

Burnside speaks out over waterside dispute victory

Andrew Burrell

The Melbourne barrister who led the Maritime Union of Australia to victory in last year's bitter waterfront dispute has detailed publicly for the first time the tactics used by his legal team in the headline-grabbing litigation.

In a paper to be delivered to an Australian Plaintiff Lawyers Association conference tomorrow, Mr Julian Burnside QC speaks of the MUA team's "daring responses" to the huge challenges involved in the case.

Mr Burnside was senior counsel for the MUA during the lengthy legal war against Patrick Stevedores in what is regarded as one of the biggest industrial disputes in Australian history.

The case was fought in the Federal Court, the Full Federal Court and the High Court during the early months of 1998.

In the paper, Mr Burnside said the union's lawyers needed to think creatively and decisively to successfully counter a series of moves by Patrick that at one stage led to a sense that "we had fallen into an abyss".

He said the first example of creative thinking was in the way the MUA legal team was assembled, primarily by Maurice Blackburn & Co solicitor Mr Josh Bornstein.

On his own appointment to the team in February 1998, Mr Burnside said: "On any view, I was a surprising choice, since I had no industrial relations experience and no discernible political leanings. As Josh (Bornstein) tells the story, a number of people were hostile to the idea that I be briefed."

Mr Burnside said the addition of junior barristers Mr Michael Gronow and Mr Peter Fox were also regarded as unusual choices for the case.

"The result was a very eclectic team of lawyers who would never have imagined they might work together as a single team, and some of whom might never have imagined that they would be acting in the interests of a union, let alone a union with the MUA's history.

"Each member of the team brought to bear on the case their somewhat different skills, knowledge and experience. None of us could have done the case alone, but together we felt invincible."

Mr Burnside said the MUA surprised Patrick with its "unortho-



Julian Burnside QC, who courted success for the MUA.

Picture: ERIN JONASSON

dox" response to rumours that the stevedore company was preparing to sack its entire workforce around Easter last year. The union sought an injunction seeking to restrain Patrick from carrying out the sackings or disposing of their assets.

As the injunction hearing was about to proceed, however, Patrick effectively sacked the workers and installed masked guards on the nation's wharves.

Patrick had also put four subsidiary labour-supply companies employing its dock workers into voluntary administration.

"In court that morning we learned that administrators had been appointed to the labour-supply companies ... none of us understood the reference to labour-supply companies," Mr Burnside said.

"Patrick's argued that we were not entitled to proceed in litigation against companies under administration; they argued it was too late for the court to do anything. We all sensed that we had fallen into an abyss, and all around was dark."

Mr Burnside said there was one ray of hope for the team - a case in which a court had ordered that building work completed by a defendant after the issue of a plaintiff's motion should be taken down pending trial. This was similar to the MUA case.

Justice Tony North later granted an injunction restraining the labour supply companies from dismissing the employees - a decision upheld by the Full Federal Court and the High Court.

At the core of the waterfront case was the MUA's action against Patrick, the National Farmers Federation, the Federal Government and others, alleging contraventions of the Workplace Relations Act and conspiracy to injure.

"Pleading a conspiracy is a bit like spotting an iceberg. It is axiomatic that there is more beneath the surface," Mr Burnside said. "It is very hard to know in advance just how much is beneath the surface."

Mr Burnside said conspiracy to injure was a rare tort suggested by MUA barrister Mr Herman Boronstein.

"It is interesting to reflect on the fact that conspiracy to injure emerged in 19th century jurisprudence as a response to the growing trouble caused by organised labour," Mr Burnside said.

"Herman Boronstein's creative idea was to turn the weapon back on the forces which created it."

Mr Burnside said another remarkable aspect of the case was the skill shown by union leaders such as Mr John Coombs and Mr Greg Combet in restraining the Patrick workers after the revelation of the sackings.

continued from page 33

16. The Next Six Months...

Our priorities should be to obtain information concerning law reform proposals, conduct visits programs in all States, participate in significant reviews, find allies and research the likely tactics of our opponents.

As our visits program is yet to be conducted in each jurisdiction, and the results are yet to be assessed and compared, it is hard to predict where the major demands on our resources will arise. By the time of the Sydney Conference, it would be great if all Branches had visited and recorded key politicians views on our core areas, and located which APLA members had sufficient personal relationship with those politicians to have 'behind the scenes' political influence. This will allow us the most realistic opportunity to assess which campaigns are winnable, and therefore worthwhile uses of our scarce resources.

On current form, Motor Vehicle and Medical Negligence look to be facing the greatest threats to common law. SIGs in these areas should raise campaign funds now, and consider tactics.

Without our media resources, and with policy output halved, the National Office will be more reliant than ever on State Branch and member contributions.

I hope you have been inspired to help. ■

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