FREEDOM OF ASSOCIATION

The Industrial Context

1. In the industrial context, freedom of association has been viewed historically as a positive right of workers to organise and participate in union activities. Since 1996 Part XA of the *WorkPlace Relations Act* 1996 (Cth) has added a right in workers not to join a union or engage in union activities. In their work Labour Law – An Introduction (3rd ed, 2000) Creighton and Stewart conceived the traditional view of freedom of association as having a protective function - to relieve employees from some of the consequences of their relative lack of power. Those professors interpret the ILO conventions dealing with freedom of association as supporting this protective function and Part XA as at odds with that concept in those ILO conventions; see paras. [1.11] and [12.71] and The Laws of Australia Vol. 21.5 [34].

2. Nonetheless, the right not to belong to a union now enshrined in Part XA has had the effect of making closed shop arrangements effectively unenforceable as are clauses in awards directing that preferential treatment be given to union members in relation to, for example, engagement, promotion and retention in employment; see Creighton and Stewart at paras. [12.72] – [12.75].

3. The Office of the Employment Advocate is active in regulating these provisions and has engaged in a number of proceedings against unions who

have sought to bring pressure on employers to discriminate against workers or, typically, sub-contractors on the basis of their non-membership of a union. In one of the earlier examples of such a proceeding, *Rowe v. TWU* (1998) 90 FCR 95; 160 ALR 66 Cooper J upheld the constitutionality of the relevant provisions of Part XA. See also the decision of Kenny J in *Australian Workers' Union v. BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482 at [12]-[32].

4. I do not wish to focus on those constitutional issues tonight rather I wish to outline briefly the provisions of the Act and the objects and general effect of Part XA and then to look at the application of these principles in practice by reference patticularly to *Patrick Stevedores Operations No. 2 Pty Ltd v. Maritime Union of Australia (No. 3)* (1998) 195 CLR 1 ("the *Patrick Stevedores* case) with which many of you will be familiar and then by reference to some more recent decisions of the Federal Court in a dispute between the AWU and BHP.

The Objects and Effect of Part XA

5. The objects of the provisions relating to freedom of association are contained in s.298A. They are to ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations and to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations. The effect

of the operative provisions has been summarised in *The Laws of Australia* as follows:

> "Under the freedom of association provisions, an employer must not, for a prohibited reason (or for reasons that include a prohibited reason):
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> (1) dismiss an employee; *Workplace Relations Act* 1996 (Cth), s 298K(1)(a). *See*, for example, the decision of the Federal Court in *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Limited* (2000) 175 ALR 173 [[2000] AILR ¶4-263; [2000] FCA 441], where it was found that the actions of the employer in dismissing a union delegate for distributing a union bulletin to union members on the employer's internal email system was a breach of the freedom of association provisions of the *Workplace Relations Act*.
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> (2) injure an employee in his or her employment; *Workplace Relations Act 1996* (Cth), s 298K(1)(b).
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> (3) alter the position of the employee to the employee's prejudice; *Workplace Relations Act* 1996 (Cth), s 298K(1)(c), *See*, for example, the decision of the Federal Court in *Community & Public Sector Union v Telstra Corporation Ltd* [2001] FCA 267 (FC). In that case the Court found that an email instruction to managers to effectively discriminate against employees whose employment was covered by an award or certified agreement when selecting staff for redundancy was in breach of the freedom of association provisions. The Court found that, despite the fact that the email had not been acted upon, the position of employees covered by an award or certified agreement had been altered to their prejudice within the meaning of s 298K(1)(c). See also *Community & Public Sector Union v Telstra Corporation Ltd* [2001] FCA 813.
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> (4) refuse to employ a person; *Workplace Relations Act 1996* (Cth), s 298K(1)(b), or
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> (5) discriminate against a person in the terms and conditions on which the employer offers to employ the person. *Workplace Relations Act 1996* (Cth), s 298K(1)(e).
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> Independent contractors are afforded similar protections (s 298K(2)). Prohibited reasons include (s. 298 L(1)):
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> (1) past, present or future status as an officer, delegate, or member of an industrial association;
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> (2) non-membership of an industrial association;
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> (3) in respect of independent contractors, the fact that the independent contractor has one or more employees who are not

members of an industrial association, or has not paid a fee to an industrial association;

(4) refusal or failure to join an industrial association;

(5) the refusal by an employee to consent to an agreement to which an industrial association (of which the employee is a member) would be a party;

(6) the making of an application to an industrial body for an order for the holding of a secret ballot;

(7) participation in a secret ballot;

(8) entitlement to a benefit of an industrial instrument or an order of an industrial body; (In *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* (2000) 101 IR 143 [[2000] AILR ¶4-326; [2000] FCA 1231], the employer Council outsourced its aged care services to a company that provided those services at a lower price than the Council could perform them using its own staff. The Council staff were entitled to wages based on the terms of the *Victorian Local Authorities Interim Award 1991* (Award) and the *Greater Dandenong City Council Enterprise Bargaining Agreement* 1998 (Agreement). They were paid at higher rates than the employees of the company to whom the work was outsourced who were covered by a different award. The in-house employees had also bid on the tender but were unsuccessful. The difference in the bids was the price. The Council staff were made redundant when the work was awarded to the outside company. Some of the redundant employees were offered and accepted work with the outside company and were subsequently paid significantly less for doing identical work. The redundancies were challenged on the basis that they were for a prohibited reason, that is, entitlement to a benefit of an industrial instrument. While the price differential between the two bids was one of the reasons for Council's acceptance of the outside company's bid, the Federal Court was of the view that there was a strong inference that the dismissals occurred because of the Council employees' Award and Agreement entitlements. Both bids were prepared upon the same number of hours of work to be provided. The successful bid did not propose the use of new technology or techniques. The decisive factor was the price and the fact that the outside company could remunerate its employees under the lower paying award. The Court concluded that the Council's decision was in part motivated by the fact that the Council staff were entitled to the benefits of the Award and Agreement. Note that the entitlement to the benefit of an industrial instrument must be an existing entitlement: see *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* [2000] FCA 1768 (FC). In that case, the Full Court of the Federal Court held that as long as the prospective employee does not enjoy an existing entitlement to a relevant industrial instrument, employers may insist that prospective

employees enter into an Australian Workplace Agreement as a condition of employment.)

(9) an inquiry or complaint seeking compliance with an industrial law or the observance of a person's rights under an industrial instrument;

(10) participation in proceedings under an industrial law;

(11) giving of evidence in proceedings under an industrial law;

(12) in circumstances where an employee or independent contractor is a member of an industrial association who is seeking better industrial conditions and is dissatisfied with his or her conditions -- the fact that the employee or independent contractor is dissatisfied with his or her conditions; (In *Independent Education Union v Geelong Grammar School* [2000] AILR ¶4-283 [[2000] FCA 557], a private school teacher had concerns over the very long hours that he was working. He expressed his concerns in writing and was asked to attend a meeting with the school's acting principal. The acting principal refused to allow the teacher to be accompanied by a union representative at the meeting. The teacher refused to meet with the acting principal without the union representative present. The teacher was ultimately dismissed for refusing to engage in communication with the acting principal. In interlocutory proccedings to determine whether there was a serious case to go to trial, on the issue of whether the teacher had been dismissed for a prohibited reason, the Federal Court found that the teacher had been dismissed because he was dissatisfied with his working conditions. The parties did not dispute the fact that the union, on behalf of the teacher, had sought better conditions. It was also the Court's view that it was sufficiently arguable that the acting principal had the teacher's dissatisfaction in consideration as one of the reasons why termination should be effected. The teacher's dissatisfaction with the working conditions of the school, and the manner in which that dissatisfaction was addressed was deemed to be disruptive. On the basis of these considerations, the Court found that the teacher had shown a sufficient case that his dismissal had been motivated by a prohibited reason. The Court ordered that the school be restrained from acting upon the termination notice.)

(13) absence from work without leave by an employee or independent contractor where the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association in circumstances where the leave was applied for in advance but was unreasonably withheld or refused; and

(14) taking action by an officer or member of an industrial association for the purpose of furthering or protecting the industrial

> interests of an industrial association where that action is lawful, and is authorised by the rules of the industrial association.
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> Similar prohibitions apply to detrimental actions taken or threatened by industrial associations against employers, employees, independent contractors or members (ss 298P-298S)."

The MUA Case

6. Ironically one of the first major tests of the freedom of association provisions highlighted their strength, as Professor McCallum has argued, in elevating freedom of association over and above other commercial rights "such as the right of capital to engage in corporate restructuring"; McCallum R, "A Priority of Rights: Freedom of Association and the Waterfront Dispute", (1998) 24(3) Australian Bulletin of Labour Law 207.

7. You will remember that the dispute commenced in the Federal Court when the MUA sought interlocutory injunctions against the Patrick Group on the basis that its members were about to be dismissed and replaced with non–union labour allegedly in breach of the freedom of association provisions in the *WorkPlace Relations Act*. The union also alleged that the Patrick Group had engaged in the tort of conspiracy.

8. The interlocutory injunctions granted by North J and the Full Court of the Federal Court were varied significantly in the High Court to ensure that it remained up to the administrators of the companies in question as to whether those companies should continue trading; see *Patrick Stevedores Operations*

No. 2 Pty Ltd v. Maritime Union of Australia (No. 3) (1998) 195 CLR 1 and The Laws of Australia Vol. 21.5 [34]. You will remember that the dispute arose out of a restructure of the Patrick Group's operations in September 1997. It resulted in a division in the group between those employing waterfront labour and those operating the stevedoring business. The employers in the Patrick Group entered into labour hire agreements with the Patrick stevedore operators. Under these arrangements a work stoppage gave the stevedore operators the right to terminate the agreements to hire labour and stop paying the labour hire companies which had no other sources of income or assets. Meanwhile, non-union workers were being trained by the National Farmers Federation Producers and Consumers Pty Ltd at a dock owned by the Patrick Group to perform stevedoring work. Selective industrial action was taken by the MUA members at ports in Sydney and Brisbane.

9. Because of the lack of assets in the labour hire companies the union's victories in the Courts were Pyrrhic but not all employers have structured their employment arrangements so strategically and the exercise demonstrated the potential of the remedies available to unions whose members were the subject of unlawful discrimination.

AWU v. BHP

10. Another major question to exercise the Federal Court has been the nature of the conduct necessary to infringe the freedom of association provisions. Does

conduct by an employer which does not have the purpose of infringing the freedom of association provisions but may have an effect of discriminating against employees because of membership of the union or non-membership of the union infringe the Act?

11. Kenny J in *Australian Workers' Union v. BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482 decided, in effect, that an offer of individual contracts to employees based on genuine business objectives where employees who did not accept the agreements did not receive the same benefits in their employment, were not in breach of the freedom of association provisions of the *WorkPlace Relations Act*.

> "Central to Kenny J's finding that there had been no breach of the freedom of association provisions by the employer were the reasons adopted by the employer for introducing the individual agreements. Her Honour accepted the employer's evidence that the primary motivation was to be able to compete against their competitors who had made productivity improvements due to the introduction of individual agreements. Kenny J held that the employer genuinely believed that the introduction of individual agreements would yield benefits in improved flexibility, pay for performance, attitude and greater commitment to the employer. The primary purpose of the employer, her Honour found, was to achieve a form of industrial regulation that would best suit its business objectives by facilitating change within the workforce. Kenny J rejected the AWU's argument that the employer's objective in introducing the agreements was to deprive the union of any role at the workplace. The injunctions granted at first instance and by the Full Court were set aside."[1]

12. The case was interesting because, at the interlocutory stage, both Gray J and the Full Court of the Federal Court thought it appropriate to grant interlocutory injunctions. Gray J in particular took the view that it was not

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1 The Laws of Australia Vol. 21.5 [36].

necessary for the unions to show that BHP intended to induce the union members away from their membership but that proof of inducing conduct leading to the proscribed result was sufficient. His Honour held that the practical effect of the respondents conduct was to induce a substantial number of its employees to stop being union members. The Full Court, however, did emphasise that "the existence of a particular intention may be a significant consideration"[2]. The question of whether the employer's intention was relevant arose in the context of the effect of s.298M of the *WorkPlace Relations Act*. It provides:

> "An employer, or a person who has engaged an independent contractor, must not (whether by threats or promises or otherwise) induce an employee, or the independent contractor (as the case requires) to stop being an officer or member of an industrial association."

13. If the intention of an employer in that context was relevant then s.298V would put the onus on the employer to prove that it did not have a relevant intent, for example, of discriminating against an employee on the basis of union membership or inducing it to be stop being a member of the union in contravention of s.298L or s.298M. The Full Court only upheld the injunctions granted by Gray J on the basis that there was a serious question to be tried that s.298M had been infringed. Their Honours disagreed with his views about the effect of ss298K and 298L and found that there was no serious

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2 *Australian Workers' Union v. BHP Iron-Ore Pty Ltd* (2000) 171 ALR 680, 696 and see Sarah Richardson, Freedom of Association and the Meaning of Membership – An Analysis of the BHP Cases (2000) 22 Sydney Law Review 435, 439-440.

question to be tried that the offer of individual employment agreements had infringed those sections.

14. When Kenny J came to examine the evidence at the trial, her Honour was satisfied that BHP's primary motivation was to be able to compete against their competitors who had made productivity improvements due to the introduction of individual agreements. Her Honour held that the employer genuinely believed that the introduction of individual agreements would yield benefits in improved flexibility, pay for performance, attitude and greater commitment to the employer. She rejected the AWU's argument that BHP's objective was to deprive the union of any role of the workplace.

15. The Full Court decision at the interlocutory level is also important because it suggests that ss.298K and 298L operate on direct, not indirect discrimination. Indirect discrimination can occur in a workplace from policies that do not explicitly mention the group affected. Where Gray J had found BHP's general offer of individual agreements combined with a refusal to bargain collectively injured the remaining award employees and altered their position as they often had to work next to employees who were enjoying the benefits of the new agreements, the Full Court took the view that the failure to negotiate collectively did not amount to conduct under s.298K because it was an omission, not an act. The Full Court also took the view at 693 that there was

no intentional conduct "singling out" employees on the basis of their union membership. And as Kenny J said in her judgment on the trial at [59]:

> "**[59]** There is not, I think, any contrariety between the interlocutory judgment of the Full Court and the judgment of the High Court in Patrick. The points considered by the Full Court were not at issue in the High Court. In Patrick, the case proceeded on the facts as pleaded, it being assumed for the purposes of the appeal that Patrick's employees were necessarily affected as individuals by the company's conduct. The case made against Patrick was that it participated in a scheme leading to the appointment of administrators, thereby creating a situation which immediately threatened the employment of each and every one of its employees, considered as individuals. The critical distinction between Patrick and this case is that the position of each of Patrick's employees was necessarily directly affected by what Patrick did. Contrast this case. The allegation here is not that BHPIO injured its employees as a direct result of what it did but, rather, indirectly. That is, injury occurred because a sufficiently large proportion of the workforce accepted the WPA offers and resigned from the unions, thereby weakening the unions' bargaining position, especially with respect to EBA 4." (My emphasis.)

16. Further, the Full Court took the view at (2000) 171 ALR 680, 693 that the fact that award employees did not get the same benefits as other employees was "a consequence of an election between different contractual regimes for the regulation of the employment of the two groups of employees … not … the active, intentional conduct of the employer which is struck at by s.298K".

17. The approach of the Full Court in proscribing only direct discrimination and the factual findings made by Kenny J make it clear that, where an employer has genuine reasons for negotiating individual agreements with its employees, it will not be in breach of s.298M, even if its offers have the effect of inducing an employee to stop being a member of a union so long as that is not the employer's intention. Even if the employer has a relevant intention Kenny J's view at [78] is that "the employer's state of mind is at most an

important evidentiary component of a s298M case. If I am wrong, however, and intention is an essential substantive ingredient, I would still hold that s298V has no application in a s298M case." In other words the reverse onus provisions do not affect the evidence in a s. 298M case.

18. Another illustration of the problems facing unions in this area comes from the recent decision of Branson J in *MUA v CSL Australia Pty Limited* [2002] FCA 513 where her Honour found that a decision by a shipowning company to sell the vessel CSL Yarra to a related company so that the vessel would, when sold, operate under a foreign flag and with a Ukrainian crew was not made for a prohibited reason. She expressed her reasons at [55]:

> "I am satisfied that the Company has proved on the balance of probabilities that the operative or immediate reason (or perhaps reasons) for the conduct of the Company with which this proceeding is concerned was Mr Jones' desire that each of the CSL Pacific and CSL Yarra should have the flexibility to trade as part of the CSL International fleet not only on the Australian coast but elsewhere in a cost effective way. I do not doubt, indeed Mr Jones did not deny, that in the process of reaching his decision that the CSL Yarra should be sold and reflagged, he gave consideration to the cost differential between an Australian crew and a foreign crew. As mentioned above, that cost differential flows from the content of the industrial instruments. However, it is necessary for me, as R D Nicolson J pointed out in MUA v Geraldton (see [42] above), to characterise the Company's reasons, which in this case are in reality Mr Jones' reasons. This exercise of characterisation involves, as his Honour observed, questions of judgment. In my judgment, part of the reason (or perhaps one of the reasons) for Mr Jones' decision was the desirability, as he saw it, of the CSL Yarra being able to be used in a cost effective way. I am satisfied that he considered that the freedom to crew the CSL Yarra with a crew which did not enjoy the protection of the industrial instruments would contribute significantly to the cost effective utilisation of the vessel. However, it seems to me that the fact that the crew of the CSL Yarra were entitled to the protection of the industrial instruments, while in part a cause of the decision taken by Mr Jones, was not an operative reason for his decision in the sense identified in [54] above. The relevant operative reason, I find, was the need to be able to utilise the vessel in a cost effective way."

19. This distinction between subjective and operative reasons for conduct proscribed by the Act is difficult to apply and conceptually unsatisfactory. I gather that there was an "industrial" solution to this case that avoided an appeal but it illustrates real difficulties in predicting what is acceptable conduct in these areas. One solution would be the revival of Gray J's view that indirect discrimination could infringe ss.298K and 298L but that seems unlikely for the moment barring a decision by the High Court.

20. The other side of the coin, that employers cannot terminate employees because of their membership of a union, remains a powerful weapon in the hands of unions in the right factual circumstances. Where employers isolate their labour hire companies from their main operations, however, and effectively send them into liquidation as happened in the *Patricks* case, those rights can end up being illusory.

Conclusion

21. The freedom of association provisions in Part XA of the *WorkPlace Relations Act* combining, as they do, the right to associate in a union with the right not to associate, have changed the industrial landscape in Australia significantly. The days of closed shops and preference clauses are gone. Employers have greater flexibility to negotiate individually rather than collectively. These are significant incursions into union power. By the same token, the statutory

recognition of a right not to discriminate against an employee because of union membership provides a powerful tool to unions to seek relief against employers who threaten such conduct against their members.

22. There is a growing body of jurisprudence in the Federal Court dealing with these issues. One area which deserves further attention is the question whether discriminatory conduct in breach of s.298K can extend to indirect discrimination as well as direct discrimination. For the moment the decision of the Full Court of the Federal Court in *Australian Workers' Union v. BHP Iron-Ore Pty Ltd* (2000) 171 ALR 680 suggests not but I expect that we have not yet heard the last word on that issue.

J.S. DOUGLAS QC
16 October 2002