THE GORDONSTONE COAL DISPUTE
Rights, Remedies and Union Exclusion under the *Workplace Relations Act*

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In this article, the relationship between legal strategy, industrial relations strategy and the framework of rights and remedies provided by the *Workplace Relations Act 1996* (Cth) is examined through the lens of a lengthy industrial dispute over individualisation and union exclusion. The parties engaged in complex legal manoeuvring to support their industrial relations positions, playing out their strategies before the Australian Industrial Relations Commission, the Supreme Court of Queensland, the Federal Court and the High Court. An examination of the resultant web of decisions suggests that the remedial framework acts as a navigating tool as the parties adjust and re-draw their tactics in the course of a dispute. Further, how the parties perceive the practical operation of this framework is crucial, since the *Workplace Relations Act 1996* (Cth) provides a host of rights for employees and their unions, but in many respects these rights cannot be enforced by adequate remedies.

Introduction

The symbiotic relationship between industrial relations strategy and legal strategy is implicitly reflected in the framework of rights and remedies provided by the *Workplace Relations Act 1996* (Cth) (the WR Act). Amongst the most important employee rights are those concerning bargaining, including the right to take industrial action 'protected' from legal sanction in specified circumstances, and rights to join unions and participate in their affairs without fear of consequent dismissal or harm in their employment. Nevertheless, the WR Act gives significant legal impetus to the union exclusion and anti-collectivist industrial strategies that re-emerged in Australia during the 1980s.[1] This arises in part from the balance the WR Act strikes between employer and union rights. However, decisions emerging from several large industrial disputes demonstrate that the procedural and doctrinal rules surrounding the relevant rights, and the practical efficacy of their associated remedies, are just as crucial.

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1 Deery and Mitchell (1999), p 4.

The nature of the dynamic between rights, remedies and strategy is investigated in this article in the context of a lengthy industrial dispute: the Gordonstone coal dispute.[2] Here, the employees and their union engaged in a complex legal strategy in response to the employer's union exclusion strategy at a remote underground coal mine in central Queensland. The dispute was played out in the Australian Industrial Relations Commission, the Queensland Supreme Court, the Federal Court and the High Court for over five years. The cases took months or even years, and as further applications were filed, matters commenced earlier were either compromised or became irrelevant. The Appendix to this article provides a summary table of the decisions and clarifies the connections between the key industrial events and the pattern of applications and decisions. The final decision in an intricate web of cases was not handed down until March 2001. This web provides a guide to the overall remedial framework in the WR Act. It highlights the connections between the cases in a tactical sense, suggesting that the framework of remedies operates as a kind of navigating tool for the parties as they construct and adjust their legal and industrial strategies in the course of disputes about individualisation and union exclusion. In turn, this uncovers the actual operation and efficacy of the law where union exclusion practices are in breach of the WR Act.

Background: The Factual Context and Substantive Matters in Dispute at Gordonstone

The Gordonstone Mine commenced operation in 1990. It was owned by a joint venture, in which Arco Coal held 80 per cent.[3] Arco Coal owned only one other mine in Australia, the Curragh open-cut coal mine, and all its overseas operations were non-union. The Gordonstone Mine was managed on behalf of the joint venturers by Gordonstone Coal Management (GCM). Union density was 100 per cent amongst the 300 production and engineering employees, and they all belonged to the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union (the CFMEU). A certified agreement between GCM and the CFMEU, the Gordonstone Certified Agreement 1996, was filed by GCM on 1 August 1996 and it was certified on 21 October 1996 under *the Industrial Relations Act 1988* (Cth) (the IR Act).[4] Until late 1996, GCM and the CFMEU enjoyed a relatively cooperative, rather than conflictual, industrial relationship characterised by a history of successful enterprise-based bargaining.

The relationship began to deteriorate after GCM engaged new human resource management staff in mid-1996. Commissioner Hingley held in one case (discussed below) that they 'applied aggressive industrial relations strategies, (which included strategies) to "actively encourage resignation from

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2 The dispute commenced in January 1997.

3 Arco was itself ultimately owned by Atlantic Richfield, the massive US-based multinational oil and mining corporation.

4 *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998).

the union"'.[5] By March 1997, the parties were in dispute over a number of conditions of work. They were all contained in the agreement certified a few months previously. GCM was now seeking to alter these conditions. The matters at issue included the maintenance of employee numbers at an already agreed level, failure to convert temporary employees to permanent positions, the authorisation of union meetings, movement from the agreed seven-day roster to a five-day roster, overtime, bonus payments, payment for the bus service to the mine from Emerald, communication of issues through the problem resolution procedure, the behaviour code, the cessation of deductions from pay (such as Medicare) and right of entry.[6]

Clauses 21 and 22 of the certified agreement contained a problem resolution procedure. It provided that any dispute about matters in the agreement would be dealt with by consultation at the local level and, if it remained unresolved, the parties agreed to comply with a decision on the matter made by the Commission. Clause 21 contained a commitment to maintain the 'status quo' while the dispute was resolved. GCM did not follow this agreed procedure, simply implementing the changes — sometimes without any prior consultation at all.[7] In July 1997, following intense industrial manoeuvring and a series of hearings before the Industrial Relations Commission and later the Federal Court, the employer announced its intention to retrench 150 employees. In October 1997, GCM retrenched the whole workforce and closed the mine, stating its intention of reopening it with new employees hired 'on merit' under 'reconfigured' wages and conditions. The mine was sold 'dry of employees' to Rio Tinto in 1998, and is now operated by a wholly owned subsidiary, which staffed it with a new workforce of non-union employees working under a non-union certified agreement.

The parties' views of the substantive dispute are summarised in the decisions spawned by this dispute.[8] GCM argued that its demands were necessary to improve the viability of the mine in accordance with the instructions of the joint venturers and that it was merely its 'right to manage' in accordance with their human resources strategy. GCM managers said this strategy was grounded in their 'magic bible', which turned out to be a remarkably concise document predicated on reducing or removing the

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5 *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998), p 9.

6 *Construction Forestry Mining and Energy Union and Gordonstone Coal Management Pty Ltd,* (Australian Industrial Relations Commission, Unreported, Print P 3415, 24 July 1997) and *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* (1999) 93 FCR 153 at 158.

7 *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* (1999) 93 FCR 153 at 158.

8 See, for example, *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998) and *Construction Forestry Mining and Energy Union and Gordonstone Coal Management Pty Ltd (*Australian Industrial Relations Commission, unreported, Print Q4628, 26 August, 1998).

influence of the union.[9] The CFMEU's view throughout the whole dispute was that the difficulties facing the mine were grossly over-stated, and related to over-capitalisation coupled with poor technical planning. More fundamentally, the union argued that GCM's demands were part of a larger strategy of individualisation and union exclusion, which reflected the approach of Arco Coal at its mines in the United States. The WR Act, which came into effect on 1 January 1997, provided a much more favourable climate for such strategies than its predecessor, the *Industrial Relations Act 1988* (Cth).

The *Workplace Relations Act:* Fostering Individualisation and Union Exclusion Strategies

The Broad Framework

The *Workplace Relations Act*'s over-arching objective is that the parties should determine terms and conditions of work at the workplace level, with minimal assistance (or 'interference') from the Industrial Relations Commission (the Commission). It hastens the spread of bargaining by reducing awards to minimum safety nets and providing that improvements in wages and conditions above the safety net are to be gained only through bargaining, including Australian Workplace Agreements (AWAs) between individual employees and employers. It circumscribes the exercise of the Commission's arbitral powers to disputes over the 20 matters specified in section 89A(1) of the WR Act. The Commission retains the power to break bargaining deadlocks by arbitration only in limited circumstances. It provides rights associated with bargaining, industrial action and freedom of association which are protected by penalties and coercive remedies, including injunctions, available from the Federal Court rather than the Commission. At the same time, the Commission is given a new coercive power in section 127 to order that industrial action cease or not occur. Section 127 orders may be sought by employers and, more rarely and with greater difficulty, by unions, but must be enforced in the Federal Court. The WR Act also implicitly retains a role for other courts.[10] For example, although parties have a statutory right to take industrial action 'protected' from legal sanctions in prescribed circumstances (protected industrial action and AWA industrial action), the question of whether particular industrial action is protected will often arise in associated tort

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9 GCM described its 'human resources strategy' in media interviews as the company's 'magic bible'. This bible was an exhibit headed 'Business Principles'. The exhibit read: 'Get what we pay for, Hire and promote the best, Control of the business, Continuous operation, Direct relationship with employees, Flexibility and adaptability'. See *GCM Pty Ltd and Construction Forestry Mining and Energy Union* (Australian Industrial Relations Commission, unreported, N Print Q3937, 22 July 1998).

10 For a detailed discussion, see Coulthard (1999); Creighton and Stewart (2000); Lee (1997); McCarry (1997); Pittard (1997).

proceedings in Supreme Courts as well as in section 127 enforcement proceedings in the Federal Court.[11]

Overall, the WR Act framework reduces the focus on the settlement of substantive matters by arbitration in the Commission and increases the focus on bargaining and the protection of rights by judicial remedies. Orr has characterised the WR Act as replacing 'Higgins' dream of arbitrated justice and harmony' with 'a new province for laws and orders, administered by the courts of general jurisdiction'.[12] Experience suggests that we might expect the courts to look more favourably on employer rights than union rights. Bennett's view is that the courts:

> literally cannot see things from the union point of view although the employer's perspective tends to come fairly naturally. So, even if they are presented with the union's point of view in argument by counsel, it tends to contradict or offend their basic values and perceptions and those of the common law tradition in which they were trained.[13]

Bennett suggests that, unlike the courts, industrial tribunals are not 'dominated by a particular approach to industrial relations'.[14] The Commission is embedded in the industrial relations system, not the legal system, and has a continuing relationship with the parties, making it in theory the more desirable forum. A tribunal's approach will be shaped by a number of factors, including the particular structure and role imposed by the relevant legislation. Furthermore, successive governments have framed the legislation to require the Commission to implement certain policies and it has been held accountable for the results.[15] While the unambiguous policy objective of the WR Act is to enhance enterprise based and individual bargaining, Coulthard, Deery and Mitchell, Naughton, Stewart and Weeks have all demonstrated that the underlying policy imperatives include individualisation and union exclusion.[16]

The Emerging Pattern of Individualisation and Union Exclusion Strategies

Individualisation has been described as 'a synonym for managerial unilateralism' in the determination of terms and conditions of employment.[17] Accordingly, it is closely interconnected with union exclusion both as a

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11 See, for example, *National Workforce Pty Ltd and Ors v Australian Manufacturing Workers Union No 2* (1997) 76 IR 2000 and, with respect to the Gordonstone dispute itself, *Kestrel Coal Pty Ltd & Anor v Construction Forestry Mining and Energy Union & Ors* [2001] 1 QdR 634.

12 Orr (1998), p 183.

13 Bennett (1994), p 91.

14 Bennett (1994), p 97.

15 Bennett (1994), p 108.

16 Coulthard (1999); Deery and Mitchell (1999); Naughton (1997); Stewart (1999); Weeks (1997).

17 Deery and Mitchell (1999), p 14.

strategy and as a result. Such employer strategies, since the commencement of the WR Act, have tended to be implemented in the context of what initially appear to be run of the mill disputes about wages and conditions. Two broad and yet closely connected industrial tactics have emerged. The first is to seek to individualise the relationship by refusing to negotiate collectively, seeking to negotiate with employees on an individual basis or the most common variant, to seek to introduce AWAs — often on a take it or leave it basis.[18] In an analysis of individual contracts and their effect on unions and collective bargaining in Australia in recent times, and the use of this tactic by a number of employers, including BHP Iron Ore, Rio Tinto and the Commonwealth Bank, Peetz concludes:

> A central element of shifting employees to individual contracts is to weaken unions. Without collective bargaining, there is little or no incentive on the part of employees to remain in a union.[19]

On its face, the WR Act provides some protection where employees confront the offer of AWAs. Section 170WG provides that a person must not apply duress to an employer or an employee in connection with an AWA or ancillary document. Section 170VV provides a penalty breach of this section of $10 000 for a body corporate or $2000 in other cases. Yet it has been difficult to prove duress, especially where an AWA is offered to a prospective employee. The pressure must be illegitimate in the sense that it negates free choice. Further, it must be proven that duress was applied to each individual, even where there are large numbers of employees involved. Thus the punitive remedy does not appear to be a useful one, especially since the Federal Court decided that it cannot void an AWA even where it is satisfied that duress has been applied in breach of the section.[20]

Implementing individual contracts may also breach Part XA, Freedom of Association (FOA). Section 298M prohibits an employer or a person who has engaged an independent contractor from using threats or promises or otherwise inducing an employee or independent contractor to stop being an officer or a member of a union. Remedies for breach of section 298M include injunctions, compensation and a maximum penalty of $10 000. Interim injunctions have been granted in several cases, preventing an employer offering individual contracts because there was an arguable case that this would induce an employee to cease union membership. Where an interim injunction to prevent the offer of individual agreements has been granted, it has completely altered the strategic landscape in the union's favour, even if the matter proceeds to

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18 For an analysis of Australian Workplace Agreements and how they may be used in this way, see Stewart (1999).

19 Peetz (2002), p 382.

20 *Schanka v Employment National (Administration) Pty Limited* [2001] FCA 1623 (15 November 2001).

final hearing.[21] Coercive remedies are thus more efficacious than punitive remedies, to the point of being crucial to a union's strategy to combat procedural individualisation strategies.

Gordonstone was an unusual circumstance, in that the employees firmly rebuffed attempts to deal with them individually and insisted that all negotiations take place with their union.[22] This forced GCM to fall back on the other major individualisation strategy adopted by employers: dismissing or retrenching employees, or threatening to do so if they refuse to agree to the employers' demands. The proportion of workers dismissed varies when the dismissal tactic is used. Sometimes only one or two employees or the local union delegates might be dismissed, usually for alleged poor performance or misconduct.[23] More spectacular has been the 'retrenchment' of a whole workforce or a large part of it, a move often associated with corporate restructuring, sale of corporate assets and outsourcing, and the subsequent employment of a new workforce on individual or non-union collective agreements. In this circumstance, the reason alleged by the employer is often that retrenchments were made inevitable by the refusal of the workforce to agree to various efficiency-related demands said to be essential to the continued profitable operation of the employer's business. Large-scale dismissals have been attempted with varying success in the mining, maritime, telecommunications and wholesale distribution industries, where union density is relatively high and the unions tend to be well organised, militant, blue collar and male dominated.[24]

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21 See, for example, *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2001) 106 FCR 482 and *Finance Sector Union v Commonwealth Bank of Australia* (2000) 106 IR 139. In the first case, the union successfully sought an interim injunction preventing the offer of AWAs. At final hearing, the Federal Court refused to make the injunction permanent, but the delay strategically favoured the union and it was then able to reach agreement with BHP. In the second case, the union also gained an interim injunction, and the bank then entered a collective agreement with it.

22 Hence the employer tactic of refusing to negotiate collectively, and the relevant legal remedies, are not considered in any further detail here, but is part of a wider research project currently being undertaken by the author.

23 In *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia* (2000) 175 ALR 173, a union delegate was dismissed by Ansett Australia Ltd, purportedly for misconduct. The misconduct alleged was using the employer's email system to distribute union reports about ongoing bargaining sessions. The Federal Court held that the dismissal was in contravention of section 298K(1)(a) of the WR Act. Ansett could not discharge the onus of proof that the dismissal was not for the reason that the employee was a union delegate. The union sought compensation and a penalty. See also *Australasian Meat Industry Employees Union v G & K O'Connor Pty Ltd* (2000) 100 IR 383, where the union successfully sought an injunction to reinstate the employee who was a union delegate and officer.

24 The employing corporations include Patrick Stevedoring, Gordonstone Coal Management Pty Ltd, Pacific Coal Pty Ltd and Coal and Allied Operations Pty Limited (both owned by Rio Tinto) and Davids Distribution Pty Ltd.

In the context of a legislative framework which circumscribes the Commission's power to settle the substantive dispute, the remedies available to the union and the employees are particularly crucial if dismissal is threatened or is imminent. Obtaining a coercive remedy that requires reinstatement or prevents threatened dismissals taking effect will be critical to the success of the union's campaign, and indeed to its future security. The WR Act remedies for dismissal and retrenchment fall into two categories: arbitral remedies from the Commission or curial remedies from the Federal Court. If the union selects arbitration, it has two further choices. The first is to seek conciliation and arbitration via a section 99 dispute notification, and seek an order preventing dismissals or providing for reinstatement as part of the settlement. The second is to seek reinstatement of the employees under the termination of employment provisions in Division 3 of Part VIA.

The procedure specified requires the Commission to conciliate first and then proceed to arbitrate depending on the grounds of the application and if the applicant so elects. Under the adjudication option, the union may pursue the termination of employment application in the Federal Court if the dismissals were, in whole or in part, union victimisation contrary to section 170CK, but conciliation by the Commission is still the first step. Alternatively, the union may seek an injunction which effects reinstatement if the dismissals take place during bargaining for an AWA or a certified agreement and are in breach of one of several provisions related to bargaining.[25] A third option is to seek an injunction to remedy breach of the freedom of association provisions in Part XA of the WR Act. Some state anti-discrimination laws may provide an additional avenue.[26] While all these options offer the *possibility* of a coercive remedy in the union's favour, the substantive and procedural rules attached to each option, and the nature of the associated remedies, differ in ways that are fundamental to the union's decision as to how best to proceed. Furthermore, what is *believed* possible is often conditioned by previous experience.[27] The

25 Section 170 MU prohibits dismissal or threatening to dismiss an employee for the reason that an employee proposes to engage, is engaged or has engaged in protected industrial action. An interlocutory injunction prohibiting threatened dismissals was made pursuant to this section in *Construction Forestry Mining and Energy Union v Newlands Coal Pty Ltd* (1997) 76 IR 243. Section 170WE prohibits dismissal or injuring an employee in their employment for the reason that the employee took AWA industrial action. Another relevant section is section 170NC which does not directly refer to dismissal. This section prohibits a person from taking or threatening to take any industrial action or other action with the intent to coerce another person to agree or not to agree to making, varying or terminating or extending the nominal expiry date of a certified agreement made under Division 2 or 3 of Part VIB.

26 For example, section 7 of the *Anti Discrimination Act 1991* (Qld) prohibits discrimination on the basis of trade union activity.

27 McCallum (1998). Professor McCallum points out at pp 218–19 that the Maritime Union of Australia's success in the 1998 maritime dispute 'was because of the strength of the freedom of association provisions', but even advisers to the Howard government and Patrick Stevedoring were stuck in what he calls a

dimensions of this strategic choice during the Gordonstone dispute were complex.

An Overview of the Strategies Employed in the Gordonstone Dispute

The CFMEU's legal strategy to combat the union exclusion tactics of GCM involved seeking remedies for breach of several different rights and, while innovative, it was largely responsive. GCM first sought changes in wages and conditions by direct negotiation with the employees on an individual basis. When the employees rejected this approach and agreement on changes was not reached by negotiation with the union, the next step in the strategy was to dismiss the entire mining workforce. The legal strategy of the parties then concentrated on the dismissals, but at the same time cases concerning the substantive matters in disputes continued.

The CFMEU's industrial strategy of resistance included negotiation with GCM over the changes it was demanding, refusal of members to engage in negotiation individually, and subsequent strike action and picketing when these measures failed. Its legal strategy initially focused on seeking conciliation and arbitration from the Commission, but the focus then necessarily shifted to preventing the dismissals and then securing reinstatement for its members. The CFMEU sought the remedies of an arbitral order settling the disputed matters, an exceptional matters order preventing the retrenchments and reinstatement in unfair dismissal proceedings from the Commission. It also sought enforcement of the relevant certified agreement in the Federal Court. Despite succeeding on the merits in the exceptional matters and termination actions, the remedies obtained were ineffective in protecting the employment of the CFMEU's members or its presence at the workplace.

The CFMEU's first legal tactic appears to have been based on those usually adopted under the IR Act. During the decade preceding the WR Act, there were several important disputes where the employer used the tactic of dismissing a whole recalcitrant workforce.[28] However, the strategy of referring a whole dispute to arbitration and seeking reinstatement of employees as part of the settlement is difficult to implement under the WR Act and success is elusive. There are a number of reasons for this. First, in accordance with the WR Act's main objective that matters should be determined at the workplace level, the Commission is largely prevented from settling a range of industrial

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'Mudginberri Time Warp' which blinded them to the possibility that unions might be able to gain injunctions against employers.

28 In *Re Printing and Kindred Industries Union v Vista Paper Products Pty Ltd* (19930) 67 ALJR 604, for example, the dismissals took place in the context of bargaining about award restructuring with several paper mills located in more than one state. At that time, the IR Act did not contain termination of employment provisions and the union sought arbitration of the whole dispute. After nearly a year of hearings, the Commission made an order for reinstatement, grounding the decision in the prevention power. The High Court agreed that this was a valid exercise of the power.

disputes by arbitration. The key section here is section 89A(1), which restricts industrial matters to the 20 allowable award matters specified in the section. Neither termination of employment nor reinstatement is an allowable award matter under section 89A(2).[29] Further, if a bargaining period has been initiated by either of the parties under section 170MI, the Act prohibits the Commission arbitrating on matters in dispute between them.[30] Even if there is no bargaining period, the Commission is charged with exercising its arbitral functions in a way that encourages enterprise level agreement making.[31]

The tactic devised by the CFMEU to overcome these difficulties was to frame the dispute as an exceptional matter under section 89A(7), and seek an order for re-employment as part of the arbitrated settlement. The person in the street might have no difficulty in describing dismissing a whole workforce with the intent of replacing them within weeks as unusual and exceptional, even in the volatile coal industry. However, the relevant sections set a high hurdle for applicants, and the drafting is convoluted, so that exceptionality is almost impossible to establish. Section 89A(7) provides that section 89A(1) does not exclude an exceptional matter from an industrial dispute if the Commission is satisfied about *all* of the following:

- A party to the dispute has made a genuine attempt to reach agreement on the exceptional matter.
- There is no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation, by the Commission.
- It is appropriate to settle the exceptional matter by arbitration.
- The issues involved in the exceptional matter are exceptional issues.
- A harsh or unjust outcome would apply if the industrial dispute were not to include the exceptional matter.

Section 120A further provides that an exceptional matter must be a single matter, the Commission must not make the order unless it is in the public interest and consistent with the objects of the WR Act, and any order made has a life of only two years and cannot be extended. Further, the enforcement regime in section 178 makes breaches of awards, certified agreements or orders punishable by a monetary penalty. Coercive remedies are not available to stop or prevent such breaches. The CFMEU was to suffer the practical implications of the remedies available under this method of enforcement when it sought to hold GCM to the terms of the Gordonstone Certified Agreement.

It might be expected that, with an unfair termination of employment regime in Division 3 of Part VIA of the WR Act, unions would — perhaps automatically — seek relief there rather than through the exceptional matter

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29 *Re Award Simplification Decision* (1997) 75 IR 272.

30 Section 170N. See also *Re Coal Mining Industry (Production and Engineering) Interim Consent Award Sept 1990* (1997) 73 IR 1.

31 Section 88A(d).

route.[32] The CFMEU tried this option in the Gordonstone dispute. However, the provisions are constructed to deal with individual complaints rather than a 'class action', are unnecessarily complex and comprise a jurisdictional minefield. Not surprisingly, successful applicants are unlikely to obtain the remedy of reinstatement. [33] The Commission may order compensation if it finds reinstatement to be inappropriate, but this is capped at six months' remuneration if the employee was employed under award conditions, as were the Gordonstone employees.[34] In the Gordonstone unfair termination case, conciliation required by section 170CF(1) failed and the CFMEU framed the terminations as harsh, unjust and unreasonable, seeking reinstatement from the Commission rather than proceeding to the Federal Court on the basis that the terminations were unlawful under section 170CK(2). The arbitration of this claim by Commissioner Hingley ran almost concurrently with the exceptional matters claim before Commissioner Hodder.

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32 The termination of employment provisions as they stood at the time of the dispute have been analysed in detail by Chapman (1997), Smith (1997), Creighton and Stewart (2000) and Chief Justice Murray Wilcox (1997). The provisions were recently amended by the *Workplace Relations Amendment (Termination of Employment) Act* 2001 (Cth), commencing in August 2001. The intention here is to discuss the provisions only in so far as they are relevant to the Gordonstone dispute and as they applied at the time.

33 In 1997–98, for example, out of a total of 886 applications disposed of by decision, reinstatement was ordered in only 29 cases, and compensation ordered in 462 cases. In 1998–99, of 8146 applications, 462 cases were disposed of by decision. Of these, only 26 orders for reinstatement were made and 96 for compensation: Australian Industrial Relations Commission (1999), Table 9, p 27. In the year 2000–01, 505 applications went to final decision, and there were 42 orders for reinstatement, 96 orders for compensation and in eleven cases a breach was found but no order made. The remaining matters were dismissed because they were out of time or because for want of jurisdiction: Australian Industrial Relations Commission (2001), Table 8, p 14.

34 Section 170CH(8) provides that where the employee was employed under award conditions, the Commission must not order compensation higher than the remuneration received in the six months before the dismissal. Section 170CD(3) provides that an employee is taken to be employed under award conditions if both wages and conditions of employment are regulated by awards, certified agreements or AWAs that bind the employer. If the employee is not so employed, the cap is $32 000 as indexed from time to time: Section 170CH(9). A complex annual indexation formula is found in *Workplace Relations Regulations* 30BB and 30BF. The actual cap as of 1 July 2001 is $37 600.

The Progression of the Parties' Strategies in the Gordonstone Dispute

Gordonstone Coal Management Avoids Arbitration of the Substantive Matters in Dispute

On 27 February and 20 March 1997, after several months of negotiation and industrial action, the CFMEU made application to the Commission under section 99 of the WR Act for determination of the substantive matters in dispute in accordance with the problem resolution procedure referred to above. By the end of March, GCM's practice was to implement its desired changes unilaterally if a decision had not been made by the Commission within two weeks of the hearing commencing. GCM's first legal tactic was to stonewall the arbitral hearings by challenging the validity of the certified agreement as a whole and of the problem resolution procedure in particular. Since this raised important questions of wider concern, the challenge was referred to a Full Bench of the Commission in March 1997. GCM argued that the agreement was not made in settlement of an interstate industrial dispute and that the last step in the disputes procedure which gave the Commission the power to arbitrate was of no effect if the disputed matter was not an allowable award matter. Both arguments were rejected by a Full Bench of the Commission in July 1997.[35]

GCM then sought leave to appeal to the High Court, which remitted the matter to the Federal Court. In a decision handed down on 29 March 1999, the court found against GCM on the validity of the certified agreement, but for GCM on the issue of the validity of the problem-resolution procedure.[36] The effect of the latter finding was that, even though the parties had agreed to refer any future disputes to arbitration and recorded this in a certified agreement, the term was unenforceable if the dispute concerned a non-allowable award matter. The High Court granted special leave to appeal this decision. The matter was heard on 11 February 2000 and the decision was handed down a year later on 15 March 2001.[37] The High Court agreed with the Full Bench of the Commission that the problem-resolution procedure gave the Commission power to arbitrate over any matters covered by the agreement, whether or not they were allowable award matters. This was an important decision, and has been described as restoring arbitration, albeit arbitration by consent.[38] In the context of the Gordonstone dispute itself, though, its practical impact was nil. When the appeal was finalised by the High Court, the employees had been retrenched for two and a half years. The doctrinal rules as they existed at the

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35 *Construction Forestry Mining and Energy Union and Gordonstone Coal Management Pty Limited* (Australian Industrial Relations Commission, unreported, Print 3415, 24 July 1997).

36 *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* (1999) 93 FCR 153.

37 *Construction Forestry Mining and Energy Union v Gordonstone Coal Management Pty Ltd & Anor* (2001) 178 ALR 61.

38 Kollmoran and Maher (2001).

time prevented the union obtaining a coercive order following arbitration. But the CFMEU was also defeated by the time it took for the matter to reach the Federal Court. While the matter was dragged through the courts, the GCM strategy moved in a different direction.

The CFMEU Fails to Obtain Coercive Enforcement of the Certified Agreement to Prevent the Retrenchments

In March 1997, Atlantic Richfield decided to sell all its coal assets worldwide. In April 1997, GCM decided to scale back operations and in July the joint venturers asked GCM to further reduce operations, report monthly on progress regarding productivity and cost control and prepare a plan in the event of closure. In July 1997, following the Full Bench's rejection of their challenges to the certified agreement and the problem-resolution procedure, and while their appeals were on foot, GCM announced that they intended to retrench 150 of the 285 employees covered by the certified agreement. One of the clauses in the certified agreement provided that retrenchment must be in order of seniority (the 'LIFO' system), and another clause provided that if GCM was hiring employees, then it had to hire from miners it had previously retrenched. The CFMEU required GCM to comply with the LIFO provision in the certified agreement. GCM refused, saying they would retrench on 'behaviour' merit. Faced with arbitration, they announced three weeks later[39] that downsizing would not be sufficient after all and that the whole mine had to be 'reconfigured'. GCM proposed to make all production and engineering workers redundant, and to restart the mine at a later time. All employees would be able to apply for the new positions and selection would be on 'merit'. The CFMEU sought orders that GCM be required to consult with them under section 170GA(2)[40]. On 21 August, the Commission ordered GCM to refrain from retrenching and to consult with the union. On 23 September, the Commission declared it was satisfied that GCM had fulfilled its obligations and declined to extend the order. Two days later, GCM recommended to the joint venturers that the mine be placed on indefinite care and maintenance. The retrenchments took place on 1 October 1997, the employees' entitlements were paid, the mine ceased production and it was put on care and maintenance.[41]

With the avenues offered by arbitration closed while the appeals were heard, the union sought an injunction from the Federal Court to restrain GCM

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39 On 18 August 1997.

40 Section 170GA permits the Commission to make orders in the public interest if an employer intends to retrench more than fifteen employees and has not consulted with the union on measures to avert or minimise the terminations, and measures to mitigate the adverse effects of the terminations. The orders must put the employees in the same position, as nearly can be done, as if the opportunity to consult had been afforded.

41 *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998). 'Care and maintenance' refers to a situation where no work is performed, but the mine is kept ready to safely restart production.

from retrenching in breach of the certified agreement.[42] Burchett J examined precedent concerning awards and agreements under previous legislation, and held that the situation had not been altered under the WR Act: injunctions were not available to prevent breaches of awards or certified agreements.[43] He held that section 178 was a 'special statutory mode of enforcement, not only of awards and orders made under the Act but also of a special statutory species of agreement, created by the legislation and conferring new rights, known as a certified agreement'.[44] Clearly a penalty was not a good, or even remotely useful, remedy to prevent the dismissals. The union then sought reinstatement under section 170CE of the termination of employment provisions, arguing all the retrenchments were harsh, unjust and unreasonable.

CFMEU Gains Compensation in the Termination of Employment Case but Not Reinstatement

A directions hearing took place on 4 December 1997, and it was agreed that it would proceed as a determination of the cases of seven of the retrenched workers, but that the final decision would apply to all 282 applicants (312 employees were retrenched). The union argued that there was no valid reason for the terminations, and that they were designed to avoid statutory obligations under the certified agreement and to avoid any statutory transmission of business provisions in the event of the sale of the mine. Furthermore, they said, GCM was deliberately seeking to eliminate the union and refused to accept the employees' choice of collective bargaining rather than individual contracts. The union submitted that GCM now intended to transfer the duties of the retrenched employees to other employees and contractors.[45]

Four months after the date of the retrenchments, Commissioner Hingley found that they were harsh, unjust and unreasonable, and was scathing of GCM's management.[46] Having avoided their statutory obligations, the

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42 Section 178 of the WR Act provides for penalties for breaching certified agreements and awards, but not for injunctions to restrain a breach. Section 178(4)(a) provides that the penalty for breach of a certified agreement by a body corporate that continues for more than one day is $10 000 and $5000 for each day the breach continues.

43 *Construction Forestry Mining and Energy Union v Gordonstone Coal Management Pty Ltd* (1997) 149 ALR 296.

44 *Construction Forestry Mining and Energy Union v Gordonstone Coal Management Pty Ltd* (1997) 149 ALR 296 at 299.

45 *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998), pp. 7–8.

46 The date of the decision was 2 February 1998. The Commissioner held: "The decision to terminate to avoid LIFO obligations was provocative and unnecessary ... The company would also not have been compelled to accept every volunteer — it could have asserted a final say ... I am of the view that the terminations had to do with the capacity and conduct of Senior Management not that of employees, and more specifically, an intent on the part of Senior Management to avoid its statutory obligations ... That the high morale and performance was not sustained

Commissioner believed that the joint venturers intended to return to production if they were unable to sell the mine. This would be easier to do if it was sold 'dry'. The Commissioner did not accept that there were genuine operational requirements for the retrenchments. The real reason was 'more about the right to hire and fire on employer assessed merit and an objective of diminishing union influence'.[47] He concluded that the reason given was not valid, that there was an absence of procedural fairness and that the employees were not advised of the real reason for their retrenchments. Each of the seven retrenchments was for an invalid reason and was therefore harsh, unjust and unreasonable.[48] As to the remedy, the Commissioner held at 15:

> [Reinstatement] is practicable because the mine is currently capable of operation and there are industrial conditions for genuine redundancy and engagement. However, since all have received redundancy termination payments, and perhaps would again face redundancy, logic makes the compensation alternative to reinstatement, overwhelmingly compelling and appropriate. Reinstatement in my view is not appropriate.

Although Commissioner Hingley believed that all the applicants had every expectation of working until they retired, he thought it was not possible to speculate who would have been made redundant or when. He decided to calculate compensation on the basis of full salary from the date of the retrenchments to the date of his decision. Thus the remedy granted for each unfairly dismissed employee was a mere four months' pay each, but the total cost to GCM/Arco/Atlantic Richfield remains confidential.[49] Before the hearing of the termination of employment case even commenced, GCM released a media statement announcing that it intended to recommence operations with existing management and temporary employees. Four days later, the CFMEU sought an exceptional matters award to prevent GCM from doing so. It then ran the two cases concurrently.

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by the employees is not surprising. That industrial relations became irreconcilable, was a self fulfilling outcome of an aggressive industrial relations strategy aimed at avoiding the LIFO enterprise agreement terms and diminishing union influence. It was a disaster of its own making: *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998), pp 11–12.

47 *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998), p 12.

48 *JW Allen & Ors and Gordonstone Coal Management Pty Ltd* (Australian Industrial Relations Commission, unreported, M Print P7786, 2 February 1998), p 14.

49 Kollmorgan and Maher (2001), p 213 state that the total compensation was $4.65 million, but no source is given for this figure, and since the final amount paid was part of a confidential agreement, I have been unable to verify that amount.

CFMEU Succeeds on the Merits in the Exceptional Matters Case but the Remedy Proves Shortlived

By the time the exceptional matters hearings commenced on 18 November 1997, GCM had advertised for production and engineering employees. Commissioner Hodder granted an interim exceptional matters award on 8 December to operate until 8 February 1998.[50] The terms were that if the employer wanted to increase hands, former employees were to be re-engaged in order of length of service at the mine. The actual numbers were to be determined by GCM alone. Leave to appeal was refused.[51] GCM took no further action regarding recruitment, and after the unfair dismissal decision was handed down on 2 February, the situation appeared to be in stalemate.

In May, despite information that GCM intended to reopen the mine, Commissioner Hodder concluded that, since the mine remained closed and the company was not recruiting, the matters were no longer exceptional matters and conversion of the interim award into a permanent award would not serve any purpose. Commissioner Hodder dismissed the application for the award on 26 June.[52] Within three weeks, Gordonstone advertised again for employees. The CFMEU immediately applied to the Commission to restore the interim award and make it permanent.[53] Commissioner Hodder considered the findings of Commissioner Hingley to be significant in the case before him. He said of GCM's strategy that it was designed to establish a smaller workforce of its own choosing, working under AWA's.[54] He found that all the elements of sections 89A(7) and 120A were satisfied, and in particular that it was GCM itself that caused the matters to be become exceptional because of its elaborate strategy.[55]

On 26 August 1998, the Commissioner made the award permanent, calling the final award the Gordonstone Mine Employment Award 1998 (the Hodder award).[56] A Full Bench of the Commission granted GCM leave to appeal. The Full Bench was not unanimous. Deputy President MacBean and Senior Deputy President Polites, the majority, while taking pains to point out that they did not endorse the actions of GCM, held:

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50 *CFMEU and Gordonstone Coal Management Pty Ltd re Gordonstone Mine Employment Award 1997* (Australian Industrial Relations Commission, unreported, Print P7274, 9 December 1997).

51 *Gordonstone Coal Management Pty Ltd v CFMEU*, (Australian Industrial Relations Commission, unreported, Print P8396, 28 January 1998).

52 *CFMEU and Gordonstone Coal Management Pty Ltd*, (Australian Industrial Relations Commission, unreported, Print Q2405, 26 June 1998).

53 *CFMEU and Gordonstone Coal Management Pty Ltd*, (Australian Industrial Relations Commission, unreported, Print Q4628, 26 August, 1998).

54 *CFMEU and Gordonstone Coal Management Pty Ltd*, (Australian Industrial Relations Commission, unreported, Print Q4628, 26 August, 1998), p 15.

55 *CFMEU and Gordonstone Coal Management Pty Ltd*, (Australian Industrial Relations Commission, unreported, Print Q4628, 26 August, 1998), p 37.

56 The Gordonstone Mine Employment Award, 1998, Print Q 5404.

> In our view, the decision of Hodder C involves a miscarriage of his discretion. In particular, we think it an error of principle for Hodder C to have taken into account in relation to the making of an award covering future rights past conduct which has been the subject of a previous order by the Commission. This is particularly so when an order having the same practical effect as the award was declined by the Commission and there was no appeal from that decision.[57]

The CFMEU sought leave to appeal from the High Court, and the case was remitted to the Federal Court. The court held that there was no such principle as that espoused by the majority of the Full Bench.[58] Yet there was a 'more fundamental reason' why the majority of the Full Bench erred. This was that the Full Bench failed to recognise that the powers exercised by Commissioner Hingley and Commissioner Hodder were materially different.[59] The court pointed out that, under Division 3, the Commission exercises 'quasi-judicial powers', while the arbitral process as exercised by Commission Hodder involves a determination of what 'quasi-legislative regime' will regulate the future relationship between the parties. The relevance of prior conduct is of a materially different kind in each situation.[60] The failure of the Full Bench to recognise this was an error of law. The Full Bench did not recognise that, in being asked to determine the appeal against Commissioner Hodder's decision, it was itself being asked to perform a function different to that performed by Commissioner Hingley. This was a jurisdictional error attracting prerogative relief.[61]

However, this conclusion was subject to the effect of section 150 of the WR Act. This is a privative section providing that an award or order affecting an award is final and conclusive and shall not be challenged, appealed against, quashed or called in question in any court, and is not subject to prohibition, mandamus or injunction in any court on any account. It focuses mainly on procedural matters in the sense that it refers to 'what courts may or may not do'.[62] The policy position lying behind section 150 and its precursors is that awards should be protected from challenge on purely technical grounds, since they are made by an expert tribunal which should be able to settle disputes promptly and with finality.[63] The Federal Court held that the Full Bench's order affected an award, the Hodder exceptional matters award, by quashing it, and thus section 150 applied to the Full Bench order. The bizarre result was

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57 *Gordonstone Coal Management Pty Ltd v CFMEU* (1998) 87 IR 470 at 479.

58 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73.

59 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 94.

60 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 97–98.

61 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 99.

62 McCallum (1991), p 159; McCallum (1994), pp 219–22.

63 Creighton, Ford, and Mitchell (1993), p 697ff.

that a Full Bench appeal decision riddled with jurisdictional error stood, while the Hodder Award — determined 'according to equity, good conscience and the substantial merits of the case' and free from jurisdictional error — remained quashed.[64] Section 150 had been applied in a way that fostered precisely the kind of outcome it was framed to avoid: an award was in effect invalidated by what was essentially a technical or procedural point. The employees, whose dismissal Commissioner Hodder had been found to be in circumstances so exceptional they warranted an award to require the employer to abide by its own certified agreement, remained dismissed.

Sale of the Mine, a New Non-union Agreement and the Transmission of Business Provisions Avoided

GCM sold Gordonstone to Rio Tinto on 17 October, 1998.[65] The mine was renamed Kestrel and was initially operated by Mine Management Pty Ltd (a wholly owned subsidiary of Rio Tinto). Mine Management later changed its name to Kestrel Coal Pty Ltd and continues to operate the mine. Mine Management was joined as a party to the appeal proceedings before the Federal Court.[66] Mine Management had entered into a non-union certified agreement with 22 employees prior to the actual sale taking place, and prior to work at the mine itself commencing. This agreement was certified by the Commission, but the certification was held by the Federal Court to have been invalid, because the relevant employees were not actually employed in the operations of the business at the time the agreement was made.[67] This did not prevent operations continuing at Kestrel or a further non-union collective agreement, the Kestrel Coal Pty Limited Certified Agreement 1999 (the Kestrel Agreement), being validly made and quickly certified on 22 July 1999.[68]

When the Federal Court decision on the exceptional matters award was handed down, on 25 June 1999, the CFMEU applied to the Full Bench of the Commission to set aside its appeal decision under section 111(1)(f) and/or section 113. The matter was heard on 15 and 16 July, and the Bench was advised that the second Kestrel Agreement had been filed for certification. Kestrel submitted that the Bench should refrain from further hearing the matter in the public interest under section 111(1)(g). In its decision handed down in

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64 Section 110(2)(c) provides the Commission shall act according to 'equity, good conscience and the substantial merits of the case' in the hearing and determination of an industrial dispute or in any other proceedings before the Commission.

65 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 79.

66 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 80.

67 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73 at 110–11.

68 *Construction Forestry Mining and Energy Union and Gordonstone Mine Employment Award* (Australian Industrial Relations Commission, unreported, Print R7740, 2 August 1999).

August, the majority of the Bench agreed.[69] There were three reasons, none of them convincing. First, the majority thought that the scheme of the WR Act, particularly section 150, showed that parliament intended that awards of a Full Bench on appeal be final and conclusive, including those containing jurisdictional error. Second, setting aside its earlier decision might not finally dispose of the matter and it might have to rehear the appeal and perhaps even come to the same conclusion as it had before. In the light of the Federal Court's decision, it is hard to imagine what grounds would underpin such a conclusion in a rehearing. The third reason was that there had been a material change in circumstances: the mine had been sold, and Kestrel Coal had not committed the conduct that had led to the making of the Hodder Award. Here the Full Bench conveniently failed to address the intention of the WR Act revealed in section 149 which provides that successors are bound by existing awards. The majority said that its decision was not affected by the certification of the Kestrel Agreement. Commissioner Bacon, in a minority judgment, did not agree that the Full Bench should refrain from further hearing and considered the matter on its merits. He did agree with the majority's views about section 150 and held that the CFMEU's application should be refused for that reason and also because reviving the exceptional matters order would have no 'practical effect'.[70] This last observation was directed at the relationship between the Kestrel Agreement and the Hodder Award: section 170LY(1)(a) provides that while it is in operation, a certified agreement prevails over an award. Put bluntly, the structure of the WR Act allowed Rio Tinto and the Kestrel employees to trade away the quasi-legislative rights of other citizens who had no say at all in the whole process.

Ketrel Brings Successful Industrial Tort Proceedings in the Queensland Supreme Court

Kestrel, under the name Mine Management, successfully sought an interim injunction from the Supreme Court of Queensland in June 1999 arguing that the CFMEU, various officials and members were committing the torts of interference with contractual relations and intimidation, in the course of picketing activity on the entry road to the mine.[71] The picketers at Kestrel largely complied with the terms of the order, and restricted their conduct to verbal protests until the picket line was lifted on July 1999, after the Federal Court's decision on the appeal from the Commission.[72] There had been no

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69 *Construction Forestry Mining and Energy Union and Gordonstone Mine Employment Award* (Australian Industrial Relations Commission, unreported, Print R7740, 2 August 1999).

70 *Construction Forestry Mining and Energy Union and Gordonstone Mine Employment Award* (Australian Industrial Relations Commission, unreported, Print R7740, 2 August 1999).

71 *Kestrel Coal Pty Ltd & Anor v Construction Forestry Mining and Energy Union & Ors* [2001] 1 Qd.R. 634.

72 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 164 ALR 73.

picket activity since that time. Nevertheless, Kestrel sought a permanent injunction. Chesterman J in the Queensland Supreme Court concluded that, although there was not a high probability of renewed picket action, there was an 'appreciable' risk that the defendants would take similar action in the future unless enjoined from doing so. He held that the damage to the plaintiffs of further picketing would be substantial, while the injunction would not cause any inconvenience to the CFMEU. The injunction was made permanent on 24 May 2000. The court also required the CFMEU to pay the applicant's costs of the action.

This decision is a particularly clear example of what Bennett identified as the inability or refusal of the courts to take into account the union point of view. There was no concrete evidence at all that Kestrel was in imminent danger of CFMEU action, merely a refusal by the CFMEU to undertake that it would never take such action again. The court saw the reason for this refusal, and evidence regarding payment and sustenance of members during the picket, as evidence showing an appreciable risk of further action, rather than being related to the union's overall industrial strategy to deal with disputes with Rio Tinto. Blacking out the union view in this way enabled the court to conclude that making the injunction permanent caused no inconvenience to the CFMEU, when it fact it seriously prejudiced its strategic position at Kestrel and at other mines as well. The Supreme Court's decision may be compared with Commissioner Hodder's refusal to make his interim exceptional matters order permanent. The reason for this refusal was that the mine remained closed and in these circumstances, the matters were no longer exceptional matters. This conclusion was reached even though GCM refused to provide any information at all about its intentions while the union provided information about GCM's actual preparations for reopening. This suggests that the evidentiary hurdle facing a union is extremely high, compared to that facing an employer seeking a permanent injunction against a union in the Queensland Supreme Court. In contrast, the FOA provisions are framed in a way which requires the Federal Court to approach applications for orders under these provisions rather differently.

Freedom of Association: A Strategic Opportunity Foregone?

Part XA establishes a scheme where certain conduct, including dismissal, is unlawful if it is motivated by a prohibited reason.[73] The section applies to conduct by registered organisations and by constitutional corporations. Most of the prohibited reasons relate to trade union membership, rights under industrial instruments, coercion of persons to become or not to be trade union members and the lodging of complaints against employers. Section 298K(1) provides that an employer must not dismiss employees or injure them in their employment, or alter the position of an employee to the employee's detriment for a prohibited reason. The most relevant prohibited reasons in section 298L, as far as Gordonstone is concerned, are because the employee:

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[73] See Creighton and Stewart (2000), Naughton (1997) and Weeks (1997) for a detailed analysis of the FOA provisions.

(a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or

...

(h) is entitled to the benefit of an industrial instrument or an order of an industrial body

Space precludes a detailed examination of the FOA provisions, but the findings of fact in the decisions of Commissioners Hodder and Hingley suggest that GCM dismissed the CFMEU members for the prohibited reasons in section 298L(1)(a) and (h). It is also likely that GCM contravened section 298M, referred to above. The CFMEU would probably have been successful in an application for an interim injunction to prevent the retrenchments. This remedy could have been obtained within a matter of weeks and would have completely altered the strategic positions of the parties and perhaps even the eventual outcome. Indeed, this was the effect of the interim injunction obtained by the Maritime Union of Australia (MUA) in the 1998 maritime dispute.[74]

Industrial Strategy, Legal Strategy and Remedies

The fundamental issues in the Gordonstone dispute were very similar to those at the heart of the 1998 maritime dispute, but on a smaller, almost 'test-run' scale. The maritime dispute concerned a strategy aimed at excluding the MUA from all docks operated by Patrick Stevedores and the major tactic was corporate reorganisation and dismissal of the union workforce of about 2000 workers. Patrick was one of only two large stevedoring companies at the time of the dispute, the other being P&O Stevedores.[75] The Gordonstone dispute revolved around one remote coal mine employing about 300 mineworkers. The industrial strategies of the respective unions were very similar, with strike action and pickets featuring strongly. Nevertheless, and although the Gordonstone pickets lasted almost two years, they never attracted the public support and notoriety of the five-week-long maritime pickets at the Patrick docks, all of which were located in cities and large towns. The main point of departure, though, is the nature of the legal strategy adopted by each union. Where the CFMEU selected the arbitration option (primarily at least), the MUA chose adjudication, seeking remedies from the Federal Court. The CFMEU succeeded on the merits in two of the major arbitral cases, but failed to get a remedy effecting reinstatement. In contrast, the merits of the maritime dispute were never heard, the interim judicial remedy sufficiently changing the industrial landscape in the MUA's favour to enable it to negotiate a satisfactory settlement with Patrick and the federal government. The respective strategists' understanding of the framework of remedies played a fundamental role. These two disputes intersected in time, and no doubt the MUA strategy was informed by legal and industrial developments at Gordonstone.

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74 See Lee (1998), McCallum (1998) and Orr (1998).

75 See Orr (1998) and Lee (1998).

The Gordonstone dispute demonstrates key aspects of the relationship between legal strategy and industrial strategy under the WR Act and the role played by remedies. The CFMEU's first tactic, arbitration of the substantive matters in dispute, was defeated by procedure and delay as much as by the doctrinal rules. GCM's response of stonewalling arbitral proceedings by instituting an appeal against the validity of its own certified agreement ultimately enabled it to avoid the terms of the agreement without fear of intervention from the Commission or the courts. This applied to the substantive matters in dispute, as well as the LIFO clause, all covered by the certified agreement. The enforcement regime in section 178 contributed to this outcome, because injunctive relief was not available to stop or prevent GCM breaching the certified agreement. By the time the High Court handed down its final appeal decision on the validity point in 2001, the employees had been sacked for two and a half years. For the Gordonstone miners, the WR Act provided no effective remedy for what was in truth no different from a breach of contract.

With respect to the actual retrenchments, the CFMEU succeeded on the merits in both the harsh, unjust and unreasonable termination case and the exceptional matters case. The remedy granted in the former case — that of compensation — was a poor one: the employees' preference was reinstatement and at the time of hearing GCM did intend to either restart operations with a new workforce or sell the mine. Far from adequately compensating the wronged party, this decision actually assisted the wrongdoers' future plans. With the interim exceptional matters order in place prior to Commissioner Hingley making his final decision, reinstatement was an entirely appropriate and necessary remedy to do justice between the parties. Interestingly, in two more recent cases of mass retrenchments at coal mines operated by companies owned by Rio Tinto in similar circumstances to those at Gordonstone, the CFMEU again brought unfair dismissal proceedings, this time obtaining reinstatement orders in both cases.[76] However, both decisions were appealed, and at the time of writing the CFMEU had settled one case by agreeing to a total payment of $25 million dollars in compensation in respect of 190 employees at two New South Wales mines.[77]

Finally, in the Gordonstone dispute, the Hodder exceptional matters award was rendered ineffective by the interaction of two sections previously thought to be mainly concerned with procedural matters. Both the Federal Court and the Commission Full Bench applied section 150 in a way which preserved the Full Bench decision riddled with jurisdictional error from judicial review and invalidated an award made on the substantial merits of the case. In one respect, this outcome also turned on what could be characterised

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76 *Robert David Smith and others and Pacific Coal Pty Limited* (Australian Industrial Relations Commission, unreported, Print PR902679, 9 April 2001); *BJ Crawford and Others and Coal and Allied Operations Pty Limited* (Australian Industrial Relations Commission, unreported, Print PR906250, 9 July 2001).

77 CFMEU, Media Release, 31 May 2002, accessed at www.cfmeu.asn.au/mining-energy/media/med0209.html.

as a semantic point. Had Commissioner Hodder framed his conclusions as a 'decision' rather than as an 'award' it is at least arguable that section 150 may have had no application to it.[78] Yet, even if this had proved correct — and even if the Full Bench had agreed to set aside its appeal decision — the Hodder exceptional matters award would have been circumvented by another procedural provision. Section 170LY(1)(a) permitted a group of non-union employees to effectively trade away the quasi-legislative rights of a group of union employees who were completely excluded from the negotiating process, if any, between Kestral and its non-union employees.

The dispute also demonstrates the significance of choice of forum. The WR Act expanded the potential for the courts to be involved and curial processes were strategically employed to avoid remedies granted by the Commission. While fine points of law were argued in a series of appeals through the court heirarchies, statutory rights apparently guaranteed to employees were sidestepped. The tort proceedings in the Queensland Supreme Court are a clear example of the attitude of the ordinary courts to industrial disputes and the strategies employed by the parties. The approach of the Federal Court has been somewhat different in FOA cases, and this is most notable where the union seeks interlocutory injunctions. The approach these courts take in constructing coercive remedies has thus proved to be crucial in industrial disputes where individualisation and union exclusion are at issue, and of great import to strategic decision-making by both employers and unions.

Conclusion

The WR Act had barely been proclaimed when GCM abandoned the previously cooperative relationship it had with its employees and the CFMEU, refused to comply with its own certified agreement and sought to exclude the influence of the union. In hindsight, it appears that the FOA provisions would have provided the most efficacious remedies, and a legal strategy based on those provisions would have had a greater chance of success than that adopted by the CFMEU. However, the WR Act did provide the CFMEU and its Gordonstone members with a host of rights quite apart from the rights in the FOA provisions. Many of those rights were clearly breached by GCM. Yet the only remedy gained was about four months' pay for each employee in compensation for harsh, unjust and unreasonable dismissal. The ultimate failure of the CFMEU's legal strategy to defeat GCM's unlawful union exclusion strategy can be traced to the nature of the framework of rights and remedies the WR Act provides. As far as employees and their unions are concerned, it is a framework of rights which in many respects cannot be enforced by adequate remedies.

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78 Section 143(2) contemplates that the Commission may make decisions which are not awards.

Appendix: Table of Events, Legal Actions and Decisions

Action/event	Party	Forum	Decision date	Decision/remedy
1 August 96 Certification of CA*	GCM	AIRC	21 Oct 1996	CA certified
27 Feb 1997 Application for conciliation and arbitration of substantive dispute	CFMEU Referral GCM CFMEU	AIRC AIRC Full Bench FCA appeal HCA appeal	March 1997 July 1997 March 1999 March 2001	Referred to Full Bench Both CA, disp proc valid and not subject to s 89A CA valid, disp proc subject to s 89A Both CA, disp proc valid and not subject to s 89A

July 1997: **Retrenchment of 150 announced; GCM refuses to comply with LIFO clause in CA.**

18 August 1997: **Announcement that whole workforce would be retrenched; retrenchments took place on 1 October 1997.**

21 August 1997 Application that GCM consult under 170FA	CMFEU	AIRC AIRC	21 Aug 1997 23 Sept 1997	GCM not to retrench until s 170FA complied with. Section 170FA satisfied.
August 1997 Application for injunction to prevent breach of CA	CFMEU	FCA	30 Sept 1997	Injunction not available to prevent breach of CA
October 1997 Unfair dismissal application; reinstatement sought	CFMEU	AIRC: Hingley C.	2 Feb 1998	Dismissals were harsh, unjust, unreasonable; compensation awarded
5 November 1997 Exceptional matters order sought	CFMEU GCM CFMEU CFMEU	AIRC: Hodder C. AIRC Full Bench appeal FCA appeal AIRC Full Bench	8 Dec 1997 26 June 1998 27 July 1998 26 Aug 1998 18 Dec 1998 25 June 1999 2 Aug 1999	Interim award granted App'n for permanent award dismissed 26/06 decision set aside, interim award restored Interim award made permanent Hodder C erred, interim award over-turned Full Bench erred, but s 150 applied Refrained from further hearing (s 111(1)(g).

17 October 1998: **Mine sold to Rio Tinto; sale completed 10 February 1999; non-union workforce hired.**

11 Jan 1999 Application certification of Mine Management CA	Mine M'gemt CFMEU	AIRC FCA	9 Feb 1999 25 June 1999	Certified Certification invalid
July 1999 Application for certification of Kestrel CA	Kestrel Coal	AIRC	22 July 1999	Certified
March 1999 Industrial tort application	Kestrel Coal	QSC	23 Mar 1999 26 May 2000	Interim injunction granted Final injunction granted

March 2001: High Court decides that dispute procedure not limited by section 89A.

* Certified Agreement

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