action for damages upon the case does not include every breach of statutory duty which in fact causes damage to the plaintiff. It remains uncertain whether it was intended to include acts done in contravention of a wider range of statutory obligations or prohibitions than those which under the principles that I have discussed above[19] would give rise to a civil action at common law in England if they are contravened. If the tort described in *Beaudesert* was really intended to extend that range, I would invite your Lordships to declare that it forms no part of the law of England.[20]

The House of Lords was thus not prepared to create liability on the defendants merely on the basis that they had been in breach of a particular statutory provision and that the breach caused the plaintiff (appellant) to suffer a loss by way of lost revenue. The situation would be different, I suggest, if the loss arose from a statute which created a right in favour of the plaintiff or the unlawfulness arose out of conduct aimed intentionally at the plaintiff.

In the *Beaudesert* case, S had been granted a licence under the relevant legislation to instal a pumping plant on part of his property for the purpose of extracting water from the river fronting his property. The local authority proceeded to take gravel for construction of a road from the bed of the river so destroying the water hole from which S pumped water. It did not hold a permit to take gravel from the river bed under the appropriate regulations. The High Court, in determining whether S had a remedy, held that:

> There is, therefore, a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of another. It is not, however, possible to adopt a principle wide enough to afford protection in all circumstances of the loss to one person flowing from a breach of the law by another, for regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages for his injury. Bearing this in mind, it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss at the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.[21]

Although the *Beaudesert* case has not been followed in Australia (and has been distinguished whenever reliance has been placed on it) it might pro-

18 (1966) 120 CLR 145.
19 Namely actions based on legislation which create public rights or benefits in favour of a class of individuals.
20 (1966) 120 CLR 145, 188.
21 (1966) 120 CLR 145, 155 *per* Taylor, Menzies and Owen JJ.

vide some encouragement for the High Court to endorse the *Merkur Shipping* case approach of recognising the 'genus tort' and a wide interpretation of what will constitute 'unlawful means'.

'Unlawful means' is, however, in my view, more likely to be regarded as unlawful conduct covering most statutory or common law crimes, tort or breach of contract committed with the intention of interfering with the business of the plaintiff. In *Van Camp* the Court of Appeal in New Zealand touched upon this issue in this manner:

> If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far.[22]

There is, of course, some controversy arising out of the decision in *Rookes v. Barnard*[23] about the extension of the tort of intimidation to encompass threats of breaches of contract. It has been said, for example, that

> 'a breach of contract should not be treated conceptually as unlawful'; that 'intimidation distorts the law of contracts and subverts the doctrine of privity of contracts'; and that 'the tort is an unwarranted interference with industrial relations dispute settling procedures.[24]

The various statutory provisions such as the Crimes Act, the Summary Offences Act *etc.* referred to by Martin in his paper should, however, provide ample scope for establishing the unlawful element required to obtain relief under the tort in its expanded form. So, for example, if persons unlawfully occupy premises, or engage in conduct contrary to section 30K of the Crimes Act, or are in breach of contract (an unlawful act), and such conduct interferes with the sponsor's trade in the sense that it is unable to produce and supply, then injunctive relief should be available.

The conduct complained of in support of this general tort must be intentional and in most instances with which sponsors are likely to be concerned directed at them. However, as an illustration of what might be possible in relation to a third party having the right to sue, the case of *Falconer v. N U R*[25] is of some interest. The case involved a suit against the trade unions by a commuter delayed by a rail strike in London by their action. The union argued that the purpose of the action by the unions was to put pressure on British Rail and that any harm caused to the passengers was a consequence of, rather than an intention of their action. The judge ruled that those submissions were

> both naive and divorced from reality . . ..(for) it was clearly the intention of the defendants in calling the strike to direct its effect upon the plaintiff and others and that by so doing create pressure upon the board to accede to the defendants' wishes.[26]

The unions were thus held liable.

22 [1984] 1 NZLR 354, 359.
23 [1964] AC 1129; [1964] 1 All ER 367 (HL).
24 Gerard Bean 'Intimidation: An Obscure, Unfamiliar and Peculiar Course of Action' (1987) 3 Aust. Bar Rev. 154, 157.
25 [1986] IRLR 331.
26 *Ibid.*

It is also interesting to consider what constitutes the 'trade' which is or can be protected in this way. Clearly the species of tort described as inducing breach of contract is illustrative of protection of contracts. However, that may well be too narrow a view of what interests may be protected. In the English case of *Stratford v. Lindley* Lord Reid held that:

> In addition to interfering with the existing contracts the respondents' action made it practically impossible for the appellants to do any business.[27]

The academic commentator Hazel Carty suggests that 'at the widest trade could be synonymous with "economic interests"'.[28] What then are the restrictions or limitations on the use of these remedies?

Justification

The question which may arise, and to which all potential plaintiffs should give some consideration is whether a defence of justification is available to this general tort (or some of the other species torts referred to in Martin's paper) in any particular case. It may also be argued that the wider the definition of the 'unlawful means' which is actionable, the more likely it is that certain conduct will be regarded as justified by the courts.

The issue of justification has arisen on a number of occasions in cases where the conduct complained of has had an industrial element to it. Trade unions will often seek to justify their actions aimed at the aggrieved party, even though it is unlawful, as legitimate conduct in pursuit of recognised and 'accepted goals'. Lord Halsbury in *South Wales Miners' Federation and Others v. Glamorgan Coal Company Limited and Others*[29] said this about the defence:

> Now it is sought to be justified, first, because it is said that the men were acting in their own interests, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the co-contractor refuses to allow the breach? It seems to me to be absurd to suppose that a benefit which he refuses to accept justified an intentional breach of contractual rights. It may, indeed, be urged in proof of the allegation that there was no ill will against the employers. I assume this to be true, but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your co-contractor . . .
>
> Some cases may be suggested when higher and deeper considerations may, in a moral point of view, justify the refusal to do what has been agreed to be done. Such cases may give rise to the consideration whether, in a moral or religious point of view, you are not bound to indemnify the person whom your refusal injures; but a Court of law has only to decide whether there is a legal justification.[30]

This limited view as to the availability of the defence of justification was not followed in *Lantham v. Singleton*[31] in which Nagle C. J. suggested that the court should look at the 'predominant motive' for the actions. If what the defendant did was 'genuinely considered by him to be for proper

27 [1965] AC 269, 324.
28 (1988) LQR 250, 274.
29 [1905] AC 239.
30 *Ibid.* 244–245.
31 [1981] 2 NSWLR 843.

union purposes it should be accepted as justification'.[32] More recently in *Ranger Uranium Mines Pty. Ltd. and Another v. Federated Miscellaneous Workers' Union of Australia and Others*[33] counsel for the plaintiffs sought to exclude from evidence any materials which sought to raise a defence of justification to an action based on interference with contractual relations by inducement and intimidation. Nader J. held that 'the question of justification, whilst it may not always or even commonly become a live issue, is an element of the tort determinative of whether the tort in a given case is actionable.'[34] So, for example, his Honour stated that

> health and safety would be seen by an ordinary well informed person in our society to be the kind of issue that could justify inducing a breach of contract in certain circumstances.[35]

If, in fact, justification exists for unlawful conduct by reason of the health and safety of employees, it is not stretching the imagination to suggest that environmental issues may well come within the scope of justification as a defence to an action based on the economic torts. It is, in my view, however, unlikely that the courts will generally go as far as Nagle C. J. in the *Lantham* case.[36] If the conduct is unlawful, as opposed to acts which persons are 'not at liberty to commit', the courts should be extremely reluctant to accept justification of the kind referred to in the cases above.

Injunctive Relief As Discretionary Remedy

There is a reluctance on the part of the courts to become embroiled in industrial disputes resulting in a refusal, in the exercise of discretion, to grant interlocutory relief whilst conciliation is in progress or until such time as conciliation is exhausted. This point can be illustrated by the case of *Harry M. Miller Attractions Pty. Ltd. v. Actors and Announcers Equity Association of Australia*[37] in which Street J. said of the Commonwealth Conciliation and Arbitration Act that:

> The scheme set up under that Act is intended to be all-embracing and to be such as to invest the Commission with the totality of jurisdiction necessary to enable it to resolve disputes such as that which presently exists between these parties. It does not, however, necessarily follow that merely because there is the machinery existing under the Commonwealth statute then this Court has no jurisdiction at all. Indeed, it has not been asserted on behalf of the defendants that this Court is lacking in jurisdiction. What, however, is put forward, and I concur in this submission, is that, in the ordinary course of resolving an industrial dispute such as this, the parties should be left to pursue their remedies before the Commission set up under the Commonwealth Act. It may well be that in particular circumstances, whether by reason of shortage of time, or by reason of

32 *Ibid.* 873.
33 54 NTR 6.
34 54 NTR 6, 9.
35 *Ibid.* (Is it surprising that his Honour would suggest that it is the 'ordinary well informed person' who should be referred to?)
36 See *Trident Construction Pty Ltd v. The Australian Builders Labourers Federated Union of Workers — WA Branch* unreported Supreme Court W.A. 10 Dec. 1982 *per* Kennedy J. and *Dollar Sweets Pty. Ltd. v. Federated Confectioners Association of Australia and Others* [1986] VR 383 where the defences were rejected.
37 [1970] 1 NSWR 614.

> some other consideration, the aid of this Court might be appropriately made available to prevent some irremedial infringement of the rights of some individual involved in an industrial dispute or otherwise to vindicate the due observance of the ordinary principles of law which must be enforced throughout the community. But, in point of the discretion, it is a well settled approach in this Court that injunctive relief will not ordinarily be granted where it can be seen that there is another tribunal particularly suited to deal with the matter in issue and having the requisite power and authority to resolve the issues between the parties.[38]

In *David Jones Ltd. v. Federated Storemen & Packers Union of Aust. (N.S.W.) & Ors*[39] this line of reasoning was followed. Waddell J. held that:

> . . . the actions of which the plaintiff complains are, I think, directly linked to an industrial dispute to which the plaintiff is, in substance, a party. The relief sought by the plaintiff would not, if granted, result in the settling of the dispute but, of course, it might provide the plaintiff with a means to resolve the dispute to its satisfaction although this is debatable.[40]

That view has, however, not always been followed in New South Wales or in all jurisdictions. So, for example, in the *Trident Construction* case Mr. Justice Kennedy remarked that at the time of the hearing before Street J. the Commonwealth Commissioner was already investigating the dispute. It was also pointed out that in *Industrial Enterprises Pty. Ltd. v. The Federated Storemen and Packers Union of Australia*[41] Lockhart J. held that:

> . . .[I]t is a fundamental misconception of the Act [the 1904 Conciliation and Arbitration Act] to assume that merely because there is a dispute to be heard by the . . . Commission which may [and for that matter, may not] involve substantially the same facts, this Court would not exercise its powers under the Act.
>
> In the present case, not to hear the application for interlocutory injunctions or, having heard it, not to grant relief merely because the dispute is soon to be heard by another tribunal under another act of Parliament, which may involve substantially the same facts, would be a serious failure by this Court to exercise its jurisdiction and would cause grave injustice to the applicants.[42]

In the *Dollar Sweets* case his Honour Mr Justice Murphy dealt with this issue in the following manner:

> It has been argued that in the field of industrial relations, this Court is loath to intervene, especially if there is some avenue still to be explored in the conciliation and arbitration arena. I accept that *at all times in the past this principle has been accepted as a generalisation only.* But in this case, the plaintiff has gone to and apparently followed to its length, the diplomacy of conciliation.[43]

And then, more recently, the Supreme Court of New South Wales in *Boral Bricks N.S.W. Pty. Ltd. v. Frost* [44] granted an interlocutory injunction notwithstanding the fact that the matter was pending before the N.S.W. Industrial Commission. Without reference to any of the earlier New

38 *Ibid.* 615.
39 14 IR 75.
40 *Ibid.* 82.
41 (1979) 2 ATPR 17, 970.
42 *Ibid.* 17, 996–7.
43 [1986] VR 383, 389.
44 20 IR 70.

South Wales decisions Browne J. said this about the exercise of the discretion to grant an injunction:

> It was then said in effect that since the Industrial Commission was seized of the dispute this Court should leave the matter entirely to the Industrial Commission. If all that this Court was being asked to do was to step into a purely industrial dispute, that is a submission I would readily accept, but on the evidence, what the members of the Brick Carriers Association are now doing and what they propose to continue to do is to step outside a purely industrial situation, and to commit what seems to be torts, and if the plaintiffs' submission is ultimately found to be correct, a crime.[45]

Action Regarded As 'Industrially Not Advisable'

Consideration will obviously also have to be given to the desirability of instituting civil action where the disturbance to the project arises from labour related problems. To some significant degree an employer which seeks to exercise its legitimate common law remedies is seen to act in a 'provocative way'. I venture to suggest that on many occasions this approach is adopted because of the effectiveness of the remedy and the inability of the unions or their officers to deal with a court with real sanctions. These issues, however, may constitute a real limitation on the willingness of parties to seek the requisite remedy from a court.

Legislative Restrictions

There has been considerable comment by politicians and the media on the possibility that the common law remedies will be curtailed by legislation. This was so particularly during the process of 'revamping' the industrial laws undertaken by the present Federal Government. The new Industrial Relations Act 1988 did not, it was said, set out to achieve a limitation on the scope of the remedy. In section 164 of the Industrial Relations Act it is provided that:

> An action under a law of a State or Territory does not lie against a trade union, or an officer, member or employee of a trade union in relation to boycott conduct of the trade union or of the officer, member or employee acting in that capacity.

'Boycott' is defined in the Act to mean a contravention of section 45D or 45E of the Trade Practices Act.

There is, of course, conduct on the part of trade unions, their officers or members which is actionable under the economic torts referred to and which do not amount to contraventions of section 45D or 45E of the Trade Practices Act. Such conduct does not appear to me to be excluded from the jurisdiction of State or Territory courts. If the conduct complained of, however, is also capable of constituting a contravention of section 45D or section 45E the legislature has removed, or sought to remove, the jurisdiction of the State or Territory for actions based on the law of that State or Territory. In that event, an aggrieved party would be forced to approach the Federal Court.

The consequences of these changes may not have been properly thought through. Take, for example, the case where a plaintiff is advised that the offending conduct contravenes section 45D (1) of the Trade Prac-

45 20 IR 70, 73.

tices Act but that the defence provided under section 45D (3) will be available to the respondents. The plaintiff then proceeds to institute proceedings in a State court on the basis of the economic torts. In order to satisfy the court that it has jurisdiction it may have to persuade the court that the provisions of section 45D (3) are applicable!

Section 166 of the Industrial Relations Act goes further. It provides that:

> An action under a law of a State or Territory does not lie against an organisation, or an officer, member or employee of an organisation, in relation to conduct of the organisation, or of the officer, member or employee acting in that capacity, that is in breach of a bans clause of an award.

The effect of this legislation is thus to create an additional defence to common law claims for damages on the basis that the conduct complained of is in breach of a bans clause in a Federal award. In addition, the approach of some of the courts to insist on the exhaustion of industrial remedies before interlocutory relief is granted will compound the difficulties. In order to exhaust industrial remedies a party to an award may have to seek the insertion and enforcement of a bans clause. Having done so, that party has effectively deprived itself of a claim for damages for conduct which persists in contravention of the bans clause.

LIMITATIONS ON THE USE OF TRADE PRACTICES ACT REMEDIES

The scope of these remedies, too, is wide, perhaps wider than Martin suggests. He expresses the view that the requirements in sub-section 45D (1) (a) (ii) and sub-section (b) of the Trade Practices Act are such that the section will have limited application where, for example, there is hindrance of the shipment of products by a mining company to a customer. I suggest that the scope of the clause is, in fact, wider than that stated. Take, for example, the following situation:

> A person (protester A) in concert with another person (protester B) engages in conduct that hinders or prevents the acquisition of goods or services by a third person (overseas customer) from a fourth person (the mining company, not being an employer of the first mentioned protester) for the purpose, or with the likely effect of causing substantial loss or damage to the business of the fourth person, the mining company.

Such conduct I suggest would contravene section 45D (1)(b)(i) of the Act.

I agree, however, with Martin that section 45D (1A) has the potential to apply to a blockade by persons who are not employees of a mining company and, in fact, that this section has significant potential for resource sponsors and miners who engage in trade with places outside Australia. The effectiveness of this remedy is, I believe, well illustrated in the case of *Mary Kathleeen Uranium Limited v. Seamen's Union of Australasia (Queensland Branch), Union of Employees and Another.*[46] The opening paragraph of the judgment of Morling J. reads as follows:

> The mining and export of uranium is a subject of considerable disputation in the Australian community. Some say that uranium should be left in the ground. Others are of the

46 38 ALR 557.

> view that it is inevitable that there will be a continuing market for uranium overseas and that there is no valid reason why the uranium deposits which exist in Australia should not be exploited so as to supply that market. These case (two cases heard together) arise out of that controversy.[47]

The facts were that in May 1981 the applicant company had arranged for containers of uranium to be shipped from Brisbane on a vessel *ACT 4* scheduled to leave that port on 16 June 1981. The respondent trade unions, acting in accordance with the ACTU's policy that employees should not assist in any way in the mining and export of uranium, imposed a ban preventing tugs from being used for the vessel. The ban was lifted on 19 June 1981. Shipping agents, however, then indicated that they were not prepared to accept further bookings from the applicant until there was a clear indication of a change in the respondent unions' policy to the export of uranium. The applicant company was granted an interim injunction against the respondent unions on the basis that they had contravened the provisions in section 45D (lA) of the Trade Practices Act. The orders were wide ranging and may be of interest. The Court ordered:

> That the respondents whether by themselves, their agents or servants in concert with any person be restrained from aiding, abetting, counselling, procuring, inducing or attempting to aid, abet, counsel, procure or induce any person to withhold labour from the Queensland Tug Company Pty Ltd (the company providing tugs to vessels exporting uranium) when and to the extent that such labour is in accordance with the ordinary course of practice required to man or operate any one or more tugs assigned for the purpose of bringing in, berthing or unberthing or taking out, to, in or from the port of Brisbane any ship loaded or intended to be loaded with containers of uranium concentrates supplied by the applicant (otherwise than where the conduct was within the descriptions contained in section 45D (3) of the Act).
>
> It was further ordered that the respondents whether by themselves, their servants or agents or otherwise in concert with any person be restrained from aiding, abetting, counselling, procuring, inducing or attempting to aid, abet, counsel, procure or induce any person to subject the owner or operator of any ship to delays, loss or damage where such ship or any other ship owned or operated by the same owner or operator is, has been, or is intended to be loaded with containers of uranium concentrates supplied by the applicant.

Limitations

There are certainly fewer limitations on the use of section 45D and section 45E (which is also a significant provision which should not be lost sight of) for beleaguered producers. The legitimate defence provisions contained in section 45D(3) open to employees or their unions have already been discussed by Martin. They are, however, mostly construed in a narrow sense and in seeking an injunction the issue of whether such a defence is or will, in fact, be established at trial often amounts to an arguable issue which, of course, does not preclude the applicant from obtaining an interim injunction. It should further be noted that organisations and their officers are not protected under this provision if they engage in conduct in concert with any persons other than the organisations, officers or employees specified in paragraph 45D(3)(b).[48] Emplo-

47 *Ibid.* 558.

48 See comment by *Tapperell, Vermesch & Harland: Trade Practices and Consumer Protection (3rd edition)*, para 5124 and *Ausfield Pty Ltd v. Leyland Motor Corp* (1977) 2 TPC 165.

yees or unions who, therefore, engage in conduct in concert with an organisation or groups of persons who are not employees and who are, for example, supporting an environmental issue will not necessarily be protected by the provisions of section 45D(3).

The discretionary nature of the remedies under the Trade Practices Act make them subject to the same possible restrictions discussed under the common law remedies although the Federal Court appears to me to be more willing 'to get involved in the industrial arena' than some judges in the State courts.

In conclusion I suggest that strong consideration be given in any particular situation to the use of all or any of the legal remedies available, in combination if necessary, if offending conduct occurs and continues.