The MUA Cases[1]

JOO-CHEONG THAM*

INTRODUCTION

For weeks in April and May last year, newspaper headlines screamed 'war on the wharves'. Photographs of security guards with guard dogs were juxtaposed with pickets set up by angry wharfies and their crowd of supporters. No mere industrial dispute, this war had an overt political complexion. The Liberal/National Coalition Federal Government was deeply involved mostly on the side of capital while the Australian Labor Party sided with organised labour.

Not surprisingly then, the dispute polarised the Australian community. What was striking about this dispute was that it was played out in the legal as well as political arena. Crucial in shaping the direction of the Wars were three consecutive court proceedings. The first was heard by North J in the Federal Court.[2] The other two were prompt appeals to the Full Bench of the Federal Court and the High Court.[3]

The MUA cases were without legal precedent in several respects. They were the first proceedings based on breach of s 298K of the *Workplace Relations Act* 1996 (Cth)[4] brought by a union against the employer. The common law conspiracy action based on this breach also sets a precedent. In clear contrast, conspiracy actions are usually brought against unions who organise industrial action.[5] This aspect of the case was noted by McHugh J who, in the proceedings, commented:

> It would be one of life's ironies, if . . . the tort of conspiracy which was used to hinder, if not seriously damage the trade union movement in the 19th century, is now, in combination with s 298K (of the *Workplace Relations Act*), to be used against the employers in the last decade of the 20th century.[6]

* Master of Laws student, University of Melbourne. I am grateful to Nehal Bhuta and Anna Chapman for their comments on the various drafts of this case-note.

1 This case-note considers three cases: *Maritime Union of Australia & Others* v *Patrick Stevedoring No. 1 Pty Ltd (under administration) & Ors* (1998) 77 FCR 456 ('North J's decision'); *Patrick Stevedoring Operations No 2 Pty Ltd & Ors* v *Maritime Union of Australia & Ors* (1998) 77 FCR 478 ('The Full Bench's decision') & *Patrick Stevedores Operations No 2 Pty Ltd* v *Maritime Union of Australia* (1998) 153 ALR 643 ('The High Court decision').

2 North J's decision.

3 The Full Bench decision and the High Court decision. I refer to these three proceedings as the 'MUA cases'. This phrasing is somewhat inaccurate as the Dock Wars did give rise to other legal proceedings, see fn 32 infra. This case-note, however, focuses on these three cases.

4 It is one of the interesting features of the *Workplace Relations Act* 1996 (Cth) that it is the first Federal industrial relations legislation to devote an entire part to freedom of association. This Act is hereafter referred to as the *Workplace Relations Act.*

5 Examples include *William* v *Hursey* (1959) 103 CLR 30 & *Ansett Transport Industries (Operations) Pty Ltd* v *Australian Federation of Air Pilots* (1989) 95 ALR 211. As Graeme Orr observes, there is a distinct irony in the use of the tort of conspiracy by the MUA as the former case, which represents the leading High Court decision on the tort of conspiracy, was one in which damages were awarded *against* the Waterside Workers' Federation of Australia, the predecessor of the MUA: Graeme Orr, 'Conspiracy on the Waterfront' (1998) 11 *Australian Journal of Labour Law* 159, 165.

6 Transcripts of the High Court hearing, 27 April, 23 1998.

The third feature of the proceedings which distinguishes it is that they represent the first time courts had to consider the legality of a corporate re-structure which arguably was done for a prohibited reason (as provided by s 298L of the *Workplace Relations Act*). Finally, the proceedings were groundbreaking for the fact that all these novel features were considered in the highest court of the land, the High Court.

This case-note sets out to consider these proceedings. The nature of a case-note clearly does not allow this to be an exhaustive exposition. This is particularly true of the political dimensions of the proceedings.

The approach adopted follows typical case-note fashion. Part II of this case-note covers the factual background of the proceedings. Part III, in its various sections, describes the judgments. Part IV follows with a commentary on the proceedings. This commentary will consider several issues brought to light by the proceedings. These include the nature of the courts' powers with respect to breaches of s 298K of the *Workplace Relations Act* and conspiracies to breach that section; principles governing such powers; the conflict between the *Corporations Law* and the *Workplace Relations Act* and the possibility of the courts emerging as the new arena for industrial battles. Part V, finally, forms the conclusion.

THE FACTUAL BACKGROUND

A. 1997 Events

In 1997, the Maritime Union of Australia was a union which had complete coverage of the workers in the stevedoring industry, while, on the other side of the capital-labour equation, the employers were represented by the stevedoring duopoly of Patrick Stevedores and P & O Ports. For some time, these two employers had muttered about the need for 'waterfront reform'. From mid-1997 onwards, the rhetoric gained momentum as the Liberal/National Coalition Government took a more aggressive approach to the issue. This included commissioning reports which canvassed the option of sacking the entire MUA workforce.[7]

In September 1997, Patrick Stevedores, a group of companies, ('the Patrick Group') underwent a significant corporate re-structure without the knowledge of its employees, the MUA wharfies.[8]

Prior to September 1997, four of the Patrick companies ('the Patrick employer companies'), Patrick Stevedores No 1 Pty Ltd, Patrick Stevedores No 2 Pty Ltd, Patrick Stevedores No 3 Pty Ltd and National Stevedores Tasmania Pty Ltd carried on the business of stevedoring at various Australian ports and also directly employed the MUA wharfies. In September 1997, these companies sold their stevedoring business to another company within the Patrick Group, Patrick Stevedores Operations No 2 Pty Ltd ('PSO No 2'). This business was subsequently transferred to Patrick Stevedores Operations Pty Ltd ('PSO').[9]

7 The person commissioned to write this report was Dr. Stephen Webster: David Elias, 'On the Waterfront: A Chris Corrigan Remake', *The Age: News Extra*, 02 May 1998, 1, 6.

8 The High Court decision, 649.

9 Ibid.

The employer companies then entered into Labor Supply Agreements ('LSAs') with PSO No 2 and, later, PSO ('the Patrick stevedoring company').[10] The LSAs meant that the employer companies, while still employing the MUA wharfies, no longer had control over the stevedoring business which was now in the hands of the stevedoring company.

This restructuring had two drastic effects. Firstly, the business was exchanged for a receivable. This meant that, while some of the sale proceeds were immediately received, part of the purchase price would be rendered at a later date. The proceeds received were, however, used to discharge intra-group loans as well to buy back shares in the employer companies owned by other companies in the Group. Shares bought back were cancelled immediately. The cumulative effect of these events was a severe reduction in the amount of capital the employer companies had to finance the companies.[11] The companies, consequently, faced a lack of working capital. They became, in essence, "shell" companies.

The re-structure, by severely reducing working capital, also undermined the job security of the MUA wharfies. This situation was compounded by the terms of the LSAs. The LSAs were, after the corporate re-structure, the only significant asset of the employer companies.[12] The LSAs, however, 'gave the stevedoring company the right to terminate the agreement without notice if there were any interference with, delay in or hindering of the supply of labour'.[13] In an industry which experiences relatively high levels of industrial conflict, this term made the employer companies' viability 'extremely tenuous'[14] and severely eroded the job security of the wharfies.[15]

These two effects were deepened when the assets of the employer companies were charged, sometime between September 1997 and April 1998, to secure the indebtedness of other companies in the Patrick Group.[16]

While these corporate maneouvres were in the process of unfolding, two attempts were made to introduce non-union labour. Both failed abysmally. In October 1997, boycotts by the International Transport Workers Federation in support of the MUA foiled an attempt to replace MUA workers with non-union labour in Cairns. Two months later, in December, the notorious Dubai plan to replace MUA workers by training former and serving soldiers to work as stevedores was aborted after being exposed in the Federal Parliament.[17] Chris Corrigan, the Chief Executive Officer of Lang Corporation, the controlling company of the Patrick Group, expressly supported the plan[18] and there is evidence to suggest the involvement of the Federal Liberal/National Coalition Government.[19]

10 Ibid.
11 Id 650.
12 North J's decision, 459.
13 The High Court decision, 649.
14 Ibid.
15 See North J's decision, 461-2.
16 The High Court decision, 673 per Gaudron J.
17 See, e.g., AAP, 'Docks Diary', *Australian Financial Review*, 09 April 1998, 6.
18 Ewin Hannan, 'Dock boss admits sack plan', *Age*, 10 February 1998, A1.
19 See Julie-Anne Davies, Mark Forbes and Bill Birnbauer, 'Howard linked to Dubai plan: claim', *The Age*, 08 May 1998, A1 and Ewin Hannan, 'Docks battle plan', *Age*, 5 June 1998, A1, 6. This confession was, among others, made before the Australian Industrial Relations Commission: *Patrick Stevedores No. 1 Ltd & Ors* v *MUA* (Australian Industrial Relations Commission, Ross VP, 13 February 1998, Decision 159/98).

B. 1998 Events

1. The January entry of PCS

In late January 1998, an explosive event occurred. The Patrick Group leased Webb Dock in Melbourne as well as various equipment to the PCS Group,[20] a company backed by the National Farmers' Federation ('NFF'). The purpose of the PCS enterprise was to offer a 'radical non-union alternative' to the MUA.[21] In response to this, the MUA set up pickets attempting to block non-union labour from entering into Webb Dock and refused to work at Webb Dock.[22] Industrial action was also taken at East Swanson Dock in Melbourne.[23] These actions were accompanied by threats to take widespread industrial action in the stevedoring and manufacturing industries.[24] Overseas unions were also in preparation for the boycotting of any ships loaded by non-union labour.[25] On the legal front, the MUA brought proceedings against various companies in the Patrick Group as well as PCS and other NFF-related parties on the grounds of breaches of the Award, the Patrick-Melbourne Enterprise Agreement 1996 and 'a wrongful plan to replace the MUA employees with a non-union workforce.'[26]

Concurrent with this dispute over the entry of PCS were negotiations between Patrick and MUA over the stripping back of the Stevedoring Industry Award. The Patrick Group had been insisting on changes to the award including reduction in shift penalties.[27] In response to this, MUA took protected industrial action at various ports.

[20] The naming of this company was a remarkable class-conscious act. The name seems to have been inspired by the non-union labour force that took over the waterfront during the Depression, the Permanent and Casual Wharf Labourers' Association, the P and Cs: see Wendy Lowenstein and Tom Hills, *Under the Hook: Melbourne Waterside Workers Remember Working Lives and Class War: 1900-1980* (1982), 67.

[21] Mark Davis, 'It's war on the wharves', *Australian Financial Review*, 29 January 1998, 1. Integral to this non-union alternative was the fact that all the PCS workers were employed on Australian Workplace Agreements, see Margaret Lee, 'On the Waterfront' (1998) 28 *Alternative Law Journal* 107, 110.

[22] Mark Davis and Katharine Murphy, 'MUA pickets as NFF equips dock operation'. *Australian Financial Review*, 3 February 1998, 5.

[23] Mark Davis and Fiona Buffini, 'MUA strikes back against Patrick', *Australian Financial Review*, 17 February 1998, 5.

[24] See John Coombs, MUA national secretary, and John Corsetti, Victorian secretary of the Australian Manufacturing Workers Union, quoted in Ewin Hannan and Clare Kermond, 'Unions vow to close docks', *Age*, 29 January 1998, A1, 5.

[25] Peter Wilmouth, John Silvester and Lyail Johnson, 'World ban threat', *Sunday Age*, 01 February 1998, 1.

[26] The High Court decision, 674 per Gaudron J.

[27] Mark Davis and Fiona Buffini, 'MUA strikes back against Patrick', *The Australian Financial Review*, 17 February 1998, 5. The process of stripping back is mandated by the *Workplace Relations Act* 1996 (Cth) which cuts back the matters in which the Industrial Relations Commission can make awards on to the 20 matters listed in s 89A (2) of the Act. This means that awards made before the Act which generally went beyond this list of matters have to be 'stripped back'.

2. The April 7 mass sackings

These disputes had yet to be exhausted when, on 6 April, 'fearing the imminent dismissal of the MUA employees', the MUA applied to the Federal Court for an interlocutory order restraining the Patrick employer companies from dismissing the union workforce. The hearing of this application was, however, adjourned to 8 April.[28]

On the evening of 7 April, Patrick the stevedoring company, in reliance on the term granting it a right to terminate, terminated the LSAs. The employer companies were effectively left without work. In short, the effect of Patrick's termination of the LSAs was the sacking of the entire MUA workforce. At the same time, Patrick the stevedoring company entered into agreements with PCS for PCS to supply non-union labour.[29]

Peter Reith, the Minister for Workplace Relations and Small Business, promptly backed the sackings which, in his opinion, was in the exercise of 'the right of the company to introduce reform.'[30] In the Federal Parliament the next day, Reith introduced the Stevedoring Levy (Collection) Bill 1998 (Cth) and the Stevedoring Levy (Imposition) Bill 1998 (Cth). The two Bills, if enacted into law, will set up a structure imposing a levy on all stevedoring companies. The monies will be used 'in connection with the reform or restructuring of the stevedoring industry'.[31] According to Peter Reith, these monies were, among others, to be used to fund the redundancies that would have to follow after Patrick Operations terminated the LSAs.[32]

The events above sparked the union response of setting up pickets at every major Patrick dock.[33] On 8 April, North J of the Federal Court granted the injunction sought by MUA restraining the Patrick Employers, now under voluntary administration, from dismissing the MUA wharfies. The MUA then joined Peter Reith and the Commonwealth Government to the proceedings.[34]

[28] The High Court decision, 674 per Gaudron J.

[29] See, e.g., Editors, 'Patrick sacks all wharf workers', *Australian Financial Review*, 08 April 1998 5 & Judy Hughes, Sid Marris and Natalie O' Brien, 'Non-union workers move in', *Australian*, 09 April 1998, 1.

[30] Peter Reith, Minister for Workplace Relations and Small Business, 'Waterfront Reform' (Media release, 7 April 1998, http://www.dir.gov.au/).

[31] See s 17 of Stevedoring Levy (Collection) Bill 1998 (Cth).

[32] Sid Marris, 'Public to foot $250m sackings bill: Labor', *Australian*, 9 April 1998, 5. For maneuvers leading up to this Bill, see Pamela Williams, 'Unchained: Patrick Breaks Open the Docks', *Weekend Financial Review*, 11-2 April 1998, 19.

[33] The proceedings on picketing include *P & O Ports* v *MUA* (unreported, Supreme Court of New South Wales, Levine J, 19 May 1998); *Patrick Stevedores Operations & Anor* v *MUA* (1998) 79 IR 276 (which was overturned in part by *MUA* v *Patrick Stevedores Operations* (1998) 79 IR 317 and *Patrick Stevedores Operations* v *MUA* (unreported, Supreme Court of Western Australia, Parker J, 23 April 1998). See, e.g., Editors, 'Standstill on the docks-the state of the nation', *Age*, 20 April 1998, A4. See Editors, 'The Legal State of Play', *Australian*, 06 May 1998, 4 and Orr, op cit (fn 4) 175-7 for details of legal actions against picketing by wharfies' supporters. For more detail on Victorian legal developments, see Andrew Burrell, 'Picket order can't be against 'world at large'', *Australian Financial Review*, 29 April 1998, 7. As stated in n 2 supra, this case-note does not discuss these picketing decisions. I have, in a different article, discussed the application of the law on industrial action in the context of the Dock Wars: see Joo-Cheong Tham, 'Propping the rule of capital: the law on industrial action', 2 (1) *Protocol* 62-8.

[34] The High Court decision, 674 per Gaudron J.

The proceedings relating to interlocutory relief were finally heard by North J at the Federal Court on 21 April. In those proceedings, the MUA succeeded in obtaining the orders it sought in protecting the workers from imminent termination. This judgment was promptly appealed by PSO No 2. Two days later, the Full Bench of the Federal Court dismissed this appeal and included a further order. This decision too was appealed, culminating in the High Court decision of 4 May which mostly upheld, by a 6-1 majority, the judgment of North J made in the first hearing.

These three decisions will be described in the following sections.

THE JUDGMENTS

A. North J's Judgment

On page 5 of North J's judgment, His Honour stated that:

> The principles which govern the determination of an application for interim injunctions are well established. The Court must determine whether there is a serious question to be tried and whether the balance of convenience favours the grant of relief.[35]

These two questions structured his judgment with the second question occupying more of his Honour's attention. This will also be the structure used in this section.

When considering these two questions, his Honour made clear that, while the applicants, the MUA and the representative workers,[36] relied upon nine causes of action, it was sufficient for his judgment to discuss only two of them: breach of s 298K (1) of the *Workplace Relations Act* and the conspiracy to injure by unlawful means.[37]

1. Serious question to be tried

Section 298K (1) of the *Workplace Relations Act* is located in Part XA of Act titled Freedom of Association. This section sets up a prohibition on certain employer conduct. It states that:

> An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
>
> (a) dismiss an employee;
> (b) injure an employee in his or her employment;
> (c) alter the position of an employee to the employee's prejudice.

Section 298L defines 'prohibited reason'. This section provides that an action done because the employee, who is a member of an industrial association, is dissatisfied with his or her conditions will be for a prohibited reason.[38]

35 North J's decision, 460.

36 This proceeding was partly brought as a 'class action' or, more accurately, a representative proceeding under s 33J of the *Federal Court of Australia Act* 1976 (Cth): North J's decision, 458.

37 North J's decision, 459. All the causes of action are listed in Gaudron J's judgment at 674.

38 s 298L(1)(l) of the *Workplace Relations Act.*

Hence, for the MUA to succeed under this head, it had prove on two levels that there was a serious question to be tried: s 298 K which concerned the alleged conduct and its impact; and s 298L which concerned the purpose of the alleged conduct.

North J found that there was a serious question to be tried under s 298K of the *Workplace Relations Act.* The corporate re-structure which involved the Patrick employers in selling the stevedoring business and entering into the LSAs had the effect of giving Patrick the stevedoring business power to terminate the LSAs, thereby, rendering the employer companies insolvent and the workforce redundant. This raised a serious question to be tried as to whether there was conduct falling within the scope of s 298K (1) (b) and (c) of the *Workplace Relations Act*[39] not least because '(t)he concepts of injury and prejudicial alteration referred to in s 298K (1) (b) and (c) are concepts of wide operation'.[40]

When discussing whether there was a serious question that such conduct was for a prohibited reason as defined in s 298L of the *Workplace Relations Act*, North J focused on whether the conduct was done because the workers, who are members of the MUA, an industrial association, were dissatisfied with their work conditions. This too did not present too much difficulty. Three facts were singled out by North J in making this finding: the Patrick Group's dissatisfaction with the MUA and its approach to waterfront reform, especially the MUA's opposition to reduction of award conditions; meetings between the Patrick Group and Peter Reith, Minister of Workplace Relations and Small Business, which canvassed the wholesale replacement of the MUA workforce; and Chris Corrigan's involvement in the Dubai plan.[41]

In the process of making both findings, an important point was made. The Patrick Group contended that 'the real cause of harm to the employees was not the employers' entry into the September 1997 transactions and the appointment of the administrators on 7 April 1998, but rather the threatened termination of their employment'.[42] As Patrick employers were currently under voluntary administration, such a termination, so the argument went, would be made by the administrators, not for a prohibited reason, but because the employer companies were insolvent.

This argument was sharply dismissed by North J. It was arguable on the facts that the conduct alleged to be in breach of s 298K (1) of the *Workplace Relations Act*, namely the sale of the stevedoring business and the LSAs, were designed in order to leave the administrators with no other option than to sack the entire workforce. This, in itself, was sufficient to found a serious question to be tried under s 298K (1).[43]

North J then turned to the allegation of the tort of conspiracy by unlawful means. This tort is committed when two or more parties, acting in combination, intentionally inflict loss on a 3rd party by doing an act which is unlawful or for a purpose which is unlawful.[44]

In finding that there was a serious question to be tried whether this tort was committed, North J built upon the discussion above. More specifically, while the applicants argued a number of causes of action, the current proceedings would focus on

39 North J's decision, 462.
40 Ibid.
41 Id 463.
42 Id 463-4.
43 Ibid.
44 Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (2nd ed, 1994) 270.

breach of s 298K (1) of the *Workplace Relations Act* as the unlawful means. Having made his finding that there was a serious question to be tried that the Patrick employers breached s 298K (1) of the *Workplace Relations Act,* the involvement of the other Patrick companies, especially Patrick the stevedoring business, made it inescapable that there was a serious question to be tried whether there was a conspiracy by unlawful means.[45]

Somewhat as an aside, North J also noted that the actions of the Patrick employers in the corporate re-structure and in the appointment of the administrators were arguably in breach of the implied term of employment contracts not to act in a manner likely to destroy the relationship of confidence and trust between employer and employee.[46]

2. The balance of convenience

The second aspect of the application for an interlocutory injunction is the balance of convenience. The applicant needs to persuade the court that the balance of convenience favours the grant of the injunction. In considering this second aspect, North J set the scene with this crucial statement:

> The Court should take into account as favouring the grant of interim relief that the context of the claims is not a commercial dispute about money but an attempt to vindicate the rights of employees to earn a living free of victimisation.[47]

Given this important principle, Patrick's contention that the injunction should not be granted because money was adequate relief was thoroughly repudiated by North J on the basis that, in providing for the remedy of reinstatement, 'the Act (*Workplace Relations Act* 1996 (Cth)) recognises that it may not be appropriate to allow people to buy their way out of discrimination.'[48]

Patrick further argued that the balance of convenience was against the applicants because the workforce was unacceptable as the workers' practices were inefficient and the workers had engaged in considerable industrial action. The first element was discredited by North J who cited statistics on the after-tax profit of the Patrick employers; profit which ran into tens of millions of dollars. The second element was met in another fashion. North J addressed this point by requiring an undertaking by the applicants not to engage in industrial action against the Patrick employers.[49]

Patrick also argued that impact on third parties should be taken into account. This would then tilt the balance of convenience against the applicants. The third parties were said to be Patrick, the stevedoring business, and PCS. They would be

45 North J's decision, 464.

46 Ibid. The existence of this implied duty has been put beyond doubt by *Burazin* v *Blacktown City Guardian Pty Ltd* (Unreported, Full Bench of the Industrial Relations Court of Australia, Wilcox CJ, Von Doussa and Marshall JJ, 13 December 1996) and *Brackenbridge* v *Toyota* (Unreported, Full Bench of the Industrial Relations Court of Australia, Wilcox CJ, Von Doussa and Marshall JJ, 13 December 1996). The possibility of obtaining damages for breach of this duty has been opened by *Malik* v *BCCI SA* [1997] 3 All ER 1. See, eg, John McMullen, 'Notes: Extending Remedies for Breach of Employment Contract' (1997) 26 (5) *Industrial Law Journal* 245 and Richard Naughton, 'The Implied Obligation of Mutual Trust and Confidence: A New Cause of Action for Employees?' (1997) 10 3 *Australian Journal of Labour Law* 287.

47 North J's decision, 464-5.

48 Id 465.

49 Id 466.

adversely affected by the grant of the injunction mainly because of actions taken on the basis of the new Labor Supply Agreements entered into between these two parties on 7 April. This argument, as described, was rejected by North J as his Honour concluded that both parties entered into the new agreements on 7 April aware of the pending proceedings and, hence, the risk of an injunction.[50]

The fourth factor discussed by North J under the head of 'balance of convenience' was the question of the insolvency of the Patrick employers. If the injunction had the effect of requiring the employers to trade insolvently, that would be a factor against granting the injunction. On balance, North J concluded that this risk was not sufficient to constitute a factor against the grant of the injunction. There were a number of reasons which gave rise to this conclusion. Prominent among them were the fact that the orders would restore the only significant asset, the LSAs, to the Patrick employers and, secondly, the greater possibility of co-operation between the MUA and the administrators as distinct from co-operation between the MUA and the officers of the Patrick employers.[51]

On a different level, Patrick strongly argued that an injunction which compelled the parties to conduct business would involve the Court in supervision of numerous commercial acts. Such constant supervision was said to be a cogent factor against the grant of such an injunction. The principal authority relied upon by Patrick was *Co-operative Insurance Society Ltd* v *Argyll Stores (Holdings) Ltd ('Argyll')*.[52]

North J began, firstly, by distinguishing *Argyll* from the present case. *Argyll* was a claim for final relief as opposed to interim relief. As the present case concerned interim relief, the orders could be varied easily, thereby, avoiding any possible oppression resulting from contempt proceedings brought for breach of such injunctions. Moreover, the point that the present case concerned vindication of personal rights was reiterated to contrast the present case to *Argyll* which 'concerned two large businesses whose interests were purely financial.'[53]

Secondly, North J addressed the concern that the orders would spawn various applications to the Court. This was not a serious risk, according to his Honour, because the orders were clear and the appointment of the administrators made co-operation more likely.[54]

The last factor North J discussed in determining the balance of convenience was whether the appointment of the administrators militated against the grant of an injunction. It was argued that, consistent with Part 5.3A of the *Corporations Law*, the administrators should be given autonomy to decide whether the business should continue or not and hence, any orders made should not tie the administrators' hands by requiring them to retain the workforce. This too was rejected by North J. The Court, according to North J, had the concern and powers to address alleged wrongful acts by the Patrick employers. According to North J, orders to address such alleged wrongs can impact on the administrators because 'there is nothing in the scheme of Part 5.3A which suggest that the administrator must be left to administer the

50 Id 466-7.
51 Id 468-73. This issue, while dealt briefly by North J, were given much greater prominence in the High Court judgments, see text above fn 81 infra.
52 North J's decision, 469.
53 Id 472.
54 Id 473.

companies without the intervention of the Court in such circumstances'.[55] Importantly, his Honour qualified his remarks by saying that 'if any orders made by the Court later create difficulties for the administrator, they may seek directions from the Court (s 447D(1)) or seek to vary the order made in light of emerging circumstances.'[56]

3. The Orders

In conclusion, North J made various findings under serious question to be tried and the balance of convenience in favour of the applicants. This led his Honour to grant leave to proceed against the Patrick employer companies which were under voluntary administration pursuant to s 440D of the *Corporations Law*.[57] In addition to that, his Honour made a series of orders.[58] It is worthwhile describing some of the paragraphs of these orders for the purposes of understanding the nature and implications of the judgment and comprehending the arguments of the appeals.

Paragraph 1 of the orders prevented the Patrick stevedoring companies from giving effect to their 7 April termination of the LSAs. The paragraph specified that if these companies intend to terminate the LSAs, they were required by paragraph 3 of the orders to give the MUA 14 days written notice of that intention and reason for the purported termination. Paragraph 4 further locked in the Patrick stevedoring companies by preventing them from acquiring stevedoring labour from persons other than the Patrick employer companies.

Paragraph 2, on the other hand, requires the Patrick employer companies to continue to treat the LSAs as being on foot and binding upon them.

Lastly, paragraph 6 restrains all the companies in the Patrick Group other than the Patrick employers from doing any act or engaging in any dealing which disposes of assets other than in the ordinary course of business.

C. The Appeal to the Full Bench of the Federal Court

Two days after North J handed down his decision, the Full Bench of the Federal Court unanimously rejected the appeal by PSO No 2.

The structure of the Full Bench unanimous judgment followed North J's judgment in dividing the decision as to whether there was a serious question to be tried and whether the balance of convenience favoured granting the orders. This structure will also be used in the discussion of the Full Bench's judgment.

The first question was dealt with in even greater brevity than at first instance. The Full Bench concluded that North J's judgment with respect to the first question 'has not been subjected to serious attack before us.'[59] Consequently, the rest of the discussion revolved around the second question.

The first part of their Honours' discussion of the balance of convenience changed the nature of the debate. This concerned whether North J had the power to make the orders that he made. Patrick put forth two arguments. The Court's powers under

55 Id 474.
56 Id. This issue too received much greater prominence in the High Court judgments, see text above fn 79-84 infra.
57 Id 475.
58 These orders can be found in the Orders of the judgment, 475-7.
59 The Full Bench's decision, 481.

s 298U of the *Workplace Relations Act* were only exercisable after a finding of fact is made that there was a contravention of s 298K(1) as distinct from a finding that there was arguably a contravention. This argument attacked all the orders other than those made regarding the preparation for trial.[60] Secondly, it was contended that s 298U of the *Workplace Relations Act* only permitted orders against employers who allegedly contravened or contravened s 298K(1) of the *Workplace Relations Act*.[61]

This first argument was rejected by the Full Bench. The second argument, on the other hand, was accepted by their Honours.[62] The success with the second argument, however, did not assist Patrick in any significant way as the Full Bench found that although s 298U did not authorise orders against 'third parties' like the Patrick operators, s 23 of the *Federal Court of Australia Act* 1976 (Cth) could fill the gap by allowing 'appropriate' orders.[63] Given that the Patrick operators were arguably party to a conspiracy by unlawful means, the objects of which have yet to be fully realised, paragraphs 1, 3, 4 and 6 of North J's orders could be seen as being appropriate.[64]

The fact that the Patrick employers were in voluntary administration was raised again by the Patrick Group to argue that leave should not have been granted under s 440D of the *Corporations Law*. This section prohibits a court proceeding being brought against a company in administration unless the administrator gives written consent or the Court grants leave. The Patrick Group argued, firstly, that leave should not be granted pursuant to this section because it was contrary to the policy of Pt. 5.3A of the *Corporations Law*, which was aimed at allowing the administrators to perform duties imposed upon them by the *Corporations Law*. This argument was unacceptable to the Full Bench. The judges concurred with North J that the orders made it more likely that the employer companies could resume trading thus promoting the policy of Pt. 5.3A.[65]

The subsidiary argument of the Patrick Group was that the order for reinstatement exposed the administrators to personal liability for the wages of the workers. The Full Bench responded by requiring an undertaking by the applicants not to hold the administrators personally liable for wages.[66] There was concern that this undertaking might be void by virtue of s 443A(2) of the *Corporations Law* which states that s 443A(1) of the *Corporations Law*, the section which imposes personal liability on the administrators, applies despite any agreement to the contrary. The Full Bench addressed this concern by adding a further order that this undertaking would be effective notwithstanding s 443A(2).[67]

The Patrick Group further urged the Full Bench to take a 'minimalist approach'. This argument, in part, blended previous arguments about money being adequate relief, interference with the administrators' autonomy and the problem of court supervision. Accepting this argument would mean that the Court should overturn the orders because they exceeded what was required to protect the applicants. In fact,

60 Id 482.
61 Id 482-3.
62 Id 483.
63 Id 483.
64 Id 483-4.
65 Id 484-5.
66 Id 485.
67 Id 487.

according to the Patrick Group, no orders should have been made because the respondents could have satisfied any monetary award. Further, there was power in the Court to order reinstatement at trial as well as employers against whom the reinstatement could be ordered.[68]

This complex series of arguments was dismantled and rejected by the Full Bench. Even assuming, on the argument put forward by the Patrick Group, the most optimistic scenario of reinstatement at trial, such an option, according to the Full Bench, left the applicants high and dry. The Full Bench made this point most vigorously:

> The applicants are presently employees of the companies in administration. If interim relief were denied, they would be dismissed. Pending the trial, they would be required to reorganise their own life situations. They would either find new jobs, or suffer the well recognised stresses and emotions of being unemployed.[69]

With respect to the purported interference with the administrator's autonomy, the Full Bench referred to North J's favourable impression of the administrators' preparedness to solve problems that arose as well as the possibility of further directions or orders from the Court should problems not be able to be worked out between the parties.[70]

This statement ties in with another factor the Full Bench considered: the question of personal relationships. Their Honours were of the view that the dispute had clearly produced a great deal of animosity between the parties. Such animosity might impair the operation of the orders by militating against resolution of problems. In the end, the Full Bench concluded that 'the personal relations problems that will undoubtedly exist during the changeover and settling period ought not to deter the Court from making whatever orders are otherwise appropriate.'[71]

In conclusion, the Full Bench upheld the orders of North J except for the minor amendment addressing the personal liability imposed on the administrators by s 443A(2) of the *Corporations Law*.

D. The Appeal to the High Court

On 4 May, the High Court handed down its decision substantially upholding North J's orders by a 5-2 majority.[72] The majority altered the orders in the following fashion: paragraphs 2, 3 and 5 of the orders, which were paragraphs specifically affecting the Patrick employers, were made subject to the powers of the administrators of the Patrick employers. Gaudron J dissented, in favour of the MUA, by ruling that North J's orders should be left undisturbed. Callinan J, on the other hand, upheld the appeal in whole.

With the exception of Callinan J's judgment, the High Court judgments paid much greater attention to whether North J had the power to make the orders than the courts below. The question intertwined with the other question which figured prominently in the High Court deliberations: whether the fact the Patrick employers were

[68] Id 486-7.
[69] Id 487.
[70] Id 486.
[71] Id 490.
[72] This majority comprised Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

under administration resulted in a failure of principle in granting the orders. Callinan J expressly did not engage in these issues and decided the case on a different footing.[73]

As Gaudron J's judgment is similar to the majority's judgment in many respects, it is convenient to deal with both judgments under one head while discussing Callinan J's judgment separately.

1. The High Court majority and Gaudron J

Both the majority and Gaudron J agreed that North J had powers to make orders against all the Patrick companies. Firstly, remedies under s 298U of the *Workplace Relations Act* were not conditioned on a finding of a contravention of s 298K(1) of the Act; orders could be issued under s 298U even when there was, as in this case, only an alleged contravention.[74] Further, s 298U(e) authorised orders against persons other than the employer involved, so far as the orders are directed towards remedying the effects of contravening or allegedly contravening conduct.[75]

While Gaudron J expressly found that paragraphs 1 to 5 of the orders could be made pursuant to s 298U(e), this question was not specifically addressed by the majority.

In discussing whether orders could be made against parties other than Patrick employers (the Patrick operating companies), the majority concluded in the affirmative by relying on s 23 of the *Federal Court of Australia Act*. This section permitted the making of orders needed to ensure the effective exercise of the jurisdiction invoked. The relevant jurisdiction, with respect to parties other than the Patrick employers, was that of the tort of conspiracy. Section 23, according to the majority, authorised orders against all parties allegedly involved in the conspiracy.[76] Gaudron J also made use of s 23 in justifying paragraph 6 of the orders[77] as well as characterising it as an alternative power to ground paragraphs 1-5 of the orders.[78]

The majority made clear that their discussion of the powers to grant the orders was subject to their later consideration of the fact that the orders were granted against the companies under administration.[79] In this discussion, the majority regarded that remedies under both s 298U of the *Workplace Relations Act* and s 23 of the *Federal Court of Australia Act* had to be subject to the *Corporations Law*.[80] From this flowed the conclusion that orders under these particular provisions of the *Workplace Relations Act* and the *Federal Court of Australia Act* 'ought not interfere with the exercise by the Administrators of their powers in respect of the employer companies provided the Administrators act lawfully.'[81] On this point, the majority plainly accepted the Patrick Group's argument about the autonomy of the administrators and, in fact, identified this aspect of the orders as its principal fault. According to the majority:

73 See the High Court decision, 701 per Callinan J.
74 Id 655 per majority and 677-8 per Gaudron J.
75 Id 655-6 per majority and 678-9 per Gaudron J.
76 Id 658-60 per majority.
77 Id 682 per Gaudron J.
78 Id 683 per Gaudron J.
79 Id 660 per majority.
80 Id 661 per majority.
81 Ibid.

> The central difficulty about the orders made by the primary judge is that they are orders which took away from the administrators of the employer companies (and the creditors) the discretions conferred upon them by s 437A of the *Corporations Law*. At least on one view of the effect of the orders, they would oblige the administrators to continue to trade while the employer companies were insolvent.[82]

Accordingly, North J's orders had to be 'rectified by the insertion of an appropriate qualification.'[83] Gaudron J agreed with the in-principle contention that the orders must not impermissibly interfere with the administrators' discretions under Pt. 5.3A of the *Corporations Law* especially in requiring the Administrators to trade insolvently.[84] The crucial point of difference was her view that the orders did not so interfere and hence, should not be disturbed by the court.[85]

As noted above, the two broad questions of powers to grant the orders and the relevance of the administration were seen by the majority and Gaudron J as the main issues of contention. There were second-order issues which they briefly discussed. Both the majority and Gaudron J considered and dismissed the argument about the impact on third parties.[86] The majority, in addition, rejected the argument about constant court supervision as presented by *Argyll*. It was this last argument that constitutes the bulk of Callinan J's judgment to which I now turn.

2. Callinan J

Callinan J by-passed the two questions which primarily occupied both the majority's and Gaudron J's attention. Callinan J upheld the appeal in whole, partly, on the strength of *Argyll*. More precisely, Callinan J concurred with the reasoning in *Argyll* that orders concerning the running of a business would require constant court supervision in the form of indefinite court rulings as 'there can be no certainty as to the way in which they (the orders) can be carried out.'[87] This was because 'they necessarily involve commercial considerations and decisions with respect to which even the best informed, and most well-intentioned commercial minds might differ.'[88] Such ambiguity was all the more repugnant, in his Honour's view, because violation of such orders would result in the quasi-criminal procedure of punishment for contempt.[89]

Moreover, Callinan J was of the view that there were 'sound reasons of public policy why courts should not make orders requiring the carrying on of businesses.'[90] In his Honour's opinion, courts, whose central role concerns adjudication of cases, should not be making 'de facto business decisions'; decisions which courts are ill-equipped to make.[91] Further, such orders attempt to impose a situation, the carrying on of business, which can only exist with mutuality.[92] Using a different method of

[82] Id 663 per majority.
[83] Id 666 per majority.
[84] Id 684-5 per Gaudron J.
[85] Id 686 per Gaudron J.
[86] Id 667 per majority and 686-8 per Gaudron J.
[87] Id 704 per Callinan J.
[88] Id.
[89] Id 705 per Callinan J.
[90] Id 706 per Callinan J.
[91] Ibid.

analysis, Callinan J characterised paragraph 6 of the orders as a Mareva injunction and attacked it on the basis that grounds for such an injunction were not made out.[93]

In conclusion, Callinan J allowed the appeal and ruled that the parties should be left to their remedies in damages.[94]

COMMENTARY

It is obvious that the MUA cases gave rise to many legal issues worthy of comment. Of these issues, six have been singled out for their importance. They are:

A. Powers available to courts with respect to breaches of and conspiracy to breach s 298K *Workplace Relations Act*;
B. How are such powers affected if a party to be restrained is the administrator of the employer companies?;
C. The conflict between the *Corporations Law* and the *Workplace Relations Act*;
D. Principles governing the exercise of such powers;
E. Courts as the new arena for industrial battles.

A. Powers available with respect to breaches of and conspiracy to breach s 298K *Workplace Relations Act*

Throughout the proceedings, North J's dual findings that there were serious questions to be tried — whether there was a breach of s 298K of the *Workplace Relations Act* and a conspiracy to breach that section — were undisturbed. Given these findings, the next question was what powers were at the court's disposal.

The judges who considered this question[95] were unanimous in their view that such powers were extensive and, in particular, could extend to parties other than the employer of the workers affected.

The two statutory sections arming the Federal Court with powers in this instance are s 298U of the *Workplace Relations Act* and s 23 of the *Federal Court of Australia Act*. Section 298U was given a broad application. Its invocation was not conditioned on a finding of an actual breach of s 298K[96] and, moreover, through s 298U(e) it could be deployed against parties other than the employer of the workers affected so far as such orders are 'necessary to stop the conduct or remedy its effects'.[97]

Should the reach of s 298U(e) be insufficient to restrain some third parties, s 23 then, subject to some qualification, can be relied upon to authorise 'appropriate' orders. Under this section, the jurisdiction relied upon would be that of the tort of conspiracy. Given this, the powers of the court are amplified to cover relevant parties other than the employer.[98]

92 Id 707 per Callinan J.
93 Id 707-8 per Callinan J.
94 Id 709 per Callinan J.
95 The only judges who did not consider the question were North J and Callinan J.
96 The High Court decision, 655 per majority; 677-8 per Gaudron and the Full Bench's decision, 483.
97 The High Court decision, 655-6 per majority; 678-9 per Gaudron J; Contra the Full Bench's decision, 482-3.
98 See the High Court decision, 656-8 per majority; 682 per Gaudron J and the Full Bench's decision, 483-4.

In light of the above, McHugh J's point above can now be made more precise: ss 298K & U of the *Workplace Relations Act*, and the tort of conspiracy in conjunction with s 23 of the *Federal Court of Australia Act* constitute a powerful armory against employers who seek to discriminate against their workers on the basis of the trade union membership or activities.

This description is especially pertinent with the scenario that existed in the Dock Wars: the corporate maneouvres that were found arguably illegal involved transactions between a holding company, PSO (previously PSO No 2), and its subsidiaries, the Patrick employer companies. The expansive interpretation placed on the powers above means that in scenarios such as the Dock Wars, a holding company cannot take advantage of the concept of separate legal entity to distance itself from its subsidiaries' actions and obligations. Put differently, the courts can, in appropriate circumstances, pierce the corporate veil of subsidiaries to sheet home responsibility to the holding companies.[99]

But the preceding statements have to be heavily qualified. The above powers are severely whittled down when a party involved is the administrator of a company. This substantial qualification will be discussed below.

B. How are such powers affected if a party to be restrained is the administrator of the employer companies?

The judgment of the High Court majority made plain one crucial point: whatever orders are made pursuant to s 298 of the *Workplace Relations Act* and/or s 23 of the *Federal Court of Australia Act*, they have to be subject to the powers of the administrators of the employer companies.[100]

The reasoning lay, in part, with the statutory construction of the relevant Acts. Firstly, there was no general inconsistency between the *Workplace Relations Act* and the *Corporations Law*. Secondly, the limiting phrase of 'appropriate' in s 23 'directs attention to the rights and liabilities of parties' under, among others, the *Corporations Law*. Hence, any orders pursuant to s 298U or s 23 'ought not to interfere with the exercise by the Administrators of their powers' conferred by Pt. 5.3A of the *Corporations Law* provided they acted lawfully.[101]

This point of statutory construction is merely arguable. Given that, it is hard to escape the conclusion that it was the in-principle considerations that fortified the majority in reaching their conclusion.

Prominent among those considerations was their finding that North J's orders, by requiring the employer companies to trade, might require the administrators to trade insolvently[102] because the employer companies had a lack of working capital[103] and there were serious doubts as to the possibility of reviving the solvency of the companies.[104]

99 See Philip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) for a discussion of how American courts have grappled with such situations.

100 See text above fn 79-84 supra.

101 The High Court decision, 661 per majority.

102 Id 663 per majority.

103 See text above fn 9-10 supra.

104 See the discussion in the High Court decision, 664-5 per majority. Note that this finding departs from that of North J: North J's decision, 467-8.

Such insolvent trading would expose the administrators to personal liability under s 443A of the *Corporations Law*[105] as well as adversely affect the interests of creditors of the companies.[106] Further, an unexpressed reason could very well be that an order that a corporation trade insolvently for the purpose of preserving the jobs of workers would be self-defeating. It would, in this instance, lead to a state of affairs in which the workers retained their jobs until the substantive hearing but no longer than that because the companies would have gone under due to the insolvent trading.[107]

This High Court ruling has grave implications. MUA argued that the:

> insolvency of the employer companies is . . . but the last, or next to last step, in the effectuation of a conspiracy to injure the employees of the employer companies by terminating their employment for the reason that they were members of the MUA. An important element of the conspiracy . . . was the dismissal of the employees through the innocent agency of the administrators.[108]

If this argument holds true,[109] preserving the autonomy of the administrators would have, in the memorable words of Julian Burnside QC, counsel for MUA, the effect of allowing Patrick to 'count the dead and bayonet the wounded.'[110]

Consequently, the alleged Patrick strategy of union-busting would still have appeal to like-minded employers. Moreover, the risk of other employers using such a strategy is not merely theoretical. Other employers, for instance in the Cobar and Woodlawn mines,[111] as well as in a South Australian abattoir,[112] have possibly sought to evade their responsibilities to their workers by creating shell companies.

This problem, however, cannot be solved by the courts alone. Legislative intervention is required not only deter employers from resorting to such tactics but also to ensure jobs of victimised workers are preserved. In this regard, it is heartening to note recent Bills which have been introduced in the Commonwealth Parliament. The Employment Security Bill 1999 makes amendments to the *Corporations Law* and the *Workplace Relations Act*. These amendments respectively give courts power to order related companies to pay the debts of the shelf companies including debts to employees[113] and to order workers' reinstatement to 'related body corporates' like

[105] The High Court decision, 665 per majority.
[106] Ibid.
[107] To avoid any confusion, it should be stressed that this reason is not identical to the usual argument that the more profits a company makes, the better off workers are because of some trickle-down effect. Rather the reason above can be described as such: a necessary condition for the workers job is a solvent enterprise.
[108] The High Court decision, 660 per majority.
[109] North J found this argument arguable: North J's decision, 10.
[110] Transcripts of the High Court hearings, 28 April 98, 32.
[111] Katharine Murphy, 'Patrick-type tactic targeted', *Weekend Australian Financial Review*, 30 May 1998, 4.
[112] *Australasian Meat Industry Employees' Union* v *Rashad Basha Aziz* (unreported, Federal Court of Australia, Marshall J, 5 August 1998). This case is the first Federal Court case, since the MUA cases, which has had to consider Patrick-style employer strategies.
[113] Murphy, loc cit (fn 107).

Lang Corporation.[114] Another Bill of note is the Employee Protection (Wage Guarantee) Bill 1999. This Bill, if enacted into law, will provide for an insurance scheme to protect workers' entitlements in employer insolvency.[115]

C. The conflict between the *Corporations Law* and the *Workplace Relations Act*

These issues are intelligible against an underlying tension; the tension between the *Corporations Law* and the *Workplace Relations Act*. The High Court found that there was no general inconsistency between the *Corporations Law* and the *Workplace Relations Act*.[116] General inconsistency, however, does not preclude specific inconsistency. Thus, in their judgment, the High Court majority made clear that, in the conflict between the workers' rights and the administrators' powers, priority should be given to the administrators' powers.[117] Put differently, in this instance, *Corporations Law* trumped the *Workplace Relations Act*.

But in seeing through the corporate re-structure undertaken by the Patrick Group, the various courts went the other way. It is true with this aspect of the case that 'the courts have ... characterised it (the dispute) as a labour law problem and said that (arguably) the commercial law has been manipulated to violate labour law'.[118]

These two instances demonstrate the underlying tension between the *Corporations Law* and the *Workplace Relations Act*. This tension can also be characterised as the conflict between the rights of capital and those of workers. According to the High Court majority, the *Corporations Law* 'deals with the constitution, administration and assets of a corporation'.[119] In short, it deals with how capital can be managed and administered. It sets down the rules in which capital can advance its purposes. Labour law, on the other hand, has traditionally been conceived as having a protective function towards workers.[120] While this traditional conception has lost its plausibility with regards to important provisions of the *Workplace Relations Act*,[121] it still applies with provisions setting down workers' entitlements;[122] provisions like s 298K of the *Workplace Relations Act*.

[114] Katharine Murphy, 'Labor unveils jobs security bill', *Australian Financial Review*, 12 May 1998, 5. This Bill was introduced in the House of Representatives on 29 March 1999: Table Office, Senate, *Senate Bills List* (as at 8 April 1999) http://www.aph.gov.au/legis.him at 13 April 1999. This Bill was based on an earlier Bill, Employment Security Bill 1998, which, in turn was introduced in the House of Representatives and Senate on 1 June 1998 and 26 May 1998 respectively: Table Office, House of Representatives, *Daily Bills List* (as at 31 July 1998) http://www.aph.gov.au/parlinfo/billsnet/current.pdf at 17 August 1998.

[115] This Bill was introduced in the House of Representatives on 8 March 1999: Table Office, Senate, *Senate Bills List* (as at 8 April 1999) http://www.aph.gov.au/legis.him at 13 April 1999. It is based on an earlier Bill, Employment Protection (Wage Guarantee) Bill 1998, which, in turn was introduced, prior to the Dock Wars, in the House of Representatives and Senate on 23 March 1998 and 14 May 1998 respectively: Table Office, House of Representatives, *Daily Bills List* (as at 31 July 1998) http://www.aph.gov.au/parlinfo/billsnet/current.pdf at 17 August 1998.

[116] The High Court decision, 661.

[117] Id 671.

[118] John Buchanan, Assistant Director of the Australian Centre for Industrial Relations and Teaching, quoted in Stephen Long, 'Decision frustrates Patrick's legal strategy', *Australian Financial Review*, 05 May 1998, 4.

[119] The High Court decision, 661.

[120] W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials* (2nd ed, 1993) 1.

[121] Prominent among those are the provisions governing individual contracts and enterprise agreements: see Pt 6B & D of the *Workplace Relations Act*.

[122] See Pt VIA of the *Workplace Relations Act*.

These two functions come into conflict because, in many instances, the profit-maximisation aim of capital is advanced when workers' rights are ignored or infringed. Conversely, respect for workers' rights might mean that capital reaps a lower return. In the Dock Wars, this conflict was played out in the two instances discussed above. But this phenomenon is by no means exceptional. Contrary to what the High Court majority thought, in a liberal capitalist system, such a conflict is systemic.

D. Principles governing the exercise of such powers

The third area of legal interest concerns the principles governing the court's powers in such instances. What should be noted, at the outset, is that when granting injunctions, especially interlocutory injunctions, courts, in considering the balance of convenience, have been very much concerned with not interfering with the workings of capital or, at least, limiting the interference to a minimum. Justice Callinan's judgment is representative of these concerns.

In particular, his Honour emphasised the problem of constant court supervision, arguing that the nature of business decisions would not only give rise to repeated applications to the court for directions but would inappropriately involve the court in making business decisions.[123]

This argument, on its own terms, insists on autonomy for business, especially autonomy from court orders. It is, in short, an argument for freedom of capital. This argument did not fare well in the proceedings. North J, in a detailed part of his judgment, rejected this argument.[124] So did the majority of the High Court.[125]

Other than Callinan J, the judgments made clear that the court, in proceedings concerning freedom of association, should be more interventionist. The most powerful judgment on this point is clearly that by North J. His Honour stressed that the context of the present claims 'is not a commercial dispute about money but an attempt to vindicate the rights of the employees to earn a living free of victimisation'. This alone favoured granting of relief.[126] So it was that damages were not an adequate remedy.[127] This theme was picked up by the Full Bench of the Federal Court which similarly rejected reinstatement at trial as being fair to the workers because of the drastic changes the workers would have to suffer pending trial due to their dismissal.[128]

The concern for the smooth workings of capital, however, does not fade away. In the first instance, it was a crucial finding of North J, in considering the balance of convenience, was that there were considerable prospects of co-operation between the

[123] See text above fn 87-8 supra.

[124] North J's decision, 468-73. The Full Bench briefly alluded to this argument in its decision at 486.

[125] The High Court decision, 670-1 per majority. The force of the High Court majority's rejection is somewhat tempered by its ruling that the administrators' powers qualified the orders.

[126] North J's decision, 464-5.

[127] Id 465 per North J.

[128] The Full Bench's decision, 486. Other judges were less explicit in expressing such a sentiment but still made the point that common law principles would have less application in the context of proceedings for reinstatement under s 298U of the *Workplace Relations Act*, see the High Court decision, 680-1 per Gaudron J and the Full Bench's decision, 482-3.

administrators and the union which could pave the way to solvent trading.[129] Such a finding was not inescapable in the MUA cases. The same can be said of any case that arises in the context of industrial disputation. It remains to be seen from future cases whether the willingness of courts to make such a finding will be significant in workers obtaining relief.

The final point that does bode well for workers is the willingness of the judges to pierce the corporate veil in making orders against the Patrick companies other than the employer companies. Throughout the proceedings, the courts did not ignore the fact that all the Patrick companies were controlled by a single entity, Lang Corporation.[130]

E. Courts as the new arena for industrial battles?

The objects of the *Workplace Relations Act* include 'ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level'.[131] This is to enable a 'more direct relationship between employers and employees with a much reduced role for third party intervention'.[132] It is clear that one of the so-called third parties being targeted is the Australian Industrial Relations Commission ('AIRC').

In the Dock Wars, the AIRC's role was greatly circumscribed. It was limited to industrial action taken in response to PCS' entry.[133] No AIRC intervention occurred subsequent to the mass sackings. The void left by the AIRC was filled by the judiciary.

The Dock Wars then make good the Full Bench of the Court of Appeal of the Victorian Supreme Court's statement that the 'industrial legislation (the *Workplace Relations Act*) ... thrusts the parties towards the ... courts'.[134] However, the issue here is not, as some commentators have characterised it, that courts might be the new arena for industrial battles.[135] Courts have always been one of the forums where

[129] North J's decision, 468, 470-1. Such sentiments were echoed by the Full Bench: the Full Bench's decision, 486, 489-90.

[130] For a discussion of this issue, see Harry Glasbeek and Richard Mitchell, 'Breaking custom on labour law', *Australian Financial Review*, 27 April 1998, 18.

[131] s 3(c) *Workplace Relations Act.*

[132] Peter Reith, 'Consideration of Senate Message: Workplace Relations and Other Legislation Amendment Bill', 21 November 1996, 1. See also Peter Reith, Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, 'Speaking notes for the address to the Licensed Clubs' Association of Victoria Inc', 21 March 1997, 2. David Rosalky, Secretary of the Department of Industrial Relations, has parroted such rhetoric, see David Rosalky, Secretary, Department of Industrial Relations, 'The Future of Work in the Public Sector', 14 June 1996, 3. For 'third party', read 'unions' and 'Industrial Relations Commission'.

[133] The AIRC's involvement came in the form of issuing a s 166A certificate on 9 February 1998: see *Patrick Stevedore No 1* v *MUA* (unreported, Victorian Supreme Court, Beach J, 23 February 1998) 5. This certificate essentially allowed Patrick to commence bringing actions in tort against the MUA. The other AIRC intervention was the issuing of a s 127 order to cease-and-desist industrial action: *Patrick Stevedores No. 1 Ltd & Ors* v *MUA* (AIRC, Ross VP, 13 February 1998, Decision 159/98).

[134] These comments were made in the context of an employer's application for an interlocutory injunction on the basis of alleged torts: *National Workforce* v *AMWU* (Full Bench, Court of Appeal, Victorian Supreme Court, Phillips, Charles and Batt JJA, 6 October 1997) 25.

[135] Shaun Carney, 'Comment: Law and a new industrial order', *The Age*, 05 May 1998, A15.

industrial battles are played out. What is really at stake is the shifting of the institutional balance between the courts and the AIRC in resolving industrial disputes.

This shift throws up a number of vital issues: how appropriate are court hearings in resolving industrial disputes given their narrow subject-matter;[136] how suited are judges, who typically do not possess industrial experience, in handling such disputes and also in empathising with the workers' point of view; and does the prohibitive costs of legal action constitute a barrier to workers' accessing the courts?[137] These are questions that will have to be resolved if judgment is to be made of the efficacy and equity of the *Workplace Relations Act*.

CONCLUSION

At the time of the writing of this article, the Dock Wars has come to an end in a relatively low-key settlement between Patrick, the MUA, the Australian Competition and Consumer Commission and the Federal Coalition government. Key planks of this settlement include the wharfies' reinstatement to solvent Patrick companies; Patrick paying up to $7.5 million to companies allegedly damaged by the MUA's industrial action; more than six hundred redundancies and changes to work practices.[138]

The significance of the Dock Wars, however, clearly goes beyond its impact on those three parties. The Dock Wars represented the most vicious assault on organised labour in years. The MUA is one of the strongest unions in the Australian labour movement hence, if it were defeated, it would be a resounding defeat for organised labour. It was this that prompted Bill Kelty, Secretary of the Australian Council for Trade Unions, to declare that this was 'a fight about the iron and steel of the labour movement'.[139] Equally, on the other side, the leaked ministerial documents state that breaking the MUA would have a 'flow on effect into other sectors of industry'.[140] This, decoded, meant that unions in other sectors would weakened by a MUA defeat.

Given this, what was at stake in the Dock Wars is individual dignity and freedom at work; dignity and freedom which collective organisations, like trade unions, promote. This crucial point is sometimes not altogether apparent. In the Dock Wars, Peter Reith, Minister for Workplace Relations and Small Business, stated

[136] Joe Isaac, Deputy President of the Australian Conciliation and Arbitration Commission 1974-87, the predecessor of the AIRC, has argued that '(t)he absence of a neutral intermediary at an appropriate time has led to resort to legal processes which can deal only with legal issues and not the merits of the dispute.' Joe Isaac, Deputy President of the Australian Conciliation and Arbitration Commission 1974-87, 'Why not restore the umpire?', *The Age*, 28 April 1998, A17.

[137] It has recently been reported that the legal bill for the Dock Wars' proceedings has amounted to more than $1 million but would blow up to $5 million if the conspiracy trial had proceeded: Bill Pheasant, 'Legal bill for Australia's docks stoush tops $1m', *Weekend Australian Financial Review*, 30 May 1998, 4.

[138] See Katharine Murphy, 'Dispute casts pall over docks deal', *Australian Financial Review*, 6 August 1998, 5; Katharine Murphy, 'Peace deal docks but stays on hold', *Australian Financial Review*, 5 August 1998, 5 and Katharine Murphy, 'Analysis: Talk is cheap, which is why it's so upbeat', *Australian Financial Review*, 4 September 1998, 4.

[139] Bill Kelty quoted in Peter Gahan, 'Strategic Unionism in Crisis? The 1997 ACTU Congress', (1997) 39 (4) *Journal of Industrial Relations* 533, 541.

[140] Ewin Hannan, 'The secret waterfront plan', *The Age*, 5 June 1998, 6.

categorically that 'it (the dispute) is about creating a more efficient waterfront for the good of the whole country'.[141] The debate was then about efficiency not about control workers have over their lives.

This argument is obscurantist. The two areas are intimately connected because of the means people, like Peter Reith, think best achieve efficiency. In highlighting the role played by the *Workplace Relations Act*, Reith makes clear that the Act aided Patrick's efforts at improving efficiency because it 'reasserts management prerogative in determining workplace arrangements'[142] and encourages 'greater flexibility in the labour market'.[143] The theme that links the former and the latter is freedom for capital. As defined by Ted Evans, Secretary to the Federal Treasury, 'labour market flexibility meant allowing companies to hire, fire and pay people according to the firms' needs'.[144]

Hence, efficiency is best achieved in workplaces, especially the waterfront, by handing over greater control to the employer. Individuals can then be stripped of their dignity and treated like any other commodity, to be used and dispensed with as the employer sees fit. Scant regard is paid to the human devastation involved, for example, the loss of livelihood and identity for the worker and the deprivation inflicted on the worker's family. The logical end-point of this world view is freedom for capital but brutalised lives for workers.

[141] Peter Reith, Minister for Workplace Relations and Small Business, 'The Introduction of Competition on to the Waterfront' (Notes for an Address to Open the February Council Meeting of the National Farmers' Federation, 17 February 1998, http://www.dir.gov.au/), 6.

[142] Peter Reith, Minister for Workplace Relations and Small Business, 'The Australian Industrial Relations Environment and the Government's Waterfront Reform Agenda' (Speaking notes for Speech to the Opening Dinner for the "1998 Growth Companies Conference", 20 May 1998, http://www.dir.gov.au/), 11.

[143] Peter Reith, Minister for Workplace Relations and Small Business, Second Reading Speech of Stevedoring Levy (Collection) Bill 1998, House of Representatives Hansard, 8 April 1998, 2724.

[144] Michael Dwyer, 'Treasury chief calls for faster labour reforms', *Australian Financial Review*, 19 August 1997, 1.