A Modern Renaissance: Industrial Law and Relations Under Federal Wigs 1977-1992

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Just fifteen years ago, on 1 February 1977, the Federal Court of Australia began operations.[1] It is composed of more than 30 judges,[2] spread over the length and breadth of this continent, who exercise broad ranging curial powers which impact upon many aspects of Australian life. The Court's major fields of work include bankruptcy;[3] restrictive trade practices and consumer protection;[4] intellectual property;[5] federal industrial relations;[6] the making of binding determinations under anti-discrimination legislation;[7] taxation;[8] judicial review of government administrative decisions;[9] and the supervision of various federal tribunals.[10] The Federal Court also has significant appellate powers over decisions of various territory supreme courts.[11] Its pendent jurisdiction over related and accrued matters,[12] coupled with the federal and state cross-vesting legislation of the late 1980s,[13] has

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1 *Federal Court of Australia Act* 1976 (Cth).

2 Volume 102 of the *Australian Law Reports*, which was published towards the close of 1991, lists M E J Black as Chief Judge, together with 32 other Federal Court justices.

3 *Bankruptcy Act* 1966 (Cth).

4 *Trade Practices Act* 1974 (Cth).

5 The *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1987 (Cth), bestowed original jurisdiction on the Federal Court under various intellectual property statutes, including the *Patents Act* 1952 (Cth) and the *Trade Marks Act* 1955 (Cth).

6 *Industrial Relations Act* 1988 (Cth) ss46, 50-56.

7 *Racial Discrimination Act* 1975 (Cth) s25ZA; and *Sex Discrimination Act* 1984 (Cth) s82.

8 Exclusive jurisdiction under the *Income Tax Assessment Act* 1936 (Cth) and other related taxation statutes, was bestowed on the Federal Court by the *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1987 (Cth).

9 *Administrative Decisions (Judicial Review) Act* 1977 (Cth); and *Judiciary Act* 1903 (Cth) s39B.

10 See, eg, *Administrative Appeals Tribunal Act* 1975 (Cth) s44.

11 *Federal Court of Australia Act* 1976 (Cth) s24(1)(b).

12 Pendent jurisdiction is discussed below in Section 2.

13 For a commentary on the cross-vesting scheme, see Mason, K, QC and Crawford, J, "The Cross-Vesting Scheme" (1988) 62 *ALJ* 328; and see also Campbell, E M, "Cross-Vesting of Jurisdiction in Administrative Law Matters" (1990) 16 *Mon LR* 1. The major legislation is the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth); *the Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW); and the *Jurisdiction Of Courts (Cross-Vesting) Act* 1987 (Vic).

further broadened its powers. Over the course of its existence, its creative judgments have enriched the law in all these fields. In fact, although only established for a relatively short time, it is difficult to imagine Australian law without the Federal Court. Indeed, if abolished tomorrow, its absence would create an enormous hole in the curial fabric of this country.

It is my contention that the Federal Court has had an enormous impact upon federal labour relations. Its judgments have travelled beyond the narrow confines of interpreting trade union rules and enforcing awards. In particular, decisions made under s45D of the *Trade Practices Act* 1974 and the enforcement of implied terms in contracts of employment, have meant that the Court's pronouncements now play a large part in shaping the conduct of the participants in federal industrial relations.

The role of the Federal Court, I believe, has yet to be fully appreciated. It is claimed on occasion, by some industrial relations practitioners, trade union leaders and commentators, that the law has little relevance to industrial relations. In their view, the law should play a non-intrusive role, thus enabling the disputants to resolve their differences through negotiations.[14] While such claims may have had some legitimacy in the rather free-wheeling days of the late 1960s and early 1970s, they have been untenable for most of this century. Certainly, in the 1980s and 1990s, it is clear that labour law has become one of the prime factors influencing Australian industrial relations.

In this paper, I will argue that the last decade and a half have seen the Federal Court judges play a significant part in re-asserting the role of the law in federal industrial relations. Not since the early days of our federation, when Henry Bournes Higgins was in his ascendancy, have federal wigs played such a prominent role in shaping our labour relations. It will be contended further that if Australian industrial relations goes further down the de-regulatory path of collective bargaining, the law is likely to play an increased role in determining the behaviour of the participants.

To show how the Federal Court has fostered the increased involvement of lawyers in federal industrial relations, I shall examine several aspects of the labour law work of the Court. Some portions of its jurisprudence on internal trade union affairs will be analysed. An examination will also be made of the manner in which award clauses have become implied contractual terms in order to fashion new employee remedies. The approach of the Court to the case law on s45D of the *Trade Practices Act* will be discussed. Finally, the paper will turn to the issue of whether this industrial jurisdiction should now be reposed in a labour court, or remain with the Federal Court of Australia. As background, it is necessary to comment upon the operation of the federal labour courts from 1904 to 1977; and also to examine the establishment and general operations of the Federal Court of Australia.

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14 In Hill, J D, Howard, W A and Lansbury, R D, *Industrial Relations: An Australian Introduction* (1982), one of the themes of the authors is that the law should only have a limited role in industrial relations. This theme is an under-current flowing throughout this entire work. See especially 12, 17, 25-27 and 140. See also Deery, S and Plowman, D, *Australian Industrial Relations* (2nd edn, 1985) at 272.

1. *Labour Courts and Tribunals 1904-1977*

By 1916, the Australian Federal Government, New Zealand and the states of New South Wales, Queensland, South Australia and Western Australia, had all established mechanisms of compulsory conciliation and arbitration for the prevention and settlement of labour disputes.[15] In each of these jurisdictions, labour courts were given powers to compel disputants to submit their claims to final and binding interest arbitration. It was believed that only courts constituted by judges would have the necessary status and authority to carry out such tasks; especially in the face of concerted employer opposition.[16] At this period of our labour relations history, judicial wigs were clearly in the ascendancy.

The Commonwealth Court of Conciliation and Arbitration was established under the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).[17] Its function was to prevent and settle interstate industrial disputes by conciliation and arbitration.[18] The principal role of this Court was to carry out the tasks of determining and enforcing arbitrated awards. It initially consisted of a president who was required to be chosen from the judges of the High Court and who was appointed for a seven year term.[19] From 1907 to 1921, Henry Bournes Higgins was the second president of this Court.[20]

Higgins J developed his own system of rather formal arbitration. In his view, the function of the Arbitration Court was to replace the barbarism of the strike and the lock-out by "A New Province for Law and Order".[21] His duty was to settle such disputes by arbitrated awards. If a disputant refused to comply with an award, the dissatsfied party could obtain redress by invoking the Court's enforcement powers. The establishment of a basic or family wage was largely an outcome of this process of dispute settlement.

By the close of the first world war in 1918, Higgins' legalistic model of arbitration had begun to break down. Higgins J had always refused to deal with workers while they engaged in strikes contrary to his awards. However, the exigencies of the war meant that politicians like Prime Minister W M Hughes simply ignored the Higgins Court and arranged settlements between the disputants.[22] This difference between the Court and the Australian

15 For an account of the enactment of these statutes, see Portus, J H, *The Development of Australian Trade Union Law* (1958) at 100-15. The three major statutes were the *Industrial Conciliation and Arbitration Act* 1894 (NZ); *Industrial Arbitration Act* 1901 (NSW); and *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).

16 See Plowman, D and Smith, G F, "Moulding Federal Arbitration: The Employers and the High Court 1903-35" (1986) 11 *Aust J Management* 203.

17 The word "Commonwealth" was deleted from its title in 1950.

18 Under s51(35) of the Australian Constitution, the Australian government has power to establish conciliation and arbitration machinery for the prevention and settlement of interstate labour disputes.

19 *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) s12(1).

20 The first President of the Court was O'Connor J.

21 This was the title of his book in which he details his work on the Court. Higgins, H B, *A New Province for Law and Order* (1922); (re-printed 1968).

22 See Rickard, J, *H B Higgins: The Rebel as Judge* (1984) at 200-04, 231-64; and see also Rawson, D W, "Industrial Relations and the Art of the Possible", in Blandy, R and

Government lead to the resignation of Higgins J from the Court in 1921.[23] The collapse of the Higgins philosophy showed that in the changing Australia of the twentieth century, it would not be possible to operate for any substantial period, a rigid form of arbitration based solely on legal prohibitions. In a highly unionised society like Australia in the first three quarters of this century, it would be necessary to develop legal sanctions which would leave room for pragmatic dispute settling practices.

It is not my purpose here to trace the jurisprudence of the Court in its first half century of dispute settling, as this task has been ably performed by other and better equipped scholars.[24] I am content to begin with the words of Bob Hawke, which showed that by the mid-1950's, the Court had begun to take on the trappings of an economic legislature.[25] The growth in post World War II Australia, led to a virtually full employment economy. Added to this prosperity was the rather high inflation of the early 1950s. Given these circumstances, the increased role of the Court in dividing up these economic gains was hardly surprising. In this climate, it was again not surprising that a High Court lead by a lawyer's lawyer par excellence, like Dixon CJ, would hold in the *Boilermaker's Case*[26] that this type of economic arbitration could not be undertaken by a court possessing federal judicial power. Even before this decision was affirmed by the Privy Council[27] the Australian government decided to divide the functions of the Court between a Conciliation and Arbitration Commission and an Industrial Court.[28] As is now well-known, the new Commission was given the administrative tasks of settling labour disputes by promulgating awards or by certifying agreements. The new Industrial Court was left with a rather narrow range of functions, including the enforcement of awards and agreements and the general supervision of internal trade union affairs.[29]

During his presidency of this Commission from 1956 to 1973,[30] Sir Richard Kirby presided over what Les Cupper has characterised as a "gradual transition"[31] from a court to an administrative tribunal. Although they still held the title of "Justice", presidential members soon abandoned their wigs.

Niland, J, (eds), *Alternatives to Arbitration* (1986) at 273, 276-78.

23 On 25 October 1920, Higgins J made a speech in open court stating his intention to resign from the Court. This resignation took effect in the following year. This speech is reproduced in Higgins op cit at 172-76.

24 See, eg, Hancock, K J, "The First Half Century of Australian Wage Policy" (1979) 21 *JIR* 1 and 129.

25 Hawke, R J, "The Commonwealth Arbitration Court: Legal Tribunal or Economic Legislature", (1956) 3 *UWALR* 422.

26 *R v Kirby; Ex parte Boilermakers Soc Aust* (1956) 94 CLR 254.

27 *A-G Aust v R* [1957] AC 288.

28 *Conciliation and Arbitration (Amendment) Act* 1956 (Cth); and see also *Conciliation and Arbitration (Amendment) Act (No 2)* 1956 (Cth).

29 In 1956, the Commission's title was the Commonwealth Conciliation and Arbitration Commission; while that of the Court was the Commonwealth Industrial Court. In 1973, the word "Commonwealth" was replaced by the word "Australian" in both these titles.

30 For comment upon his presidency, see d'Alpuget, B, *Mediator: A Biography of Sir Richard Kirby* (1977) at 149-67.

31 Cupper, L, "Legalism in the Australian Conciliation and Arbitration Commission: A Gradual Transition" (1976) 18 *JIR* 337.

With the restriction of the penal powers[32] in the *Conciliation and Arbitration Act* in 1970,[33] the Commission was left to operate in a world which was then largely sanction free in practice.[34] In 1972, amending legislation enabled non-lawyers to hold presidential rank in the Commission.[35] From the late 1960's, until the establishment of wage indexation in April 1975,[36] large scale industry-wide collective bargaining took place. In this period of "accomodative" arbitration when market forces prevailed,[37] conciliation and arbitration was presided over by presidential members in suits and not by bewigged judges.

The Industrial Court began in 1956 with a bench of three judges.[38] By the time of the establishment of the Federal Court in early 1977, the Industrial Court had a Chief Judge and 11 other justices and a growing non-industrial jurisdiction.[39] Although this was not prescribed in the Conciliation and Arbitration Act, the judges of the Industrial Court were appointed in part because of their knowledge of labour law and industrial relations. This meant that their minds were on the whole, less divorced from industrial relations matters, than are those of judges who had been appointed to less specialised courts. Furthermore, on many industrial matters which came before them, they were required to sit in full benches comprising two, then later three judges.[40] In my view, this gave the Industrial Court a much greater degree of collegiality, than is the case with courts where matters are usually heard at first instance by a single judge. The functions which were bestowed upon the judges by the Conciliation and Arbitration Act were rather narrow, relating in the main to the enforcement of awards and the supervision of internal trade union affairs.[41] From this distance, however, few landmark decisions[42] remain of relevance today. In my view, the pace of legal, social and economic events has largely overtaken this jurisprudence.

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32 For discussions of the operation of the penal powers, see Isaac, J E, "Penal Provisions Under Commonwealth Arbitration" (1963) 5 *JIR* 110; and Mills, C P, "The Practice of the Commonwealth Industrial Court in Strike Cases" (1968) 7 *The Aust Lawyer* 137.

33 *Conciliation and Arbitration (Amendment) Act* 1970 (Cth).

34 For comment, see Cupper, op cit at 358-62. In 1973, the Whitlam government made it clear that it would no longer collect fines under these penal provisions

35 *Conciliation and Arbitration (Amendment) Act* 1972 (Cth).

36 *National Wage Case April 1975* (1975) 167 CAR 18.

37 For an illustration of this approach, see *Electrical Trades Union of Australia v Altona Petrochemical Co Pty Ltd* (1970) 134 CAR 159.

38 Section 98 of the *Conciliation and Arbitration Act* 1904 (Cth) as it stood in 1956, provided that the Commonwealth Industrial Court should consist of a Chief Judge and two other judges. This provision was amended from time to time, thus increasing the number of judges to 11 by 1976.

39 Its most interesting area of non-industrial jurisdiction was that given to it by the *Trade Practices Act* 1974 (Cth).

40 *Conciliation and Arbitration Act* 1904 (Cth) s104. For details of the intricate amendments to this section, see Mills, C P, and Sorrell, G, *Federal Industrial Laws* (5th edn, 1975) at 286.

41 For useful comments on its work in supervising the internal affairs of trade unions, see Tracey, R R S, "Determination of the Validity of the Rules of Organizations Under Section 140 of the Conciliation and Arbitration Act" (1976) 8 *FLR* 57; and Tracey, R R S, "Section 141 of the Conciliation and Arbitration Act and Natural Justice" (1976) 18 *JIR* 58.

42 The major exception is *Moore v Doyle* (1969) 15 FLR 59 which relates to the legal personality of trade unions which are simultaneously registered under federal and state industrial laws.

2. *The Mechanics of the Federal Court of Australia 1977-1992*

The passage of the *Federal Court of Australia Act* 1976 (Cth), was the culmination of more than a decade of debate concerning the establishment of a federal or superior court.[43] The proposals put forward were varied, but all reflected a desire to relieve the High Court of some of its routine work and to bring specialist areas of federal jurisdiction under the umbrella of a single court. A detailed account of the structure and jurisdiction of the Federal Court is beyond the scope of this paper.[44] To comprehend the labour law work of the Court, however, it is necessary to outline briefly the operation of the Court and some aspects of its jurisdiction.

The *Federal Court of Australia Act* did not itself bestow any original jurisdiction on the Court.[45] Rather, it was decided that Parliament should, from time to time, invest the Court with original or concurrent jurisdiction as it saw fit. Upon its establishment, the non-industrial jurisdiction of the old Industrial Court, including that under the *Trade Practices Act*, was transfered to the Federal Court.[46] The jurisdiction under the *Conciliation and Arbitration Act* was also given to the new Court.[47] In 1989, the *Conciliation and Arbitration Act* was repealed[48] and replaced by the *Industrial Relations Act* 1988 (Cth). This new statute abolished the Conciliation and Arbitration Commission and replaced it with the Industrial Relations Commission. Throughout these developments, the industrial work of the Federal Court remained largely unchanged. Its jurisdiction is now governed by the *Industrial Relations Act*.[49]

Under the doctrine of precedent, the Federal Court has never been bound to follow decisions of the Industrial Court, either with respect to its industrial or non-industrial decisions.[50] This has meant that it has not been shackled by out of date decisions, which has been especially significant in its work in internal trade union affairs.[51]

The Federal Court has always been divided into two divisions, a general division and an industrial division.[52] It was believed that an industrial division could continue the work of the Industrial Court and maintain the rather specialist nature of this jurisdiction.[53] To this end, it has always been

43 See Crawford, J, *Australian Courts of Law* (2nd edn, 1988) at 136-38.
44 For a brief analysis, see id at 138-46.
45 See s19.
46 *Federal Court of Australia (Consequential Provisions) Act* 1976 (Cth).
47 *Conciliation and Arbitration (Amendment) Act (No 3)* 1976 (Cth). Certain other matters in this industrial jurisdiction were clarified by the *Conciliation and Arbitration (Amendment) Act* 1978 (Cth).
48 *Industrial Relations (Consequential Provisions) Act* 1988 (Cth).
49 Sections 46, 50-56. For transitional provisions, see *Industrial Relations (Consequential Provisions) Act* 1988 (Cth).
50 See *Wood v Melbourne City Council* (1979) 41 FLR 22; and on precedent generally, see *Viro v R* (1978) 141 CLR 88.
51 Internal trade union affairs are discussed in section 3.
52 *Federal Court of Australia Act* 1976 (Cth) s13.
53 See the second reading speech to the Federal Court of Australia Bill 1976 by the

possible for judges to be assigned to only one of these divisions.[54] In practice, however, most of the judges have been assigned to both divisions. Indeed, the rationale for retaining a separate industrial division has diminished with time, and in my view it would be preferrable for the Court to do away with it. The labour relations matters which come before the Court are not confined to issues within its industrial jurisdiction. For example, s45D of the *Trade Practices Act* which relates in the main to trade union industrial action, comes under the umbrella of the general division of the Court.

This two division structure of the Court has been made virtually obsolete, owing to the growth of the Court's pendent jurisdiction. This power enables litigants to request the Court to determine in conjunction with a matter within its jurisdiction, either associated matters under federal law, or related matters at common law.[55] I am not here concerned with the Court's associated jurisdiction, where it can hear associated matters under federal law, otherwise outside its jurisdiction.[56] Of more relevance to the subject at hand, is its accrued jurisdiction, where the Federal Court may hear a common law claim concurrently with a matter within its jurisdiction, provided the common law matter is an attached non-severable claim. This matter first arose in *Adamson v West Perth Football Club Inc*,[57] where Northrop J held that a common law restraint of trade action could be joined to a similar claim under s45 of the *Trade Practices Act*.[58] This form of accrued jurisdiction was upheld subsequently both by the Federal Court[59] and the High Court.[60] More recently, the Federal Court has affirmed that it has accrued jurisdiction to deal with a common law claim, even where the matter within jurisdiction may fail.[61] Since 1 July 1988, cross-vesting legislation[62] has minimised some of these technical jurisdictional problems.[63] The net result of this pendent jurisdiction is that the

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Attorney-General Ellicott, R J, *Hansard*, 21 October 1976, vol 101 2110, 2112.

54 *Federal Court of Australia Act* 1976 (Cth) s13(4). Under this provision, it is however possible for the Chief Judge to give a judge who has only been assigned to one division permission to hear a case in the other division.

55 For useful commentaries, see Crawford, op cit 142-46; and *High Court and Federal Court Practice* vol 2 para 20 -060.

56 *Federal Court of Australia Act* 1976 (Cth) s32(1). This associated jurisdiction has been approved by the High Court. See, eg, *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* and *United States Surgical Corp v Hospital Prod Int Pty Ltd* (both cases were heard together) (1981) 148 CLR 457.

57 (1979) 39 FLR 199.

58 Id 211-24 where Northrop J analyses all the previous High Court authorities.

59 For examples in the industrial field, see *Kennedy v Australasian Coal and Shale Employees Federation* (1983) 78 FLR 252; and *Gregory v Philip Morris Ltd* (1988) 80 ALR 455.

60 See, eg, *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*, above n56; and *Fencott v Muller* (1983) 152 CLR 570.

61 *Burgandy Royal Investments Pty Ltd v Westpac Banking Corp* (1988) 18 FCR 212.

62 See above n13.

63 Under s4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth), however, matters arising under both the *Industrial Relations Act* 1988 and s45D of the *Trade Practices Act*, may not originate in a Supreme Court of a state or territory, nor may such matters be transfered from the Federal Court to a state or territory Supreme Court.

Federal Court has more than a decade's experience in hearing common law claims which arise with matters within its jurisdiction. This has been of enormous significance in the development of federal labour law.[64]

To complete this background, it is necessary to say a few words about the changing nature of federal awards. Throughout most of this century, in the main, awards have been confined to setting minimum wages, maximum working hours and annual leave. Apart from a two year break,[65] ever since the establishment of the Federal Court until the present time, the federal commissions have maintained centralised wages systems. This was first achieved through wage indexation, and later by the various prices and incomes accords. Within these structures, it has been possible for trade unions to greatly broaden the scope of their awards. The most significant expansion took place in 1984, when the Conciliation and Arbitration Commission inserted into awards, clauses relating to unfair dismissals, technological change and redundancy.[66] Other significant alterations have related to superannuation[67] and to parental leave.[68] This has meant that in its role of enforcing such awards, the Federal Court has been upholding not so much the old framework awards, but rather awards which are gradually becoming employment codes.

It is not possible here to analyse every facet of the Federal Court's labour law work. In what follows, I shall examine some aspects of internal trade union law relating to trade union democracy. Then, an analysis will be made of the manner in which some federal award clauses have become implied terms in employment contracts. Lastly, I shall say a few words about the various judicial approaches to s45D of the *Trade Practices Act* which have emerged in this growing body of case law. In my view, these three areas best typify not simply the work of the Court, but also the manner in which the judges have been prepared to break new ground hitherto untrodden by the federal judiciary.

3. *Internal Trade Union Law*

Under both the *Conciliation and Arbitration Act* 1904 (Cth)[69] and now the present *Industrial Relations Act* 1988 (Cth),[70] the courts have been given broad powers to control the internal affairs of federal trade unions. In fact,

64 See sections 4 and 5 below.

65 Wage indexation came to an end in July 1981, and the prices and incomes accord approach was not adopted by the Conciliation and Arbitration Commission until September 1983. See *National Wage Case July 1981* (1981) 260 CAR 4; and *National Wage Case September 1983* (1983) 291 CAR 3.

66 *Termination Change and Redundancy Case* (1984) 294 CAR 175; and see also the *Supplementary Decision* (1985) 295 CAR 673.

67 *National Wage Case June 1986* (1986) 301 CAR 611.

68 In 1979, the Concilation and Arbitration Commission granted women 12 months unpaid maternity leave on the birth of a child. See *Maternity Leave Case* (1979) 218 CAR 121. In 1990 the Industrial Relations Commission extended this right to fathers, hence the term parental leave. See *Fed Misc Workers' Union v Angus Nugent & Son Pty Ltd* (1990) 36 IR 1.

69 Sections 132-171G.

70 Sections 188-298.

these controls are more stringent than those placed upon the trade union movements of any of the comparable western industrial democracies. In a paper of this length, it is not possible to examine the entire gamut of federal internal trade union law.[71] Here, I shall be content to discuss the manner in which the Federal Court has sought to impose upon trade unions its concept of representative democracy. To illustrate the expansive operations of the Court, an examination will be made of candidature qualification rules; trade union structures and rule amendment powers; and the use of trade union resources in election campaigns.

The Industrial Court had power to declare that a rule of a trade union was "oppressive, unreasonable or unjust";[72] and the Federal Court still retains this rule invalidating power.[73] As Richard Tracey and I have argued elsewhere,[74] from 1956 to the early 1970s, the Industrial Court adopted a laissez faire approach to its supervision of trade union rules. It took the view that trade unions should be left alone to adopt rules, unless they were patently unreasonable. This laissez faire approach is best illustrated by the 1959 decision of *Cameron v Australian Workers Union.*[75] In this case, one of the rules under challenge was a candidature qualification rule. Persons were ineligible to stand for any federal office in the union, unless they had been a member for five years and a financial member for three years. From the report of this decision, it appears that no evidence was lead showing what per centage of the membership would be disqualified by this rule from standing for office. The Court held that this rule was not unreasonable. The full bench opined that this candidature qualification measure ensured aspirants to office had a continuous association with the union.[76]

In 1973, a significant change occurred when the Whitlam government amended the *Conciliation and Arbitration Act* to include as one of the statute's objects, to encourage "the democratic control" of trade unions and "the full participation by members . . . in the affairs of the" trade union.[77] Subsequently, this change was used by the Federal Court to justify a more interventionist role in the shaping of trade union rules. In truth, however, even without this additional object, both the *Conciliation and Arbitration Act* and the *Industrial Relations Act* expressly require that trade unions elect their

71 For more detailed accounts see Tracey, R R S, "The Conduct of Union Disciplinary Hearings" (1982) 24 *JIR* 204; Tracey, R R S, "The Legal Approach to the Democratic Control of Trade Unions", (1985) 15 *MULR* 177; McCallum, R C, "Federal Controls Upon Trade Unions: An Australian Enigma", in Rawson, D W and Fisher, C, (eds) *Changing Industrial Law*, (1984) 174; Creighton, B and Stewart, A, *Australian Labour Law — An Introduction*, (1990) 183-202; and McCallum, R C, Pittard, C M J and Smith,G F, *Australian Labour Law: Cases and Materials* (1990) 472-94.

72 *Conciliation and Arbitration Act* 1904 (Cth) s140(1)(c).

73 *Industrial Relations Act* 1988 (Cth) s196(c) which must be read together with s208.

74 McCallum, R C and Tracey, R R S, *Cases and Materials on Industrial Law in Australia* (1980) at 382.

75 (1959) 2 FLR 45.

76 Id at 59 per Spicer CJ.

77 The *Conciliation and Arbitration (Amendment) Act* 1973 (Cth) inserted this new object (f) into s2 of the parent statute. This object is now to be found in s3(g) of the *Industrial Relations Act* 1988 (Cth).

leaders democratically. In the 1970s and 1980s, the judiciary adopted an interventionist stance in the field of public law. The more interventionist approach of the Federal Court in the area of trade union rules, parallelled this general development.

On 26 August 1977, a full bench of the Federal Court constituted by Smithers, Evatt and Northrop JJ, handed down the two decisions of *Leveridge v Shop Distributive and Allied Employees Association*[78] and *Allen v Townsend*.[79] In *Leveridge*, a rule which prohibited members from standing for various offices unless they were members for two years was struck down by the Court. Several of these offices were part-time positions for delegates to the branch conference and the national council. Given that this union comprised shop assistants who often did not maintain long periods of membership, the Court had no difficulty in holding this rule to be unreasonable. On figures presented to the Court, this rule disqualified approximately 66 per cent of the members from standing for these offices.[80] In *Allen v Townsend*[81] a rule of the Vehicle Builders Employees Federation of Australia required that candidates for national secretary and national assistant-secretary have at least five years continuous membership. Some 64 per cent of the membership were disqualified from candidature. On this basis, Evatt and Northrop JJ held the rule to be invalid.[82] In his dissent, Smithers J said that given the responsibilities of these offices, it was open to the union to have such a rule.[83]

In the 1985 decision of *Rule v Australian Workers Union*,[84] the wheel had turned full circle. Wilcox J was asked to consider the reasonableness of a candidature qualification rule of the Australian Workers Union, which was similar to the rule which had been upheld in *Cameron v Australian Workers Union*.[85] The rule in these later proceedings required candidates for federal offices to have five years continuous financial membership. On the evidence presented to the Court, this rule disqualified some 96 per cent of the NSW membership and 72 per cent of the Victorian members from standing for any federal office.[86] Wilcox J had no difficulty in holding this rule to be unreasonable.[87]

The case of *Doyle v Australian Workers Union*[88] is also of interest. A rule which required candidates for union office to be below the age of 65 was under challenge. The Applicant sought to rely upon some dicta of Wilcox J in *Rule v Australian Workers Union*.[89] This was that the onus lay upon trade

78 (1977) 31 FLR 385.
79 (1977) 31 FLR 435.
80 See above n78 at 398 per Smithers J.
81 See above n79.
82 Id at 470.
83 Id at 457-58. See also the later decision by this full bench in *Lovell v Fed Liquor & Allied Employees Union* (1978) 35 FLR 72.
84 (1985) 10 FCR 280.
85 See above n75.
86 See above n84 at 286.
87 Id at 292-4.
88 (1986) 12 FCR 197.
89 See above n84.

unions to justify any candidature qualification rule by showing a nexus between its restrictions and the good government of the union.[90] The full bench explained that no such onus rested upon trade unions. They were entitled to adopt any rules which were not contrary to law. It is up to a member who challenges a rule to demonstrate its invalidity by producing evidence to show that it is oppressive, unreasonable or unjust.[91] The full Bench held this age limitation rule to be reasonable.[92] After all, the vast bulk of the membership retired before reaching this age.[93] Candidature qualification rules are still a live issue before the court and are generating further case law.[94]

Legislative powers over labour relations are divided between the Australian and state governments. Many trade unions wish to operate in both the federal and state regimes of conciliation and arbitration. This has meant that most trade unions are divided into branches which usually, although not always, conform to the boundaries of the Australian states. Such trade unions will have federal and state councils and officials, with their highest authority being a national council. They can best be thought of as mini-federations. The problem of fairly representing all branches on such a national council is beset with all the difficulties common to federal structures where the federated components are of different strengths and sizes.

The Federal Court tackled this problem head-on in the 1978 decision of *McLeish v Kane*.[95] The Electrical Trades Union of Australia consists of six state branches, with its highest body being a national council. Branch delegates were elected to this council according to a rather complex formula which also gave multiple votes to the delegates from each branch. Under this formula, voting was heavily weighted in favour of the smaller state branches. For example, the NSW branch which had over 22,000 members received 10 votes; the Victorian branch with just under 11,000 members had nine votes; whilst Western Australia which had just over 3,500 members received six votes.[96] The full bench held that in determining the reasonableness of these rules, the democratic value of one vote one value, must be balanced against trade union viability. If pure democracy was to be the sole yardstick, then the smaller branches would be swamped by the larger ones.[97] They bolstered their view by citing the High Court decision in *McKinlay*,[98] which upheld different sized electorates for the Australian Parliament. In this present case, the relevant rules were struck down because the imbalance between the small and large branches was too great. However, the full bench made it clear that

90 Id at 292-94.
91 See above n88 at 205-06 per Evatt, Sheppard and Gray JJ.
92 Id at 206.
93 Trade unions have now been given express power to place age qualifications in their rules. See *Industrial Relations Act* 1988 (Cth) s199.
94 The focus now appears to be on what is meant by "continuous financial membership" in various rules. See, *Re Carter; Re Federated Clerks Union Aust, Victorian Branch (No 1)* (1989) 32 IR 1; and *Re Porter; Re Transport Workers Union Aust (1989) 34 IR 179*.
95 (1978) 36 FLR 80.
96 Id at 88 where the relevant tables are set out in the joint judgment.
97 Id at 90 per Sweeney, Evatt and Northrop JJ.
98 *A-G Aust at the Relation of McKinlay v Cth Aust* (1975) 135 CLR 1.

heavier weight could be given to the voters in small branches, provided it was justified in all the circumstances relating to branch sizes and union structure. This holding has been adhered to in subsequent decisions.[99]

Once deliberative bodies have been democratically elected, further questions usually arise with respect to their powers and functions. One such matter, which has taken up a good deal of the time of the Federal Court, is whether any limitations should be placed upon the rule amending powers of trade union national councils. In the 1982 decision of *Cook v Crawford*,[100] one of the many issues which came before the Court related to the rule amending powers of the Federal Council of the Plumbers and Gas-Fitters Employees Union. The rule in question, enabled the Federal Council to amend its rules at any time. Sheppard J held that it was an unreasonable rule because it was necessary for there to be some rank-and-file participation in rule amendments, in order to maintain the democratic character of the union.[101] Keely J agreed,[102] while Smithers J dissented.[103]

This decision created a stir in trade union circles, for many of the federal councils had broad rule-amending powers which might now be in jeopardy. In 1983, this issue again arose in *Wright v McLeod*.[104] Owing to its importance, a full bench of five judges was constituted to hear the matter. In this case, the Federal Council of the Australian Insurance Employees Union sought to utilise its rule-amending powers, by way of a postal ballot of Federal Council members, to abolish certain ex-officio positions on the Council. The applicants asserted that this rule-amending power was both unreasonable and contrary to law.[105] Bowen CJ,[106] Smithers J,[107] Evatt and Northrop JJ,[108] all held this amending power to be valid. Not unexpectedly, Sheppard J dissented.[109]

In my view, the arguments were finely balanced. For the majority, it was important to allow democratically elected trade union bodies to choose their own rules and the manner in which they should be amended. In the case before them, the rules enabled membership plebiscites to overturn Federal Council decisions, and thus a brake could be placed upon the Council. On the other hand, unfettered rule-amending powers can be seen as anti-democratic devices which can be used to give a small oligarchy enormous power. In my view, the majority were swayed in the final analysis by the fact that many rule changes are procedural, and the necessity of obtaining rank-and-file approval of every alteration would be both tedious and time consuming. If limitations are to be placed upon certain rule amendments, then this is a matter which is

99 See, eg, *Lancaster v Municipal Officers' Assoc Aust* (1981) 54 FLR 129; and *Lawley v Transport Workers Union Aust* (1987) 22 IR 117.
100 (1982) 62 FLR 34.
101 Id at 106-09.
102 Id at 74-75.
103 Id at 50-54. At first instance, Evatt J agreed with Smithers J, (1981) 52 FLR 1 at 14-21.
104 (1983) 74 FLR 146.
105 The Federal Court also has power to invalidate rules which are contrary to law under what is now s96(a) of the *Industrial Relations Act* 1988 (Cth).
106 See above n104 at 151-57.
107 Id at 161-65.
108 Id at 181-86.
109 Id at 193-200.

best left in the hands of the Parliament. Since *Wright's Case*, however, the Federal Court has continued to give trade union councils wide latitude as to their rule amending powers.[110]

The manner in which trade unions use their resources in their own elections, has also come under the scrutiny of the Court. Federal and State parliamentary elections in this country are contested, in the main, by well organised political parties. These elections cost large amounts of money which these parties seek to obtain through contributions from both members and outside bodies. The funding of election campaigns, and the use of political advertising, are at the forefront of today's political debates.[111] In a series of decisions, the Federal Court has sought to place limits on the use of trade union resources by incumbent officials. The Court has endeavoured to establish a level playing field on which those in power and opposing factional groupings can seek to win the hearts and minds of the rank-and-file membership.

In trade union elections, however, there are no established parties backed by well oiled political machines. Rather, in such elections there are, on the one side, the incumbent trade union officials, and on the other, one or more factions or groupings who are seeking to win the major trade union official positions. In such election campaigns, those in power are usually in an advantageous position. Their names and faces are occasionally in the media, and much is written about their activities in the trade union journal which is often distributed to the membership. Especially where an election is fought vigorously, there may be a temptation on the part of these officials to use the resources of the union, which are in their control, in an endeavour to secure their re-election.[112]

Under the former *Conciliation and Arbitration Act*[113] and now under the *Industrial Relations Act*,[114] the Federal Court has power to make mandatory orders in relation to the registered rules of trade unions. Where the Court finds that trade union officials are failing to comply with their rules it can order them to "perform and observe" the rules of their union. One of the questions which came before the Court in the 1984 decision in *Scott v Jess*[115] was whether the judges could use this power to prevent the misuse of trade union resources in relation to election campaigns. The case related to elections being conducted in what was then the Amalgamated Metals Foundry

110 See, eg, *Campbell v Crawford* (1985) 12 FCR 317.

111 See, eg, the *Political Broadcasts and Political Disclosures Act* 1991 (Cth). A constitutional challenge to this statute was mounted and on 27 August 1992 the High Court announced that this statue was unconstitutional. The High Court will release its reasons for so holding at a later date.

112 Under the *Industrial Relations Act* 1988 (Cth) the Federal Court does have power to inquire into election irregularities. See ss218-26 and s4(1) definition of "irregularity". It is clear that an election irregularity covers ballot rigging and like offences. In two recent cases, however, the High Court has held that the dissemination of misinformation is not an election irregularity. See *R v Gray; Ex parte Marsh* (1985) 157 CLR 351; and *Re Collins; Ex parte Hocking* (1989) 167 CLR 502.

113 *Conciliation and Arbitration Act* 1904 (Cth) s141(1G).

114 *Industrial Relations Act* 1988 (Cth) s209(9).

115 (1984) 3 FCR 263.

and Shipwrights' Union.[116] In *Scott v Jess*[117] a full bench held that the Court did possess such a power and they developed a series of principles relating to union resources[118] which have been refined in later decisions.[119] I shall call these principles the fair elections principle and the bona fide principle.

During an election campaign, the fair elections principle, prevents trade union officials from utilising the resources of their union to publish material to either support one group of candidates, or to defeat an opposing group of candidates.[120] This principle is an objective one in the sense that once the election is in progress, then if the disseminated material amounts to this type of electioneering, it is forbidden whatever be the motives of its publishers.

Under the bona fides principle, trade union officials are under an obligation to use the resources of the union in a proper manner, that is in the interests of the trade union.[121] Like all bona fides issues, this principle is subjective in nature. The officials are free to use union resources to communicate with their membership on matters of interest to the union. They are not free, however, to use its funds to further their own ends, such as securing their re-election.

Where trade union officials breach the fair elections principle, a wronged candidate will be able to apply to the Court for an order requiring the officials to perform and observe their rules by treating any expenditure resolution as null and void. In most instances, however, it will not be possible to obtain such an order until the election has been completed. The breach of the principle will only become apparent during the campaign, and it will take some time to bring the proceedings before the Court. The question then arises as to what disincentives can be placed on officials who breach this principle. The easiest deterent is to require the officials to repay to the union, the costs of publishing and distributing this electioneering literature.

Such a repayment order was sought in *Darroch and Ors v Tanner*.[122] In that case, the Court held that the Executive of the Victorian Branch of the Federated Clerks Union of Australia had breached the fair elections principle. The executive had authorised the printing and distribution of a pamphlet to the members of the Central and Southern Queensland Branch of the Union. This publication clearly supported one group of candidates whilst an election was being conducted in that Branch. However, the full bench held that the Court lacked the authority to make this type of repayment order. In the view of these judges, the power to order the performance and observance of rules

116 It is now called the Metals and Engineering Workers Union.

117 See above n115.

118 Id at 269-72 per Evatt and Northrop JJ, and 286-89 per Gray J.

119 *Tanner v Maynes* (1985) 7 FCR 432, 440-44 per Evatt and Northrop JJ; and *Darroch v Tanner* (1987) 16 FCR 368, 371-72 per Northrop, Keely and Ryan JJ.

120 In formulating this principle, the judges relied upon a much earlier decision of the Commonwealth Court of Conciliation and Arbitration, namely *Short v Wellings* (1956) 84 CAR 72.

121 Here the judges relied upon *Allan v Townsend* see above n79 at 483-89 per Evatt and Northrop JJ and the cases cited therein.

122 See above n119.

did not empower the Court ". . . to give directions designed to overcome the affect of a past breach of a rule, unless there is, on a proper construction of the rules, a continuing obligation to observe the rules . . ."[123]

In my view, the judgment of Gray J at first instance in this matter is to be preferred.[124] He gave a more liberal interpretation to the relevant statutory provision and to the case law.[125] He made the point that the Court's power to order the performance and observance of rules extends to the making of appropriate orders. Where there has been misuse of union funds, then the most appropriate order is to require the wrong-doers to reimburse the union for this impermissible expenditure. In my view, the approach of Gray J should be adopted by the Court in future cases. It has not been beyond the ingenuity of some judges to order directors to repay unauthorised election expenditures in the company law field.[126] Similarly, in the industrial arena, the Court should make such reimbursement orders in appropriate cases. Unless it is prepared to do so, or unless the *Industrial Relations Act* is amended to enable the making of such orders, the fair elections principle may become an empty shell. If officials know that they cannot be required to repay misspent moneys, then in close campaigns, they will be tempted to engage in electioneering contrary to this principle.

4. *Award Clauses as Implied Contractual Terms*

Under both the *Conciliation and Arbitration Act* 1904 (Cth)[127] and the *Industrial Relations Act* 1988 (Cth),[128] the Federal Court has power to impose penalties upon those persons or bodies who breach federal awards. In 1979, the Court made it clear that these proceedings were not criminal in nature, but they were civil proceedings for the imposition of civil penalties.[129] This holding has proven to be of enormous significance, for it has enabled the use of the Court's accrued jurisdiction to join common law breach of contract claims with these civil award enforcement proceedings. This coupling of claims has lead to a remarkable breakthrough in federal labour law. It has at last given employees meaningful remedies for what are, in effect, employer breaches of award clauses.[130]

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123 Id at 374 per Northrop, Keely and Ryan JJ. In so holding, they relied upon a series of decisions, the primary one being *R v Cth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 156-57 per Latham CJ and at 163 per Dixon J. It is suggested that they construed these passages in *Barrett's Case* in a rather restrictive manner.

124 *Tanner v Darroch* (1986) see above n119.

125 Id at 1250-253.

126 See, eg, *Advanced Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 468.

127 Section 119.

128 Section 178.

129 *Gapes v Commercial Bank of Australia Ltd* (1979) 38 FLR 431. For comment upon this process, see Freiberg, A and McCallum, R C, "The Enforcement of Federal Awards: Civil or Criminal Penalties?" (1979) 7 *ABLR* 246.

130 In most cases where employees have not received award wage rates, it is usual for them to seek redress by relying solely on the award. It is not necessary to mount a concurrent claim in contract to recover such under payments. Proceedings are usually brought pursuant to ss178 and 179 of the *Industrial Relations Act* 1988 (Cth).

This breakthrough occurred in the 1988 full bench decision in *Gregory v Philip Morris Ltd.*[131] Mr Gregory was an electrician who was employed by Philip Morris Ltd at its Melbourne plant.[132] The terms and conditions of his employment were governed by both a federal award[133]and a contract of employment. Under a common law collective agreement between the Electrical Trades Union of Australia ("ETU") and Philip Morris Ltd, it was agreed that the company would only employ electricians who were members of the ETU. Gregory, who had been a shop steward in the ETU, quarrelled with his fellow unionists and was purportedly expelled from the ETU. Thereupon, Philip Morris dismissed Gregory with five weeks pay in lieu of notice and other award entitlements on the grounds that he was no longer a member of the ETU. After this dismissal, Gregory's purported expulsion from the ETU was retracted. Gregory commenced proceedings in the Federal Court. First, as a member of the ETU and thus a party to the award,[134] he asserted that the employer had breached the award and sought the imposition of a penalty on his employer. The award contained an unfair dismissal clause[135] which prohibited the employer from making a "harsh, unjust or unreasonable" termination of employment. This clause was inserted into the award after Gregory had commenced his employment with Philip Morris. Second, using the Court's accrued jurisdiction, he sought a declaration that the employer's unilateral act had not put an end to the contract, and accordingly that he was still employed by Philip Morris.[136] In the alternative, he sought damages for the employer's breach of his contract of employment.

The three judges on the full bench were Jenkinson, Wilcox and Ryan JJ. They held that in all the circumstances, Gregory's dismissal was "harsh, unjust or unreasonable", and thus contrary to the unfair dismissal clause in the award. A $400 penalty was imposed on Philip Morris for breaching the award.[137] While the Court did not grant a declaration that Gregory's contract of employment was still in existence, they did award him $30,000 damages[138] for breach of contract.

Gregory's action in damages differed from the typical wrongful dismissal suit. In most wrongful dismissal situations, the employer will have the unfettered power to bring the contract to an end. This can be done either through the giving of a period of notice, or by paying wages in lieu of this

131 (1988) 80 ALR 455.

132 For a comprehensive statement of the facts see the thoughtful judgment of Gray J at first instance (1987) 77 ALR 79.

133 The Metal Industry Award 1984.

134 *Conciliation and Arbitration Act* 1904 (Cth) ss61 and 119; and see now *Industrial Relations Act* 1988 (Cth) ss149 and 178.

135 Metal Industry Award 1984 Cl 6(d)(vi).

136 His counsel relied upon *Turner v Australasian Coal and Shale Employees Federation* (1984) 6 FCR 177 at 189-93, where a full bench of the Court had held that without more, a unilateral breach of contract is incapable of putting an end to the contract. See also *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 265-66 per Gray J.

137 Wilcox and Ryan JJ imposed the $400 penalty, whereas Jenkinson J would have been content to penalise the employer only $100.

138 While Wilcox and Ryan JJ held the measure of damages to be $30,000, Jenkinson J took the view that $15,000 was the appropriate sum.

period of notice. In such situations, if the employer has wrongfully dismissed the employee without notice or pay in lieu thereof, the courts have regarded the employee's complaint as amounting to no more than the failure of the employer to pay salary in lieu of giving notice. Thus the measure of the employee's damages will be restricted to an amount equivalent to the salary the employer would have been required to pay as wages in lieu of notice. In such actions, the issues will often relate to what is the period of notice under the contract, and whether the employee has sought to mitigate her or his damages.[139] The unfair dismissal clause in Gregory's contract of employment meant that the employer no longer possessed an unfettered power to give notice or pay in lieu thereof, in a manner which was harsh, unjust or unreasonable. As the Court had held the dismissal to be unfair, Gregory's damages were not limited to a relevant period of notice. He was able to claim damages for the loss of this position, subject to discounting for present and future alternative employment and for the occurrence of future events, like promotion in his present employment and early retirement.[140]

In *Gregory's Case*, however, the significant issue was how could a contractual action in damages be founded upon an unfair dismissal award clause. In a joint judgment, Wilcox and Ryan JJ took one approach to this problem, while Jenkinson J travelled along a separate path of reasoning.

Wilcox and Ryan JJ held that the unfair dismissal clause in the award had become an implied term of Gregory's employment contract. As the dismissal had been unfair, it amounted to a breach of the implied contractual term for which damages could be awarded. To hold that an award clause is at one and the same time an implied contractual term, is a novel assertion. The major argument of the judges, was that the clause became an implied term by virtue of settled contract law. In their view, had Gregory and his employer been asked at the time of engagement whether the award, as varied from time to time, was intended to govern the terms of their contract, they would have given their assent.[141] They relied upon the *BP (Westernport) Case*[142] to bolster this view. First, this implied term was reasonable and equitable. Second, the relevant award clauses gave the contract content. Lastly, the term was obvious, capable of clear expression, and did not contradict any express term of the contract. In the alternative, they also relied on some old High Court authorities[143] to conclude that the relevant award clause bestowed contractual rights on the employee. It thus became an implied term of the contract, irrespective of the intention of the parties.[144]

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139 See, eg, *Dyer v Peverill* (1979) 2 NTR 1.

140 See the useful comments by Gray J in *Wheeler v Philip Morris Ltd* (1989) 97 ALR 282 at 312-13.

141 See above n131 at 479.

142 *BP (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26.

143 *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66; *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 431 per Dixon J; and *R v Gough; Ex parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237 at 246 per Windeyer J.

144 See above n131 at 478.

Jenkinson J took a different tack. In his view, the unfair dismissal award clause had not become an implied term in the employment contract. If a mythical conversation had taken place between employer and employee, he concluded it could not be said that they would have agreed unhesitatingly to the insertion of such an implied term.[145] Nevertheless, Jenkinson J held that Gregory could obtain damages from his employer. When read together, the statute[146] and the award gave him the capacity to found an action in damages flowing from the breach of the award.[147] In my view, this right of action appears to be somewhat akin to an action in damages flowing from the breach of a statutory duty.[148] This approach, however, has not been adopted expressly in the subsequent case law.

The law on implied terms appears to be in a state of flux. It is surrounded by fictional conversations between the contracting parties, and also by notions of what will and what will not give business efficacy to a contract. It has given judges great latitude to re-fashion contracts.[149] The comments of Wilcox and Ryan JJ were rather brief, and no judge in the subsequent case law has analysed their holding in any detail.[150] While their approach is a novel one in the industrial field,[151] until it is reversed by a higher tribunal, it remains the law.

Their approach was followed by Gray J in *Wheeler v Philip Morris Ltd*,[152] where the Judge awarded another dismissed electrician more than $38,000 damages. In *Gorgevski v Bostik (Australia) Pty Ltd*,[153] Keely J held that a 53 year old unskilled employee, who had been unfairly dismissed, should be awarded $195,000 damages. In the present harsh economic climate, his chances of re-employment were slim.[154] Richard Naughton and Andrew Stewart have aptly named this remedy, "The New Law of Wrongful Dismissal".[155] It has bestowed at long last, on employees whose terms and

145 Id at 459.

146 *Conciliation and Arbitration Act* 1904 (Cth) s123. See now *Industrial Relations Act* 1988 (Cth) ss179, 179A and 179B.

147 See above n131 at 459-61.

148 Jenkinson J relied upon *Mallinson v Scottish Australian Investment Co Ltd. See above n143; and also upon Groves v Lord Winborne* [1898] 2 QB 402.

149 For comment, see Greig, D W and Davis, J L R, *The Law of Contract* (1987) at 517-38; together with its 1991 supplement, at 111-18; and Carter, J W, *Breach of Contract* (2nd edn, 1991) at 27-33. See also *Castlemaine Tooheys Ltd v Carlton and United Breweries Ltd* (1987) 10 NSW LR 468 at 486-90 per Hope JA.

150 The most detailed analysis of the Wilcox and Ryan JJ position which has been given to date was by Brooking J in the Supreme Court of Victoria. See, *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637 at 679-80; and see also *Nunn v Chubb Australia* [1986] Tas R 183.

151 For comment see Mitchell, R J and Naughton, R B, "Collective Agreements, Industrial Awards and the Contract of Employment" (1989) 2 *AJLL* 252 at 267-73.

152 See above n140 at 309.

153 (1991) 39 IR 229. A Full Federal Court has upheld the quantum of damages in this matter. *Bostik (Aust) Pty Ltd v Gorgevski Federal Court Aust*, unreported, Sheppard Gray and Heerey JJ, 14 May 1992, noted in (1992) 34 *AILR* para 186.

154 The *Gregory Case* was distinguished by Morling J in *Roach v Hydro Electric Commission* (1991) 37 IR 315.

155 Naughton, R B and Stewart, A, " Breach of Contract Through Unfair Termination: The New Law of Wrongful Dismissal" (1988) 1 *AJLL* 247; and see also, McCallum, R C and

conditions of employment are governed by federal awards, a high level of protection against unfair dismissal. The substantial damage pay outs under this approach, have given unfairly dismissed workers greater and more appropriate compensation than is usually awarded to them by statutory industrial tribunals.[156]

A further illustration of how the judges have used the notion of implied terms in employment contracts is *Lane v Arrowcrest Group Pty Ltd.*[157] In that case, Von Doussa J held that one of the applicants could found an action for breach of contract on an unfair dismissal clause which had become an implied term of his contract of employment.[158] In the case before him, however, the dismissal of the applicant — Mr Argirov — had not been harsh, unjust or unreasonable. Although the employee had been summarily dismissed which was contrary to the notice provision in the award,[159] subsequently the employer discovered that Argirov had lied about his previous employment history. When seeking engagement as a spray painter, Argirov had untruthfully stated that his prior employment had been of a continuous nature with two reputable firms. He had also fabricated a reference letter from one of these employers. The truth was that he had an unstable work history. In the view of Von Doussa J, these facts which had come to light after the dismissal, were sufficient to justify the termination.[160] Whether or not a dismissal is unfair, will depend upon all the evidence before the Court, and on the demeanour of the employee and of the employer or its representative. From this academic vantage point, however, Von Doussa J has given a rather narrow reading to a harsh, unjust or unreasonable termination clause. His view appears to go against previous authorities.[161] The subsequent uncovering of facts about an employee, such as theft from the employer, may make otherwise unfair dismissals justifiable. In my view, the telling of untruths about prior employment history, in order to obtain a manual job, should not turn an award breach into a valid summary dismissal.[162]

Trade unionists are parties to the federal awards which govern their terms and conditions of employment.[163] It is clear that employees who are not trade union members are not parties to such awards, even though these instruments govern their employment.[164] Although such a non-member is not a party to

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Pittard, M J, "Industrial Law", in Baxt, R and Kewley, G, (eds) *An Annual Survey of Law 1988* (1989) 126 at 139-42.

156 See, McCallum, Pittard and Smith, op cit at 152.

157 (1990) 27 FCR 427.

158 Id at 76.

159 Vehicle Industry Award 1982 Cl 6(c)(i). Von Doussa J also held that the employer had breached Cl 6(e)(i) by treating the applicant as a casual employee, when in fact he was a fulltime employee.

160 Above n157 at 73-76.

161 *Gregory v Philip Morris Ltd* see n131 at 471 per Wilcox and Ryan JJ; and *Wheeler v Philip Morris Ltd* n140 at 308 per Gray J.

162 Even if this dismissal is regarded as fair in substance, it was surely unfair in a procedural sense. See generally, Johnstone, R, Mitchell, R and Riekert, J, "Procedural Fairness in Dismissal Cases: What Should be the Approach in Victoria?" (1991) 4 *AJLL* 99; and see also *Polkey v A E Dayton Services Ltd* [1988] AC 344.

163 *Industrial Relations Act* 1988 (Cth) s149(f).

164 *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR

an award, could its unfair dismissal clause become an implied term of her or his employment contract? In *Lane v Arrowcrest*,[165] Von Doussa J answered this question in the affirmative. Although he did not give detailed reasons on this point,[166] Von Doussa J held that Koehn, who was one of the applicants, was not a member of the union. As the legislation then stood, Koehn lacked the capacity to bring an action for the imposition of a penalty for breach of the award.[167] Nevertheless, Von Doussa J held that the unfair dismissal award clause had become an implied term of his contract.[168] In my view, the approach of Von Doussa J in relation to the employment contracts of non-menbers is a sound one. The employers of non-unionists are parties to the awards which govern the employment relationships of non-members. In these days of declining trade union membership, it would make little sense to disenfranchise non-unionists from being able to avail themselves of this new remedial approach. Since this decision by Von Doussa J, amending legislation which came into force in January 1991,[169] has given non-members the capacity to bring actions for the imposition of penalties for breaches of awards which govern their employment.[170] The capacity which non-members now have to bring award breach proceedings, adds weight to his finding on this matter.

The *Gregory v Philip Morris*[171] line of cases is certainly the most remarkable piece of judicial labour law which has yet been crafted by the Federal Court. If it receives the imprimatur of the High Court, then in the coming years, the Federal Court is likely to hand down a crop of decisions embellishing this novel approach in the fashioning of remedies.

5. *Section 45D and Trade Union Industrial Action*

On 1 July 1977, when the Federal Court was just five months old, s45D of the *Trade Practices Act* 1974 made its way onto the statute book.[172] This provision outlaws certain forms of trade union industrial action, as well as various anti-competitive commercial boycotts. Over the years, a steady stream of case law on this section has found its way into the law reports. As a number of scholars have catalogued and classified this jurisprudence,[173] it

387; and *R v Graziers Association of New South Wales; Ex parte Australian Workers Union* (1956) 96 CLR 317.

165 See above n157.

166 Id at 76.

167 Id at 66.

168 Id at 76.

169 *Industrial Legislation (Amendment) Act* (No 2) 1990 (Cth).

170 See now *Industrial Relations Act* 1988 (Cth) s178(5)(ca).

171 See above n131.

172 *Trade Practices (Amendment) Act* 1977 (Cth).

173 See Creighton, W B, "Secondary Boycotts Under Attack — The Australian Experience" (1981) 44 *Mod LR* 489; Hall, D R, "Section 45D: Secondary Boycotts in So Many Words" (1984) 10 *SydLR* 277; Pittard, M J, "Trade Practices Law and the Mudginberri Dispute" (1988) 1 *AJLL* 23; Sykes, E I, *Strike Law in Australia* (2nd edn, 1982) at 248-63; Creighton, W B, Ford, W J and Mitchell, R J, *Labour Law: Materials and Commentary* (1983) at 792-805; Miller, R V, *Annotated Trade Practices Act* (11th edn, 1990) at 81-92; Macken, J, McCarry, G J and Sappideen, C, *The Law of Employment* (3rd edn, 1990) at

would serve no useful purpose to repeat this exercise. Rather, I wish to examine the two contending approaches to the interpretation of this provision, each of which is still competing for supremacy.

I shall call the first method of interpretation the "literal approach", but such a methodology does not necessarily mean that a provision is read broadly. The literal approach is word-centred, in the sense that it focuses upon the meaning of individual words or groups of words. Each word may be given a broad or narrow meaning, depending upon the predelictions of the interpreter.[174] In relation to s45D, judges who use this approach focus upon the key words of the provision, namely, "conduct", "in concert", "hinders or prevents", "purpose", "affect" and "dominant purpose".

The second method, which I shall refer to as the "purposive approach", seeks to have regard to the purposes and objects of the section, in order to make it operate in a manner which is consonant with the present webb of commercial and industrial laws. When analysing these methods of interpretation, I shall spend most of the time upon decisions of the 1990s, for they point towards the probable course which will be taken by the Federal Court in this decade.

Before continuing with this discussion, however, it is essential to say a few words about the text of this section. In my view, the major reason for the enactment of s45D, was to give a statutory remedy to persons and bodies who were the targets of trade union secondary action.[175] This type of trade union activity is known in common parlance as a secondary boycott.[176] For example, where employees of an oil company refuse to deliver fuel to a customer because that customer will not grant its work force a wage rise, the employees will be engaging in secondary action. They will be using their capacity to withhold fuel supplies, in order to place pressure on the customer who is the target of their secondary action.[177] Many industrial disputes are not so clear cut; and it is easy to posit examples which straddle the line between primary and secondary action. Section 45D is drafted so broadly that it is possible to interpret it as being applicable not only to trade union secondary action, but also to much primary activity as well. The section is not expressly confined to trade unions, and its proscriptions also apply to the behaviour of corporations when they engage in commercial warfare.

423-34; McCallum, Pittard and Smith, op cit at 503-651 and 665-71; and Creighton and Stewart, op cit at 240-46.

174 For an incisive analysis of the manner in which lawyers interpret words, see Weeramantry, C G, *The Law in Crisis: Bridges of Understanding* (1975) at 131-77.

175 This was the view of the Swanson Committee whose report led to the passage of the 1977 amendments to the *Trade Practices Act* 1974 (Cth). See the *Report of the Trade Practices Act Review Committee*, Canberra, 1976) at 86. For general background to the enactment of s45D, see McCallum, Pittard and Smith, op cit at 593-97; and Sexton, M, "Trade Unions and Trade Practices" (1977) 5 *ABLR* 204.

176 I appreciate that the phrase "secondary boycott" is a rather inaccurate one. See, Sykes, op cit at 56-58.

177 These facts are taken from *Transport Workers Union of Australia (NSW Branch) v Leon Laidely Pty Ltd* (1980) 43 FLR 168.

Section 45D(1)[178] and s45D(1A),[179] are the two major provisions which proscribe certain types of behaviour. Under s45D(1), a first and a second person (who are usually employees and/or trade unions and their officials), are forbidden from engaging in conduct in concert, which hinders or prevents a third person from either supplying goods or services to, or acquiring goods or services from a fourth person, who I shall refer to as the "target". The first person cannot be an employee of the target; and the conduct will fall foul of this provision where it has the purpose or affect of either causing the target substantial damage, or of lessening competition in a market in which the target operates.[180] Section 45D(1A) prohibits a first and second person from engaging in conduct in concert, which has the purpose or affect of substantially hindering a third person target from engaging in interstate or overseas trade and commerce. In such circumstances, the first person must not be an employee of the third person target.[181]

Viewed in isolation, these two sub-sections are broad enough to prohibit most strike activities, whether they be of a primary or secondary nature. In order not to outlaw the right to strike altogether, the Parliament enacted s45D(3), which I shall refer to as an "exculpatory provision". It provides that employees and their trade union will not be taken to have breached s45D, where the dominant purpose for their conduct is substantially related to their remuneration or conditions of work, or where one of their number has been dismissed. The employees who engage in the conduct must all be employed by the same employer, and apart from their trade union and its officials, they must not act in concert with any other person.[182]

The first major decision to interpret s45D was the *Ascot Cartage Case*.[183] It was decided by Smithers J in 1978, and related to a dispute in the trucking industry. It was clear that the defendant union had engaged in secondary action in contravention of s45D(1). In granting interlocutory injunctive relief, Smithers J made it clear that he favoured a literal approach which focused upon the interpretation of words and of groups of words. He saw the primary purpose of this section as one of fostering competition, and of giving protection to individual traders from oppressive action.[184] In the following year, Smithers J stated his views with greater clarity in *Wribass Pty Ltd v*

178 When enacting this sub-section, the Australian Government relied upon its power to make laws with respect to corporations in s51(20) of the Australian Constitution. This provision was constitutionally upheld in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.

179 In enacting this sub-section, the Australian Parliament relied upon its power to make laws relating to interstate and overseas trade and commerce in s51(1) of the Australian Constitution. This provision was constitutionally upheld in *Seamens Union of Australia v Utah Development Co* (1978) 144 CLR 120.

180 In the text, I have summarised s45D(1)(b) of the *Trade Practices Act* 1974 (Cth) which operates only in respect of targets that are corporations. I have left out of account s45D(1)(a) which relates to non-corporate targets, because the vast bulk of targets are incorporated bodies.

181 See also *Trade Practices Act* 1974 (Cth) ss45D(1B) and 45D(1C).

182 Id s45D(4).

183 *Ascot Cartage Contractors Pty Ltd v Transport Workers Union of Australia* (1978) 32 FLR 148.

184 Id at 152.

Swallow and Australasian Meat Industry Employees Union.[185] The defendant union, whose members were employed by a wholesale meat supplier which also had a retail outlet, placed a ban on the plaintiff supermarket because it sold packaged meat on Saturday mornings. The union argued that its dominant purpose was within the confines of the exculpatory provision, because the conduct was engaged in to preserve the conditions of work at the retail outlet which did not open on Saturdays. The Judge held that the exculpatory provision was not applicable in the circumstances before him. In the opinion of Smithers J, the word "purpose" should be given the same limited meaning in both s45D(1) and in the exculpatory provision. In his view, " . . . the concept of the purpose for which the actual conduct was engaged in, does not extend beyond the achievement of the goal which that conduct was capable of achieving."[186] He held that the ban on the supermarket could only have been engaged in for the proximate purpose of achieving the goal of making it give up Saturday morning trading in packaged meat. If the dominant purpose was to protect their work free Saturdays, it was an ultimate purpose which was beyond the scope of the section.

As was pointed out by Gray J in the 1984 decision of *Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 1)*,[187] if the view of Smithers J was accepted, it would make the exculpatory provision nugatory in most instances. Gray J disagreed with the literal approach and adopted a purposive view of the section. He said that if the word "purpose" is always given the same meaning of "proximate purpose" in sections 45D(1), 45D(1A) and in the exculpatory provision, that is s45D(3), the exculpatory provision cannot operate.[188] In his view, "[t]he Parliament did not intend to create a provision which could be relied upon to support anti-strike injunctions."[189] Where the dominant purpose of employees is to protect their own working conditions, the exculpatory provision will exempt them from liability, even though one of the purposes of their conduct, for example, may be to cause damage to a target under s45D(1).[190] When this matter went on appeal, the full bench reversed Gray J, holding that interlocutory relief should be granted. Given that this was an appeal in interlocutory proceedings, the full bench refrained from expressing any opinion on this controversy between Smithers J and Gray J.[191] This reticence by the full bench meant that in interlocutory proceedings, the view of Smithers J prevailed. For when seeking an interlocutory injunction, the applicant must only show that there is a serious question to be tried, that injury will be suffered, and that the balance of convenience favours this form of relief.[192] In the mid-1980s, however, the literal interpretation of s45D was in the ascendancy.[193]

185 (1979) 38 FLR 92.
186 Id at 103.
187 (1984) 54 ALR 713.
188 Id at 726.
189 Ibid.
190 Ibid.
191 *Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 2)* see above n187 at 63.
192 See *Castlemaine Tooheys Ltd v State of South Australia* (1986) 161 CLR 148, per Mason ACJ.
193 See, eg, *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1985) 9 FCR 425 at 430-35 per Keely and Pincus JJ.

It was not until the 1990 decision in *GTS Freight Management Services Pty Ltd v Transport Workers Union*,[194] that the exculpatory provision was held to be applicable to conduct which was otherwise prohibited under s45D. The applicant was a trucking company whose major contractor was Lindemans Pty Ltd which is a well-known producer of fine wines. The applicant had contracted to be the sole carrier to deliver Lindemans products to various parts of Australia. A group of the applicant's employee drivers went on strike and established a picket line, in an endeavour to secure award terms and conditions of employment. At that time, the applicant was not bound by any federal or state transport award. The applicant then brought proceedings asserting that this picket line amounted to conduct which hindered it obtaining supplies of goods from Lindemans. The matter came before Von Doussa J, who upon the affidavit evidence then before him, granted an interlocutory injunction.

When the picket line continued to function, the applicant brought further proceedings. It sought orders from Von Doussa J that several respondent picketers were guilty of contempt. He held that the applicants were unable to prove the commission of contempts, for the respondent picketers were able to show, on a balance of probabilities, that their conduct came within the exculpatory provision. The drivers were seeking award conditions and were engaging in a primary strike. Accordingly, Von Doussa J found that the actions motivating the picketers substantially related to their conditions of work. The Applicant had argued that by going on strike, the drivers had lost their status as employees and so could not bring themselves within the exculpatory provision. Von Doussa J had no difficulty in holding that for the purposes of this measure they were employees, else this exculpatory provision could never operate when employees strike in relation to their own conditions of employment.[195] He rejected the "proximate purpose" reasoning of Smithers J in the *Wribass* decision,[196] and adopted the purposive approach of Gray J in *Epitoma*.[197] Von Doussa J said that in his opinion, " . . . the dominant purpose is not necessarily to be treated as the immediate purpose which the relevant conduct is intended to achieve by those engaging in it".[198] In differentiating between the immediate and dominant purposes, Von Doussa J was favouring a purposive interpretation of the section. His view

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194 (1990) 95 ALR 195. For earlier proceedings before Keely J see *GTS Freight Management Services Pty Ltd v Transport Workers Union* (1990) 25 FCR 296. For comment, see Naughton, R B, "Trade Union Liability for Acts of Members — Implications for Section 45D" (1991) 4 *AJLL* 151.

195 See above n194 at 208. Van Doussa J relied upon some remarks of Gray J in *Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 1)* see above n187 at 727; and distinguished some rather loose dicta by Keely and Pincus JJ in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* see above n193 at 434. For comment, see Pittard, op cit at 45-46.

196 *Wribass Pty Ltd v Swallow and Australasian Meat Industry Employees Union* see above n187 at 103.

197 *Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 1)* see above n187 at 726.

198 See above n187 at 210.

balanced the prohibitions of certain conduct under sections 45D(1) and 45D(1A) on the one hand, as against the need to give some latitude to the operation of the exculpatory provision on the other hand.

The exculpatory provision was again found to be applicable in the November 1991 full bench decision of *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia.*[199] At first instance,[200] the applicant the Meat and Allied Trades Federation of Australia ("MATFA"), sought and obtained a permanent injunction, prohibiting the defendant the Australasian Meat Industry Employees Union ("AMIEU") from breaching s45D. At the trial, MATFA had asserted that the AMIEU had orchestrated a series of stoppages at various meat processing works (known as "sheds") which were owned and operated by its members. The AMIEU was engaged in a campaign to pressure MATFA's employer members to implement the Prices and Incomes Accord Mark VI. To this end, votes were taken at each of the sheds, and only where a majority voted in favour of strike action, did stoppages in work occur.

The major argument for MATFA was that the AMIEU and all of its members who stopped work, had breached s45D(1A).[201] In the view of MATFA, they had engaged in conduct in concert which had the purpose or effect of preventing or substantially hindering the shed owners from engaging in overseas trade and commerce. It will be remembered that under the exculpatory provision, the employees who engage in the conduct must not do so in concert with any other persons. It was argued by MAFTA that the exculpatory provision did not apply, because this campaign should be viewed as one by the AMIEU membership in all the sheds. Thus although the employees in an individual shed might have the dominant purpose of securing better working conditions for themselves, this was a campaign which spread across shed boundaries. As the employees of each shed had acted in concert with employees of other sheds who were not employed by their employer, the exculpatory provision was not applicable.

When handing down the decision, Gray and Olney JJ delivered separate judgments, with French J expressly concurring with Olney J. The Judges allowed the appeal and lifted the injunction. Gray[202] and Olney JJ[203] held that the exculpatory provision was a good defence in this instance. The Judges decided that the dominant purpose for engaging in the conduct by the employees related to their conditions of work. They held further that the

199 (1992) 104 ALR 199. For comment, see Naughton, R, "Coming to Terms with Section 45D" (1992) 4 *AJLL* 171.

200 This matter had come before Jenkinson J and he handed down his reasons on 18 March 1991. For earlier proceedings before Jenkinson J, see *Meat and Allied Trades Federation of Australia v Australasian Meat Industry Employees Union* (1991) 37 IR 374.

201 A second argument was that the conduct in question had hindered or prevented customers from acquiring meat from the shed owners. When this matter came on appeal, this argument was no longer open, because of the High Court's holding in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32. This decision is discussed below.

202 See above n198 at 208-12. This judgment should be read in its entirety, for the Judge takes a broad and purposive view of the section as a whole.

203 Id at 221-22.

matter should best be viewed as a series of disputes in each of the sheds. There was no evidence that the voting in any shed was affected by the actions of the employees in any other shed. Olney J stated that there may have been an expectation that most of the employees " . . . would adopt a course of action favoured by their union, but this is merely one of the facts of industrial life in this country . . . "[204] This decision is significant, for at long last, a full bench has allowed the exculpatory provision to operate in a situation which was clearly a primary strike by employees against their own employers.

The 1991 decision of *Devenish v Jewel Food Stores Pty Ltd*,[205] was the first occasion on which the High Court has had an opportunity to consider in any detail,[206] the scope of s45D.[207] This case did not involve employees and their trade unions; rather it was a dispute which arose out of a purely commercial situation. As the exculpatory provision is only applicable when employees and/or trade unions are defendants, it was irrelevant to this litigation.

The Respondent Jewel Food Stores Pty Ltd ("Jewel Foods") which is a supermarket chain operating in New South Wales, decided to import cheaper Victorian milk and to sell it to its New South Wales customers. The Appellants were the Amalgamated Milk Vendors Association of NSW Inc (the "Association") and a number of its members, who were wholesale suppliers of milk. They had retaliated against Jewel Foods by refusing to supply them with New South Wales milk. In other words, the Association and its members were engaging in a primary boycott against Jewel Foods. The response of Jewel Foods was to bring an action in the Federal Court, asserting that the Association and its members had contravened s45D(1). They argued that the Association and its members had engaged in conduct in concert which hindered or prevented the customers of Jewel Foods (the third persons) from acquiring milk from Jewel Foods (the fourth person target). They asserted further that this conduct was engaged in for the purpose of causing Jewel Foods substantial loss or damage.

At first instance, the matter came before Burchett J.[208] He pointed out that s45D(1) relates to conduct by a first and second person which hinders or prevents a third person from supplying goods to, or aquiring goods from, a fourth person target. It does not cover the situation where a first and second person, without more, refuse to supply goods to a fourth person target. In the words of Burchett J, to hold the Association liable, " . . . is to look beyond the direct affect of those actions upon supply to the stores, and to take account of an indirect or ultimate affect upon the availability of milk to the customers of

204 Id at 221.

205 See above n201.

206 The High Court had examined constitutional and procedural aspects of this provision in *Seamens Union of Australia v Utah Development Co* (1978) 144 CLR 120; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169; and *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) see above n193.

207 For comment upon this decision, see Davison, M and Duns, J, "When Will a Primary Boycott be a Secondary Boycott: The High Court's Riddle in *Devenish v Jewel Food Stores*" (1991) 19 *ABLR* 458.

208 *Jewel Food Stores Pty Ltd v Hall* (1989) 85 ALR 375.

the stores".[209] Jewel Foods successfully appealed to a full bench of the Court.[210] Sheppard and Wilcox JJ delivered a joint majority judgment. They opined that the section was not solely concerned with secondary boycotts, and that the failure of the Association and its members to supply milk had hindered the third person customers from acquiring milk from Jewel Foods.[211] In dissent, Spender J delivered a comprehensive judgment on s45D. He showed that it had been designed to cover secondary action. In his view, it should only proscribe primary activities that are related to such secondary action. He then agreed with Burchett J that it was not designed to prohibit a mere refusal to supply which is nothing more than a primary boycott.[212]

The Association had the last word, for it successfully appealed to the High Court. Toohey J agreed with the dissent of Spender J, and held that the Association and its members were not liable for their withdrawal of supplies of milk.[213] Brennan J agreed that s45D did not cover the situation of a mere failure to supply, but he did not hold that primary action was outside the scope of this provision.[214] Dawson J was content to concur with Brenna J.[215]

Mason CJ and Deane J delivered dissenting judgments. Mason CJ began by holding that the section did not really differentiate between primary and secondary activities.[216] He then held that this provision would cover indirect affects of the refusal to supply, that is the inability of the customers to acquire milk from Jewel Foods. He justified giving s45D its "literal meaning"[217] by saying:

> When a provision in a statute is intended to be protective and remedial, and to that end prescribes certain conduct, strong reasons are required to justify an interpretation of the provision which would narrow the scope of the provision and exclude conduct falling within its literal terms.[218]

When sitting on s45D cases in the Federal Court , Deane J had adhered to a literal and word-centred approach to this provision.[219] It was not surprising therefore that " . . . after some vacillation"[220] he came down on the side of the literalists. Although the literalists were in the minority on this occasion, only Toohey J expressly held that the section was primarily enacted to cover secondary boycotts. If future litigation holds corporations liable for various primary activities engaged in during commercial warfare, pressure may be placed on Parliament to amend this provision. It is surely timely to re-think this measure in both its industrial and commercial aspects.

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209 Id at 384.
210 *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc* (1989) 24 FCR 127.
211 Id at 132-36.
212 Id at 136-46.
213 *Devenish v Jewel Food Stores Pty Ltd* see above n201 at 56-58.
214 Id at 47.
215 Id at 53.
216 Id at 42.
217 Id at 45.
218 Ibid.
219 See, eg, his remarks in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331 at 344-51.
220 See above n201 at 51.

The major criticism which can be levelled at the Federal Court, is that not until the 1990s have a majority of the judges sought to come to grips with s45D. In my view, this provision requires a balance to be struck between the right of workers to take legitimate primary strike action, as against the needs of corporations to operate their enterprises free of secondary pressures. The Australian Parliament must also share some of the criticism, for the vague drafting of s45D has made it a difficult provision to interpret. If federal industrial relations travels further down the de-regulatory path and enterprise bargaining becomes the norm, then to ensure observance of enterprise agreements, the Parliament will be required to fashion new sanction mechanisms. It is hoped that it will learn some lessons from this s45D experience and draft any new measures in clear language.[221] The role of the Federal Court as enforcer of these agreements will be a delicate one indeed; and its work will be facilitated by well drafted provisions.

Throughout this discussion, I have not mentioned the Mudginberri litigation (other than in footnotes). Readers of the literature will be aware that this case law has been extensively analysed elsewhere.[222] More importantly, however, now that the dust from this conflict has settled, little of substance can be derived from these decisions on s45D which were handed down when the literalist star was at its zenith. These decisions did have a significant impact upon industrial relations at that time, for the use of the literalist interpretation meant that s45D was an effective sanction against much trade union industrial action.

It should be noted also that little use appears to have been made of the Federal Court's accrued jurisdiction in this type of litigation. Plaintiffs have been content to rely upon s45D without bringing concurrent claims utilising the common law industrial torts[223]. The only recently reported decision in which such joint claims were made is the 1991 full bench decision in the *Trouble Shooters Case*.[224] If the Federal Court continues to give some latitude to the exculpatory provision in s45D, plaintiffs may seek to skirt around this defence by bringing concurrent actions in tort where the common law defences are rather narrow. If this type of litigation occurs, it is to be hoped that the Federal Court does not follow the approach of Brooking J, who decided the *Air Pilot's Case*[225] when sitting in the Supreme Court of Victoria. He appears to have perceived his function as one of merely applying an area

221 For some thought provoking ideas on sanctions under federal law, see Creighton, B, "Enforcement in the Federal Industrial Relations System: An Australian Paradox" (1991) 4 *AJLL* 197.

222 Pittard, op cit; and on the Mudginberri dispute generally, see Kitay, J and Powe, R "Exploitation at $1,000 per Week: The Mudginberri Dispute" (1987) 29 *JIR* 365.

223 The industrial torts are the torts of interference with contractual relations, interference with trade, civil conspiracy and intimidation. For a detailed analysis of these tortious actions, see McCallum, Pittard and Smith, op cit at 497-92.

224 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 99 ALR 735. Concurrent claims were also brought under s45D for the commission of the tort of tresspass in *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation* (1988) 83 ALR 385.

225 *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637.

of the common law which is based almost exclusively on English precedents.[226] If the occasion arises, it should be possible for the Federal Court to mould the common law industrial torts, in order that they may have a role to play which is consonant with the commercial and industrial realities of an Australia in the late 20th century.

6. *A General Court or a Labour Court?*

For the first half century of Australian federal conciliation and arbitration, both its judicial and arbitral functions were carried out by a labour court,[227] namely, the Commonwealth Court of Conciliation and Arbitration. For the next 20 years, federal judicial power in the industrial relations field was bestowed upon the Industrial Court. In 1977, the Federal Court of Australia was given jurisdiction over conciliation and arbitration litigation. This alteration marked a dramatic shift in government policy. For the first time in our federal history, industrial relations judicial matters were taken from a specialist labour court and bestowed upon a generalist Federal Court.

In 1987, when the Federal Court was a decade old, the Hawke Labor Government attempted a switch in policy by seeking to create an Australian Labour Court. Under the Industrial Relations Bill 1987 (Cth), an Australian Labour Court was to be established,[228] and was to be given jurisdiction over federal industrial relations,[229] including industrial cases brought under s45D of the *Trade Practices Act*.[230] The judges of this Court were required to possess the normal qualifications for judicial office. However, the Bill went further by providing that they were also required to possess "skills and experience in the field of industrial relations" which in the opinion of the Governor-General made them suitable persons to be appointed as judges.[231] These proposed qualifications also represented a departure from established policy. Neither appointees to the Commonwealth Court of Conciliation and Arbitration, nor to the Industrial Court were required to have qualifications, other than to be suitable judges. The selection of such appointments from the pool of qualified persons was left to the good sense of the government of the day. Judges of the Australian Labour Court were also able to hold joint appointments as presidential members of the Industrial Relations Commission,[232] and could be appointed concurrently as Federal Court judges.[233]

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226 Id at 640.

227 I appreciate that there was a gap in the exercise of the judicial powers of this Court from 1918 to 1926. In 1918, the High Court decided *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 in which it held that as High Court judges were only appointed to the Arbitration Court for seven year terms, they did not have life tenure as judges of this Court, and that this contravened s72 of the Australian Constitution as it then stood. Under the *Commonwealth Conciliation and Arbitration (Amendment) Act* 1926 (Cth), Arbitration Court judges were given life tenure.

228 Industrial Relations Bill 1987 (Cth) cl 47.

229 Id cl 62-75.

230 Id cl 90.

231 Id cl 49(b).

232 Id cl 51.

233 Id cl 52.

When introducing the Bill, Mr Ralph Willis, the Minister for Industrial Relations, argued that the establishment of this Court would enable further integration between the judicial and arbitral aspects of federal conciliation and arbitration.[234] He also added that the special skills required of these judicial appointees " . . . recognises the unique requirements of the industrial relations system, and will promote consistency and understanding in the application, interpretation and enforcement of the law . . . "[235] After opposition by some employers to various aspects of this Bill, it was hurriedly shelved in order to clear the decks for the forthcoming federal election.[236]

In my view, had such a labour court been established, it would have been a retrograde step in the history of federal industrial relations. The two reasons given for proposing the creation of the Labour Court by Ralph Willis are unconvincing. First, the holding of concurrent appointments as presidential members of the Industrial Relations Commission and as judges of the Australian Labour Court, would not bring about an increased integration of these functions. This is because the power to conciliate and arbitrate is separate and distinct from a curial jurisdiction to pronounce upon the rights of the parties. The placement of these disparate functions in the one group of persons would do little for conciliation and arbitration,[237] and would diminish the judicial standing of such appointees. In my view, it is much healthier to separate the arbitral and judicial functions of our system.[238] Conciliation and arbitration often require the Commission to take into account the proposals of the disputants, and to produce a settlement which is responsive to them. The judicial approach must remain aloof from such matters. The task of the court is to do justice to the parties in accordance with the laws of the land.

The second reason for proposing such a Court, according to Ralph Willis, was so that judges with special industrial relations skills could hear industrial cases. In my view, the appointment of such a panel of judges would have taken us speedily back to the days of the Industrial Court. After reading the bulk of the major decisions of the Industrial Court over the 20 years of its existence, I have gained the sense that its judges were mentally hemmed in by

234 Second reading speech to the Industrial Relations Bill 1987 by the Minister for Industrial Relations, R Willis, *Hansard*, 14 May 1987, HR vol 155 3164 at 3167.

235 Ibid.

236 This election was held on 11 July 1987.

237 The resolution of unfair dismissal cases may have been facilitated by this type of integration. Under cll 188-191 of the Industrial Relations Bill 1987 (Cth), an employee who believed her or his dismissal to have been unfair, could apply to the Commission for redress. If conciliation failed, the Court was given power to make reinstatement orders in appropriate cases. The framers of this Bill believed no doubt that a person appointed concurrently to the Commission and the Court could exercise these powers expeditiously. This gap is now being filled by the powers of the Industrial Relations Commission to deal with unfair dismissals. See *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 636; and *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers' (Victoria) Ltd* (1989) 166 CLR 311.

238 See the interesting remarks on the Conciliation and Arbitration Commission in its conciliatory and arbitral roles by Sir A E Woodward, who was at the time of writing a practising Queen's Counsel, and then later a Federal Court Judge. Woodward, A E, "Industrial Relations in the 70s" (1970) 12 *JIR* 115 at 115-21.

the narrowness of their industrial relations jurisdiction. An Australian Labour Court, whose specialist industrial relations judges only heard labour relations matters, would find itself stiffled by such a narrow jurisdiction. An industrial court with limited industrial powers was tolerated by the community in the 1950's and 1960's. It is my belief that such a court would not find favour in the harsh economic climate of an Australia in the 1990s. It would be difficult for such specialist appointees to shake off the appellation that they were members of an industrial relations club. Sooner or later, disgruntled litigants whether as employers or employees, would throw such an appellation at these judges.

A court which operates in the field of industrial relations, at least in this country, requires a broad community consensus in order to perform its function of doing justice between the various parties. Over the last decade and a half, the Federal Court of Australia has always had this community consensus, in large part because it is a generalist court with broad and wide ranging jurisdictions in the commercial and industrial fields. In the area of internal trade union affairs, it has taken an interventionist stance. The Court has promoted trade union democracy by limiting the scope of candidature qualification rules; by balancing one vote one value democracy against the requirements of trade union branch structures; and by ensuring the fair use of trade union resources during election campaigns. Its use of federal award clauses as implied contractual terms, has enabled it to develop a new and novel remedy for unfairly dismissed employees. Finally, it is, albeit rather belatedly, at last coming to grips with s45D of the *Trade Practices Act*. It is endeavouring to balance the rights of employees and employers in the field of secondary industrial action. All in all, the first fifteen years of the Federal Court's labour relations jurisprudence can be pronounced an outstanding, if largely unpublicised success.