A NEW TORT FOR MASS PICKETING: THE THOMAS CASE AND ITS IMPLICATIONS FOR AUSTRALIA PART TWO

ALAN DAVIDSON*

Introduction

The objective of this part of the article is to assess whether, if the English industrial picketing case *Thomas & Ors v National Union of Mineworkers (South Wales Area) & Ors ("Thomas")*[1] had been decided in the Australian jurisdictions, the result would have been the same. It is proposed to consider first, the scope of criminal offences resembling those in the English Conspiracy and Protection of Property Act 1875 ("the English Act"); secondly, tortious liability; thirdly, the nature of the peculiarly Australian provisions in sections 45D and 45E of the Commonwealth Trade Practices Act 1974, and finally, an attempt will be made to summarise the similarities and main points of contrast between Australian and English law in the areas touched by the *Thomas* case.

At the outset, it may be of assistance to outline briefly the facts of *Thomas*. In support of a wider dispute between the National Union of Mineworkers (NUM) and the National Coal Board (NCB), the South Wales Branch of the NUM organised picketing at the gates of collieries in South Wales, collieries outside that area, and at industrial premises both inside and outside the South Wales area. For present purposes, we need only be concerned with the events

* LLB Dip Ed, LLM, Senior Lecturer in Law, University of Tasmania Part One of this article appeared in (1988) 18 UWAL Rev 138

1. [1985] 2 All ER 1, also reported in [1985] I RLR 136 All subsequent citations in this article will be to [1985] 2 All ER

which took place at the gates of collieries within the South Wales area. In order to prevent the plaintiff employees from working, an average of 50-70 and sometimes 200, striking miners attended with six "official" pickets standing close to the gates and the rest held back away from the entrace by a police cordon. Abuse was hurled at the plaintiffs as they drove to work and on their return, but there were no acts of physical violence. In refusing injunctive relief, Scott J held that there was no evidence of tortious assault and, in the circumstances, no public nuisance and no interference with contractual relations.[2] On the other hand, he was of the opinion that, on the face of it, tortious intimidation and a new tort of unreasonable harassment of the plaintiffs in the exercise of their right to use the highway to go to work (a species of private nuisance) had been proved.[3] His Honour dismissed the plaintiffs' argument that picketing, which constituted a criminal offence under section 7 of the English Act was therefore automatically tortious.[4] To find otherwise would be to ignore *Ward, Lock & Co Ltd v The Operative Printers' Assistants Society*[5] ("*Ward, Lock*") which held that proof of an action in tort or a crime must be demonstrated before any section 7 crime can result.

Section 7 of the English Act, prior to its amendment by the English Trade Disputes Act 1906, created a number of offences which were designed to penalise those participating in certain kinds of picketing. These included intimidation and watching or besetting the house or other place where a person resides or carries on a business. Only picketing with the object of persuading another person to act or not to act was caught since section 7 contained a proviso which validated attending at or near the place of work, home or place of business if it was merely for the purpose of communicating information.

The provisions have been interpreted in two different ways. The narrow view is to be found in *J Lyons & Sons v Wilkins*[6] ("*Lyons v Wilkins*") where it was held that even non-violent picketing was both

2. Ibid, 20-21.
3. Ibid, 22-23.
4. Ibid, 19.
5. [1906] 22 TLR 327
6. [1896] 1 Ch 811 and [1899] 1 Ch 255.

a common law nuisance and a criminal offence under section 7 if the aim of the pickets was to persuade. The wide interpretation adopted in *Ward, Lock*, was that peaceful picketing did not constitute a nuisance and section 7 was not applicable as the words "wrongfully and without legal authority" at the head of the section were intended to prohibit only those acts which were independently tortious or criminal.

Criminal watching or besetting and intimidation in Australia

All states have enacted legislation[7] analogous to the intimidation and watching and besetting sections of the English Act. The Victorian Employers and Employees Act 1958 has been repealed[8] and there are significant differences in the phrasing of the Queensland and New South Wales legislation. It would thus appear that persuasional mass picketing, such as that which occurred in *Thomas*, would infringe the statutes only in Tasmania, South Australia and Western Australia. Nevertheless, it is submitted that an offence or offences under Queensland and New South Wales legislation would still be committed.

All states, except Victoria and New South Wales, protect informational picketing. In New South Wales it is not expressly provided for but if it has the qualities usually associated with, though not necessarily limited to, informational picketing, such as not involving obstruction, intimidation or a breach of the peace, it will not be an offence under that State's legislation. Informational picketing in Queensland is protected provided the act is done in furtherance of an industrial dispute under the Queensland Industrial Conciliation and Arbitration Act 1961.

Queensland

Section 534 of the Queensland Criminal Code 1899 lists the offences in the same way as the English Act but omits the vital phrase

7 (Tas) Conspiracy and Protection of Property Act 1889 s 6; (Vic) Employers and Employees Act 1958 ss 52-54; (NSW) Crimes Act 1900 s 545B, (Qld) Criminal Code 1899 s 534; (SA) Criminal Law Consolidation Act 1935-1974 s 264; (WA) Criminal Code 1913 s 550.

8. (Vic) The Employers and Employees Act 1958 was repealed in 1976. But see E I Sykes and R C McCallum "Uncertainties Regarding the Law of Peaceful Picketing in Victoria" (1979) 53 ALJ 241. Picketing may still be a conspiracy in Victoria even if it is informational rather than persuasional

"wrongfully and without legal authority" at the beginning of the section. Catastrophic results ensue for those engaging in persuasional picketing in Queensland. The *Ward, Lock* interpretation cannot be applied and even non-tortious picketing will be a criminal besetting. The same may be said of intimidation under the section.

However, section 534 is more helpful in another respect because the proviso in relation to informational picketing makes such picketing "lawful" rather than deemed not to be a watching or besetting. Consequently, picketing to communicate information cannot give rise to an action in public nuisance or be otherwise illegal.

New South Wales

The New South Wales legislation, in the form of section 545B of the New South Wales Crimes Act 1900 is notable because it does not give any express protection to informational picketing. It would appear, therefore, that if the *Lyons v Wilkins* view prevailed, so that even peaceful persuasional picketing was criminal, all picketing would be a watching or besetting. The situation is made more difficult by the case of *Re Van der Lubbe*[9] where it was held that, although there must be at least a public nuisance, as in *Ward, Lock* and *Thomas*, peaceful picketing, whether of the persuasional or informational type, necessarily amounts to a common law nuisance.

Unlike the English legislation, the New South Wales statute defines "intimidation" as causing a reasonable apprehension of injury to a person or the person's family or dependents or of violence or damage to any person or property. "Watching or besetting" is defined as including attending at or near any house or place in such numbers or otherwise in such manner as is calculated to intimidate any person in that house or place or to obstruct the approach thereto or egress therefrom or to lead to a breach of the peace. Although the court in *Re Van der Lubbe* accepted that there was nothing akin to intimidation or obstruction on the facts, since the picketing was entirely peaceful, it still held there to be a watching or besetting under this section. The decision has quite properly been criticised[10] because, although the word "including" is used in the

9. (1949) 49 SR (NSW) 309. See also *Ex parte Farrell, Re Fongold* (1936) 36 SR (NSW) 386; *Fongold v Farrell* [1937] ALR 91 (High Court).
10 E I Sykes *Strike Law in Australia* Second Ed (Sydney. Law Book Co, 1982) 144-145

"watching or besetting" definition, it is clear that the whole purpose of the section is to limit the offence to instances of breaches of the peace, obstruction or intimidation. If *Thomas* had been decided in New South Wales the offence of watching or besetting would have been committed, not through intimidation or obstruction (since there could be no reasonable apprehension of violence and no obstruction where pickets are not blocking the work entrance), but through a breach of the peace.

The *Re Van der Lubbe* case, or at least that part of it which held that a watching or besetting was only criminal if it amounted to a public nuisance, may also be queried since it failed to consider the relevance of a much earlier British statute which is part of the law of New South Wales and which has not been repealed.[11] The Act, of 1825, makes "molestation" and "obstruction" crimes without defining them. These crimes have been interpreted broadly by the courts. The result may well be that the independently wrongful act required to trigger the watching or besetting offence will be supplied by the 1825 Act.

It should also be added that none of the states has reached the 1906 English position of making lawful both peaceful informational and peaceful persuasional picketing in pursuit of a trade dispute although, as we have seen, Queensland has legalised informational picketing in support of an "industrial dispute".

There are, of course, numerous other common law and statutory crimes capable of being committed in the course of picketing, for example, conspiracy, assault,[12] obstructing the police in the execution of their duty,[13] common nuisance,[14] participating in an

11 6 Geo IV C 129. Part of the law of the Australian colonies by virtue of the (UK) Australian Courts Act 1828. See *Bilby v Hartley* (1892) 4 QLJ 137

12 Eg (NSW) Crimes Act 1900 ss 61 493-500; (Vic) Crimes Act 1958 s 31; (SA) Criminal Law Consolidation Act 1935 ss 39-47; (Qld) Criminal Code Act 1899 ss 246 335 346 359; (WA) Criminal Code Act Compilation Act 1913 ss 223 313-318, 321-324; (Tas) Criminal Code Act 1924 ss 182-184.

13. Eg (NSW) Crimes Act 1900 s 494; (Vic) Crimes Act 1958 s 31; (Vic) Summary Offences Act s 52(1)(1A); (WA) Police Act 1892 ss 20 and 90; (Tas) Criminal Code s 114, (Cth) Crimes Act 1914 s 76

14. Eg (NSW) Crimes Act 1900 s 494; (Vic) Crimes Act 1958 s 31; (Vic) Summary Offences Act s 52(1)(1A); (WA) Police Act 1892 ss 20 and 90; (Tas) Criminal Code s 114; (Cth) Crimes Act 1914 s 76.

unlawful assembly[15] and obstruction of the highway. Other forms of obstruction may also be criminal, such as, obstructing railways,[16] obstructing or harassing a worker in the Queensland electricity industry,[17] obstructing or hindering the performance of services by or to the Commonwealth[18] and unreasonable obstruction in relation to the passage of persons or vehicles into, out of, or on Commonwealth premises.[19]

The last of the offences just mentioned was examined in *Bolwell v Jennings*[20] where a union picket line was set up, in support of a national strike at the entrance to Commonwealth property in Hobart. The applicant Bolwell, along with other pickets, stood in front of an electrical contractor's vehicle, which was partly on Commonwealth property in order to prevent it from gaining entry. Words were exchanged and the vehicle was driven forward slowly until it touched Bolwell and he fell across the bonnet. The vehicle stopped and Bolwell wrenched off one of the wiper blades. He was charged with unlawfully damaging property and with unreasonable obstruction under section 12(2)(a) of the Commonwealth Public Order (Protection of Persons and Property) Act 1971. In convicting Bolwell on the second charge, the magistrate seemed to think that the only relevant factors to be considered in determining whether the obstruction was unreasonable were those relating to Bolwell's purpose in respect of the strike and the disutility of the means adopted to achieve it. From these factors alone the magistrate concluded that the obstruction had needlessly inconvenienced some members of the public. On appeal to the Supreme Court of Tasmania, Cox J quashed the conviction. He was of the opinion that the magistrate had failed to correctly apply section 4 of the Act, which defines "unreasonable obstruction" as

15 Eg (NSW) Crimes Act 1900 s 545c; (WA) Criminal Code ss 62-63; (Qld) Criminal Code ss 61-62; (Tas) Criminal Code ss 73-74; (Cth) Public Order (Protection of Persons and Property) Act 1971 ss 6-7

16. (WA) Criminal Code s 462, (Qld) Criminal Code s 477, (Tas) Criminal Code s 271.

17. (Qld) Electricity (Continuity of Supply) Act 1985 s 25(1); New South Wales and Queensland also possess Essential Services Acts granting extensive powers to the government including deregistration of unions following proclamation of a state of emergency in essential services. See also (Cth) Crimes Act 1914 s 30J and (Cth) Industrial Relations Act 1988 s 294.

18 (Cth) Crimes Act 1914 s 30K.

19. (Cth) Public Order (Protection of Persons and Property) Act 1971 s 12(2).

20. (1986) 28 AILR 48

> an act or thing done by a person that constitutes, or contributes to, an obstruction of, or interference with, the exercise or enjoyment by other persons of their lawful rights or privileges (including rights of passage along the public streets) where, having regard to all the circumstances of the obstruction or interference, including its place, time, duration and nature, it constitutes an unreasonable obstruction or interference...

This definition does not require any consideration of the purpose of the strike or whether a picket line is the best method of achieving that purpose. All it demands is a consideration of the place, time, duration and nature of the conduct. His Honour thus looked, rightly, it is submitted, at the fact the obstruction arose on a Monday morning when few people were about, that it lasted for a short space of time, that it inconvenienced one person only, that it was not shown to be essential that the driver should have vehicular access to the premises, and that there was no damage to personal property as the broken windscreen wiper was not alleged as part of the obstruction.

This case establishes that it is not an offence against this Act merely to obstruct another in the exercise or enjoyment of lawful rights and privileges. It is interesting that, in view of the complete absence of any direct Australian authority, a number of English "highway cases" were cited to the magistrate. Although in the Supreme Court, Cox J was of the opinion that the legal position in England was totally different to that in Australia and those cases were of little assistance, the above statement of principle does appear to be in line with the *Ward, Lock* approach to picketing and public nuisance.[21]

Tortious Liability

The torts that may be perpetrated in Australia[22] in the course of picketing are, of course, generally the same as in England. Assault and battery, public and private nuisance,[23] interference with con-

21 See also *Hubbard and Ors v Pitt and Ors* [1976] QB 142.

22. See J H Portus "Civil Law and the Settlement of Disputes" (1973) 15 Jo Ind Rel 281; P Latimer "The Application of Industrial Torts in Australia" (1978) 20 Jo Ind Rel 407, A J Stewart "Civil Liability for Industrial Action. Updating the Economic Torts" (1984) 9 Adel L R 359, J D Heydon *The Future of the Economic Torts* Second Ed (London: Sweet & Maxwell, 1978).

23 Eg *Std Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 ("the *Std Ross Agency* case"); *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia and Ors* [1986] VR 383 ("the *Dollar Sweets* case"); *David Jones Ltd v Federated Storemen and Packers Union of Australia and Ors* (1985) 14 IR 75 ("the *David Jones* case")

tractual relationships,[24] intimidation[25] and civil conspiracy are all recognised as giving rise to a cause of action at common law.

Perhaps the most important issue arising from the *Thomas* case is the extent to which the innominate tort of unreasonable harassment in the exercise of rights other than those associated with land or easements, has been recognised in Australia. A significant decision in the industrial area and one which also involved mass picketing is *Williams and Anor v Hursey* ("the *Hursey* case").[26] Since there are other parallels to be drawn with *Thomas*, the *Hursey* case will be examined in more detail although that aspect of *Hursey* raising questions of union responsibility will not be discussed.

The Hurseys, father and son, were members of the Hobart branch of the Waterside Workers Federation of Australia ("the Federation") and had refused to pay a levy imposed by the branch on its members in order to assist the Australian Labor Party in a Tasmanian election campaign. The underlying reason for their refusal was that they were members of a political party strongly opposed to communism and, more particularly, to certain communists who were members of the Federation. With the persistance of their refusal the Federation claimed that they had ceased to be members in accordance with the rules of the branch and national Federations. However they continued to be rostered for work by the Stevedoring Industry Authority, the Commonwealth statutory body in charge of allocating registered workers to waterside work. Hobart branch members of the Federation, authorised by the branch and with the support of the national Federation, responded by engaging in mass picketing at the Hobart wharves in order to prevent the plaintiffs from getting to the place on the wharf where they were normally picked up for work. The mass of pickets formed a human barrier shouting abuse across the wharf entrance and remained there un-

24. Eg *Williams and Ors v Hursey* (1959) 103 CLR 30, *Woolley v Dunford* (1972) 3 SASR 243, *Davies and Davies v Nyland and O'Neill* (1975) 10 SASR 75, *J G K Nominees v P K I U* (1977) 19 AILR 239 ("the *JGK Nominees* case"); *Tasmanian Television Ltd v J C Rolph* (unreported) Supreme Court of Tasmania 1975, *Sid Ross Agency* ibid; *Dollar Sweets* ibid; *David Jones* ibid.

25 Eg *Sid Ross Agency* supra n 23; *Pierce v Annis-Brown* (unreported) District Court of NSW 1971, *J G K Nominees* ibid, *Latham v Singleton* [1981] 2 NSWLR 843; *Dollar Sweets* supra n 23

26. Supra n 24. See E I Sykes "The Hursey Case: Part 2, The Tort Aspect" (1960) 34 ALJ 13, M Otlowski "The Demise of Conspiracy by Unlawful Means? Future Directions for Australia" (1989) 2AJLL 106, 109

til the Hurseys' absence forced the Authority to use other workers to fill the gangs. Later, after an interlocutory injunction had been granted prohibiting this strategy, the union resorted to pulling a key worker out of any gang containing the Hurseys, making it an unworkable unit and leading to the dismissal of the gang members.

The High Court held, reversing the judgment of Burbury CJ in the Tasmanian Supreme Court, that the political levy was valid, that the plaintiffs had ceased to be members of the Federation and that the Authority had acted unlawfully in rostering them for work. The High Court, however, affirmed the judgment of Burbury CJ that the Federation and the branch officials and members, but not the branch itself, were liable for civil conspiracy by unlawful means. No liability arose for civil conspiracy to injure, that is combination causing damage, as the necessary motive for conspiracy to injure was missing.[27] The Federation was pursuing a legitimate purpose in trying to enforce obedience to a majority decision on the political levy and this was a sufficient justification for their actions.

On the issue of civil conspiracy by unlawful means, Burbury CJ detailed a number of torts and criminal offences which he thought provided the necessary illegality. The High Court judgments are contradictory on the unlawful means aspect. Taylor and Menzies JJ emphasised breaches of the Tasmanian Stevedoring Industry Act 1956.[28] Fullagar J on the other hand, determined that the "illegal means" element was provided by tortious acts and ignored breaches of the Stevedoring Industry Act as not intended to confer a civil remedy on individuals.[29] On balance it seems that both tortious and non-tortious acts may be relied on to establish this type of civil conspiracy. The point was not, of course, relevant in *Thomas* since the pickets were not sued for conspiracy but for individual torts arising in the course of picketing. The allegations of tortious unlawfulness are analagous, however, in both the *Thomas* and *Hursey* cases.

27 *Crofter Hand Woven Harris Tweed Co Ltd and Ors v Veitch and Anor* [1942] AC 435.

28. Section 44(a)(b) of the Act made it an offence to prevent, hinder or dissuade a person from offering or obtaining employment as a waterside worker by violence, threats, intimidation or incitement without reasonable excuse Section 44(2) made it an offence for a registered waterside worker to refuse to accept employment or perform work with another registered waterside worker without reasonable excuse See *Hursey* supra n 24 Taylor J, 108-109 Menzies J, 125-127

29. *Hursey* supra n 24, 78-80. For criticism of Fullagar J's judgment see Sykes supra n 10, 202

Before proceeding to examine the torts alleged in *Hursey* it is worth noting that one of the criminal offences accepted by Burbury CJ, though not alluded to by any members of the High Court, was a breach of the intimidation and watching and besetting provisions in the Tasmanian Conspiracy and Protection of Property Act 1889.

All members of the High Court agreed that an assault had been proved. In the words of Burbury CJ "the mass picketing by the men on each occasion was a threat to use unlawful means by resort to physical force against the plaintiffs to repel any attempt to pass through".[30] Unlike *Thomas*, the "human barriers" were in a position to make their threats immediately effective.

The tort of interference with contractual relations[31] arises when the defendant knowingly interferes with the contractual relations of the plaintiff causing consequential loss to the plaintiff without just cause or excuse. When *Hursey* was decided, the tort was known as inducing a breach of contract, with its essential ingredients as stated by Jenkins LJ in *D C Thompson & Co Ltd v Deakin and Ors.*[32] Yet according to Lord Diplock in *Merkur Island Shipping Corporation v Laughton and Ors*,[33] Jenkins LJ did not intend to confine the tort to the situation where there is a breach of a primary obligation which would necessarily give rise to a secondary obligation to make monetary compensation. Any prevention of due performance of a primary obligation under a contract is now included even if no secondary obligation to make monetary compensation comes into existence due to exclusion of the secondary obligation by a force majeure clause.[34]

In *Hursey* the tort of inducing a breach of contract was discussed by Fullagar J[35] who held, with Dixon and Kitto JJ in agreement,[36] that it had not been established. There were two main reasons for this. In the first place Fullagar J, assuming that contracts of employ-

30. Cited by Fullagar J in *Hursey* supra n 24, 76
31. See generally G Owen "Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?" (1976) 3 Mon U L Rev 41.
32. [1952] Ch 646, 697.
33. [1983] 2 AC 570, 608
34. *Torquay Hotel Co Ltd v Cousins and Ors* [1969] 2 Ch 106 extended the scope to include interference not amounting to a breach of contract
35. Supra n 24, 77.
36. Ibid Dixon J, 45 Kitto J, 86

ment existed between the Hurseys and the registered employers, rightly thought it was the employer,[37] and not the Hurseys, who could sue for this tort. The fact that the Hurseys had suffered lost wages through the action of the pickets in causing a breach of their contracts of employment was irrelevant. Their loss could, on the facts, have been recovered through an action for assault but not through an action for interference with contractual relations, for the latter tort does not extend to preventing a breach of contract by the plaintiff.[38] This conclusion provides an additional reason, not mentioned by Scott J in *Thomas*, that even if a breach of a primary obligation in the contracts of employment of the miners with the NCB had been shown, recovery would have been available only to the NCB and not to the miners.

Secondly, Fullagar J did not think that a contract of employment existed between the Hurseys and the registered employer, so there could be no question of liability for inducing a breach of it. He could not agree with the analysis which had attracted the trial judge: that every registered worker made an offer to work on registration which was accepted by an allocation announcement in the press and by radio. His Honour considered that the contract was only created when the worker actually entered upon the work assigned to him and, since the mass picketing had prevented the creation of the contract, there could be no breach of contract.[39] These conclusions, of course, also apply to the later tactics of refusing to work with the Hurseys where this happened before they had commenced work, although Fullagar J did not examine this aspect. He did acknowledge that the actions of the defendants were breaches of the Stevedoring Industry Act but dismissed this as not creating civil liability, the erroneous implication being that criminal or non-tortious offences could not provide the unlawful means for civil conspiracy.[40]

The contention that there was a public nuisance, in that the picket lines unlawfully prevented the plaintiffs from exercising their rights

37. For Australian cases where the employer succeeded in proving this tort as plaintiff see supra n 24.
38. *Hursey* supra n 24, 76-77; Sykes supra n 10, 215-218, A P Davidson "Left Turn at Main Junction Leads to Dead End" (1975) 5 U Tas L R 80
39. *Hursey* supra n 24, 77-78
40. Ibid, 79

to use public highways and other places to which they were entitled to enter as of right, was made on appeal but not to Burbury CJ. The argument succeeded in the High Court. Relying on dicta of Patterson J in the well-known false imprisonment case of *Bird v Jones*,[41] Fullagar J held the acts of picketing, quite apart from the assault and intimidation aspects, constituted an interference with the plaintiff's personal liberty and freedom of movement, and an obstruction of their path to work.[42] The only snag was that, unlike *Bird v Jones*, the acts had not taken place on a public highway.[43] Nevertheless, it was confirmed that anyone rostered for work entered the wharf as of right because it was the only route to work and that this was analogous to a public highway. No authority was cited to support this conclusion but it is not difficult to see that public rights of access to ships and recreation might have been infringed by the action of the pickets on the wharf. Also, the obstruction was total with the pickets standing shoulder-to-shoulder across the wharf in contrast to *Thomas* where there was no effective obstruction.

It is noteworthy that despite the multitudinous torts alleged in *Hursey* no reference was made to private nuisance, either in the Supreme Court of Tasmania or in the High Court. The judges did not make the same error as Scott J in *Thomas*. Since they were employees, the plaintiffs in both cases had no interest in land capable of being protected by this cause of action. The statement of Fullagar J that the acts of the pickets "constituted an interference with the plaintiffs' personal liberty and freedom of movement, and an obstruction of their path to work"[44] taken in its context, meant simply that an assault and a public nuisance had arisen. His words do not, it is submitted, give support to Scott J's ruling in *Thomas* that unreasonable harassment of a person using a public highway (or wharf) for the purpose of going to work is a private nuisance or innominate new tort.[45] Nor does there appear to be any other Australian authority for such a proposition.

41. (1845) 7 QB 742, 751-752; 115 ER 668, 672.
42. *Hursey*, supra n 24, 78. See also *Sid Ross Agency* supra n 23; *Dollar Sweets* supra n 23; *David Jones* supra n 23. All held that picketing amounting to obstruction and besetting of the plaintiff employer's premises was a public nuisance.
43. *Hursey* supra n 24, 78.
44. Ibid.
45. Supra n 1, 22-23.

The tort of intimidation takes two forms. Where A makes an unlawful or illegal threat to B (which as between A and C is unlawful or illegal) demanding that B do something or not do something to C which is likely to cause damage to C and the threat is successful causing consequential damage to C, C may sue A. For obvious reasons, this is known as "three-party" intimidation. Threats of breaches of contract may now be illegal threats as a result of the House of Lords decision in *Rookes v Barnard and Ors.*[46] "Two-party" intimidation arises where A makes an unlawful threat to B, which as between A and B is unlawful, demanding that B do something or not do something which is likely to cause damage to B and the threat is successful, causing consequential damage to B. B then has an action against A.

Intimidation as a tort was also not alluded to by any of the judges in the *Hursey* case. The main reason appears to be that it was decided some years prior to *Rookes v Barnard and Ors* and there was uncertainty as to the existence of the tort, particularly the two-party variety. Another reason may be that it was unnecessary for the High Court to consider in depth, other grounds for conspiracy by unlawful means, once it had found that an assault had been proved. It is true that Menzies J did find that the formation of the picket lines amounted to intimidating, preventing, hindering or dissuading the plaintiffs, who were registered waterside workers, from offering for, obtaining or accepting employment as waterside workers in stevedoring operations, but this finding was made in relation to a breach of section 44(1)(b) of the Stevedoring Industry Act and not in respect of intimidation as a tort. It was made clear that there was a breach of that section sufficient to amount to conspiracy by unlawful means regardless of whether the threats of violence were otherwise unlawful. According to Menzies J, the intimidation referred to in the section arose if the threats were sufficient to deter a person of resolution and fortitude from returning to face the ordeal again, even if the mass pickets merely stood silently shoulder-to-shoulder to bar a person's way to work. It was argued by the defendants that in that situation, leaving aside the assaults, threats and abuse, the pickets would

46. [1964] AC 1129 See generally D W Smith "Rookes v Barnard: An Upheaval in the Common Law Relating to Industrial Disputes" (1966) 40 ALJ 81.

be no more than stakes in the ground.[47] The argument failed to convince His Honour who thought, without, it is submitted, the slightest justification, that even a spiked and barbed wire linked fence which was insurmountable and impenetrable would not produce the same effect of concern and timidity in the mind of a person attempting to get to work as would a living barricade.[48] This feeling was echoed by Scott J in *Thomas* in connection with intimidation under the English Act.[49]

There are many Australian examples of civil liability for three-party intimidation[50] but *Hursey* would seem to be the only case which would have satisfied all the requirements of the two-party variety had it been decided after 1964.[51] In particular, since the unlawful threats of violence directly coerced the plaintiffs into the action demanded, that is, prevented them from getting to their place of work, the case is distinguishable from *Thomas*.

Other more recent Australian instances of three-party intimidation are *Pierce v Annis-Brown, J G K Nominees v PKIU, Latham v Singleton, Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association* and *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia & Ors*.[52]

Of those, only the last two cases mentioned dealt with intimidation through threats of violence and abuse rather than through threats of interference with contractual relations, as in the first three. The *Sid Ross Agency* and *Dollar Sweets* cases are therefore nearer to the facts of *Thomas* and *Hursey*.

In *Sid Ross Agency*, the Actors and Announcers Equity Association ("Equity") had published a list of approved threatrical agencies and had instructed its members not to deal with agencies not on the list. The plaintiff claimed it had been wrongfully excluded from the list. Equity officials threatened the plaintiff that it would have its members engage in abusive and threatening picketing of the clubs which booked threatrical performers through the plain-

47. A picket fence perhaps!
48. *Hursey* supra n 24, 126.
49. Supra n 1, 22.
50. See the cases cited at supra n 25.
51. Ie after *Rookes v Barnard and Ors* supra n 46.
52. *Pierce* supra n 25; *J G K Nominees* supra n 24; *Latham* supra n 25; *Sid Ross Agency* supra n 23; *Dollar Sweets* supra n 23.

tiff, in such a way as to obstruct public thoroughfares outside the clubs, preventing them from dealing with the plaintiff and causing loss of profits to the latter.

In demurrer proceedings, which turned on the sufficiency of pleading, the New South Wales Court of Appeal held that the tort of intimidation had been committed by Equity. The unlawful act threatened was constituted either by common law nuisance (obstruction and besetting) or by interference with the contracts between the clubs and the plaintiff, or by inducing breaches of the contracts of employment by employees of the clubs.[53]

The second of the apposite Australian picketing cases is *Dollar Sweets*, a decision of Murphy J of the Supreme Court of Victoria. Here the Federated Confectioners Association, ("FCA") a federally registered organisation, had refused to participate in "The Accord" under which unions had agreed to accept wage increases granted by the Australian Conciliation and Arbitration Commission so long as no claims were made for a reduction in working hours. The FCA members were thus not entitled to such increases but the plaintiff, a small manufacturer of confectionery, promised to pay those amounts to its employees in return for a written undertaking not to demand a shorter working week. When the FCA pressed for a 36 hour week (the employees were working 38 hours by agreement although the award stipulated 40) and sought to achieve this through a series of rolling strikes, Dollar Sweets informed its workers that the strikes were seriously affecting their business, asked them whether they would continue to work under their contracts of employment and the award, and threatened those not complying with dismissal. Twelve employees returned to work but the remainder, with FCA assistance, set up a picket line outside the work place which obstructed the free passage of vehicles into the plaintiff's premises, turned back delivery lorries and the vehicle of an electrical contractor and photographed defiant drivers, causing loss of profits to Dollar Sweets, and indiscriminately obstructing people attempting to do business with other shops in the laneway unconnected with the business of the plaintiff.

One truck driver who had persisted in making deliveries was

53 *Sid Ross Agency* supra n 23, 765-769.

followed by FCA officials and on another occasion was punched and fell to the ground. He was then kicked and injured by a number of women on the picket line and had his wig snatched off. He also received abusive and threatening telephone calls. The plaintiff notified the dispute to the Australian Conciliation and Arbitration Commission. Following a hearing, the Commissioner recommended that the FCA lift the picket. The FCA refused to comply.

An interlocutory injunction was granted by Murphy J against the FCA and individual FCA officials, FCA members and employees who had participated in the picketing. On the face of it, a case had been shown that there existed, and would continue to exist, tortious conduct in the nature of interference with contractual relations, intimidation (relying on the *Sid Ross Agency* and *J G K Nominees* cases), nuisance (*Sid Ross Agency*) and conspiracy to injure, that is, conspiracy causing damage where the motive is more than the mere pursuit of justifiable group interests.

Here, unlike *Thomas*, the level of violence both threatened and actual was such that there can be little doubt that the grant of the injunction was fair.

Nuisance was proved by acts performed over many months amounting to "obstruction, harassment and besetting". In the words of Murphy J "besetting" means "surround with hostile intent" and was "a term applied to the occupation of a roadway or passageway through which persons wish to travel, so as to cause those persons to hesitate through fear to proceed or, if they do proceed, to do so only with fear for their own safety or the safety of their property".[54]

One objection that could be made to both the *Dollar Sweets* and *Sid Ross Agency* decisions on nuisance is that, in contrast to the English picketing case *Hubbard v Pitt*,[55] there was no consideration of the concept of "reasonableness" nor of what was meant by the "ordinary" use of the public domain. On the facts of *Dollar Sweets* it would have been almost impossible for the Court to have held that the pickets' conduct was reasonable. But in *Sid Ross Agency* the threat to commit a public nuisance (that is, intimidation) never materialised in-

54. *Dollar Sweets* supra n 23 Murphy J, 388-389
55. Supra n 21.

to actual picketing, so there was no evidence of actual numbers nor of the way in which the picketing would be conducted. This might have been construed by a more charitable court as a threat to attain Equity's objective only through reasonable means not constituting a nuisance.[56]

In *Hubbard v Pitt* a small, peaceful group of four to eight people stood outside an estate agent's office for about three hours on Saturday mornings holding placards and distributing pamphlets in order to protest against the operations of developers. Although not an industrial one, the case is notable since two differing views on the nature of public nuisance on the highway are to be found in it. Forbes J was of the opinion that a public nuisance had been proved, and that it was no defence that a member of the public could easily get around the obstruction. The fact that the pickets were standing on the pavement was sufficient (except where the de minimis rule was applicable), because public nuisance derived its essence from trespass, or protection of the right of passage on every part of the highway. In holding that the pickets were liable, he failed to ascertain whether special damage, a vital ingredient of the tort when an individual sues, had been proved.[57] The other view was expressed by Lord Denning MR in the Court of Appeal. His judgment gives some meaning to the word "reasonable" in the definition of public nuisance. There must be an unreasonable assembly through, for example, crowds or queues, actual obstruction, threatened violence, smells or noise, which was not the case on the facts. And if there was no public nuisance, the issue of special damage does not arise.[58] Forbes J's judgment was relied on by the plaintiff in *Thomas*. If it had been applied, the six official pickets, and those on the pavement, would have been liable in public nuisance. Instead, Scott J properly chose to ignore it, preferring Lord Denning's opinion, and he reaffirmed the need for special damage, which had not been proved as the plaintiff miner's entry and egress had not been affected.[59]

56. See also *David Jones* supra n 23 where complete physical obstruction of the employer's premises by the pickets occurred on only one day although admittedly a "substantial" gathering was there throughout the dispute.
57. Supra n 21, 158-159
58. Ibid, 175.
59. Supra n 1, 21.

It is recognised in Australia that obstruction of a right of access may amount to a public nuisance where it disturbs the public right of passage causing special damage to a neighbouring occupier and the "give and take" principle operates to protect "reasonable" use provided the person is engaged in "ordinary" use of the public domain.[60] Yet, in none of the reported cases on picketing has there been any detailed examination of the sometimes conflicting principles underlying this type of public nuisance. The erroneous assumption made in the *Sid Ross Agency, Dollar Sweets* and *David Jones* cases was that obstruction and besetting made the nuisance unlawful at common law.

Considerable interest has been shown by some commentators and, understandably, by many employers in the *Dollar Sweets* case although while it was still at the injunction stage this enthusiasm was incomprehensible. Rawson has stated that the decision to grant an injunction was "the most significant step towards making common law actions a significant factor in [Australian] industrial relations" because the defendants had "thumbed their noses" at the Australian Conciliation and Arbitration Commission, knowing it was powerless to impose any sanction. Yet the ordinary courts were able to intervene.[61] He is correct in asserting, earlier in his paper, that with the more lenient penalties enacted in 1970 by the Commonwealth Conciliation and Arbitration Act, many employers preferred to take action at common law; and that there was a flurry of cases up to the middle of the 1970s, which ceased when the possibilities of more rigorous action through the Industrial Relations Bureau and section 45D of the Commonwealth Trade Practices Act 1974 opened up. The now defunct Bureau proved to be a "paper tiger", and section 45D of the Trade Practices Act, although a useful weapon for employers in the areas in which it operates, does not apply to all industrial disputes. Consequently, employers may again be more

60. F A Trindade and P Cane *The Law of Torts In Australia* (Melbourne. Oxford University Press, 1985) 543-548.

61. D Rawson "The Interaction of Law and Politics in Australian Industrial Relations" in *Industrial Relations Papers* (Canberra: ANU Research School of Social Sciences, 1986), quoting Andrew Hay, President of the Melbourne Chamber of Commerce (reported in The Age 13 December 1985). The Paper will form a chapter, "Law and Politics in Industrial Relations" in G W Ford, J M Hearn and R D Lansbury (eds) *Australian Labour Relations Readings* Fourth Ed (Macmillan) (forthcoming).

willing to sue at common law. Nonetheless, the mere fact that an injunction was granted in *Dollar Sweets*, does not make the case any more industrially significant than other industrial tort cases decided in that year in which employers obtained injunctions.

What made the case noteworthy was that the plaintiff, Dollar Sweets, with the support of the Melbourne Chamber of Commerce, brought what was claimed to be the first common law action for damages against a trade union. Although there have been numerous instances in Australia of pre-trial injunctions[62] and at least one injunction issued after trial,[63] it does not seem that there are any industrial tort cases where an employer has succeeded in an action for damages against a union or union official. There are three principal reasons for this. First, the employer has normally gained its objective in securing cessation of industrial action through the injunction, assuming that the injunction is obeyed. Secondly, most employers realise that it is not in their long-term interests to bankrupt unions, and, finally, the pursuit of such an action many months after the dispute has been settled is not conducive to harmonious industrial relations. It is important, however, to appreciate that *threats* by employers to persist in an action for damages, even to the point of lodging a claim, are not unusual occurrences but are usually no more than strategic moves in the industrial dispute settlement game. It was therefore far too early to say, at the time that the injunction was granted, whether *Dollar Sweets* was part of the existing pattern or represented the first stage in a momentous new development. Indeed, with the recent withdrawal of the action and a settlement out of court, it would seem that the range of effective employer remedies has not been increased, and it is still the case that no Australian court has held a union liable to pay damages to an employer merely for committing an industrial tort.

62. Eg *Harry M Miller Attractions Pty Ltd and Ors v Actors and Announcers Equity Association of Australia and Anor* [1970] 1 NSWLR 614, *Adriatic Terrazzo and Foundations Pty Ltd v Robinson, Owens and the Australian Building & Construction Workers Federation, South Australian Branch* (1972) 4 SASR 294; *Davies & Davies v Nyland and O'Neill* supra n 24, *J G K Nominees* supra n 24.

63 *Woolley v Dunford* supra n 24

Secondary boycotts and the Commonwealth Trade Practices Act 1974[64]

Under this heading we will need to determine the elements of liability in sections 45D and 45E of the Trade Practices Act, the main defences and whether, if *Thomas* had been an Australian case, the participants in the picketing would have been liable under those sections.

In the nineteenth century, until the enactment of the English Trade Union Act 1871 and its local equivalents,[65] many of the activities of trade unions were inevitably an interference with the freedom of the market and were often contrary to both common law and statute[66] as an unlawful restraint of trade. It would seem that until 1977 the English position under section 9(6) of the English Restrictive Trade Practices Act 1976 was equivalent to the position in Australia under section 51(2)(a) of the Trade Practices Act in that both assumed that the criteria for regulating labour were not the same as for capital. However, as a consequence of the Report of the Swanson Committee of August 1976,[67] section 51(2)(a) was replaced by section 45D which, in general terms, does not make that distinction.[68]

Sections 45D and 45E[69] of the Trade Practices Act were ostensibly designed as part of an even-handed attack on restrictive trade practices, the sections applying equally to both employers and

64. See B G Donald and J D Heydon *Trade Practices Law Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* (Sydney: Law Book Co, 1978) ch 10; W B Creighton, "Secondary Boycotts Under Attack – The Australian Experience" (1981) 44 MLR 489; M Sexton "Trade Unions and Trade Practices" (1977) 5 Aust Bus Law Rev 204; Sykes supra n 10.
65. (WA) Trade Unions Act 1902; (NSW) Trade Union Act 1881; (Vic) Trade Unions Act 1958; (Tas) Trades Union Act 1889. Similar Acts in Queensland and South Australia were repealed in 1961 and 1972 respectively.
66. Eg (UK) Combination Acts 1799-1800; (UK) Combination Laws Repeal Act 1824; (UK) Combination Laws Repeal Act Amendment Act 1825; (UK) Criminal Law Amendment Act 1871.
67. Trade Practices Act Review Committee Report (Canberra: Australian Government Publishing Service, 1976), known as the "Swanson Committee", after its chairperson, T B Swanson.
68. W B Creighton, W J Ford and R J Mitchell *Labour Law: Materials and Commentary* (Sydney: Law Book Co, 1983) 793.
69. S 45D was introduced by (Cth) Trade Practices Amendment Act 1977 and s 45E by (Cth) Trade Practices (Boycotts) Amendment Act 1980. Parallel, though by no means identical, provisions are to be found in (Qld) Industrial (Commercial Practices) Act 1984

employees. In fact, the non-criminal offences created by the sections have been honed by judges into formidable anti-union weapons and most of the cases have involved union officials. In the context of the Trade Practices Act this judicial approach is not entirely surprising. Had the sections appeared in the federal conciliation and arbitration legislation, with its overall emphasis on the prevention and settlement of industrial disputes, the result may well have been different. Some emphasis is now given to prevention and settlement of sections 45D and 45E industrial disputes. Since 1980, the Australian Conciliation and Arbitration Commission has had the power to conciliate and make recommendations (though the Commission is unable to arbitrate) in order to settle disputes before recourse is had by employers to sections 45D and 45E actions.[70] If a union ignores the recommendation, or an earlier order or award, the employer is free to pursue a remedy in the Federal Court.

Although the sections are directed primarily towards secondary boycotts, where indirect pressure is brought to bear on the target by direct pressure on another person who has a contractual relationship, whether commercial or employment, with the target, section 45D(1A) prohibits primary boycotts, where direct pressure is placed on the victim if interstate or overseas trade is affected.

Section 45D — the nature of liability

As Bowen CJ in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* has indicated, there are four elements for liability in section 45D(1):

(1) there must be a person in concert with another person engaging in conduct;
(2) their conduct must hinder or prevent the supply of goods or services by a third person to a corporation;
(3) the conduct must be engaged in for the purpose of causing substantial loss or damage to the business of the corporation;
(4) the conduct must be such that it would have or be likely to have the effect of causing substantial loss or damage to the business of the corporation.[71]

70. (Cth) Conciliation and Arbitration (Boycotts) Amendment Act 1980 inserting Div 5A into Part III of the (Cth) Conciliation and Arbitration Act 1904 (now ss 156-163 of the (Cth) Industrial Relations Act 1988). The statute was complementary to s 80AA of the Trade Practices Act 1974

71 (1979) 27 ALR 367, 370; Evatt J in agreement, 377.

Broadly speaking, these elements have remained the same despite the 1980 amendments which are considered below.

The target

Prior to 1980 the target had to be a corporation. Now the target is described as "the fourth person". If the fourth person is a corporation the position is as mentioned above. On the other hand, if the third person is a corporation and the fourth person (the target) is not, there is liability if the conduct would have, or would be likely to have, the effect of causing substantial loss or damage to the business of the third person, or a corporation related to it.

Person acting in concert

The "person" can be a commercial company, federal or state registered union, union official, union member or employee, so long as he or she was not employed by the fourth person target.

"Acting in concert" means acting in combination with another person.

The second person may be an employee of the third person, a member of the board of the third person or an employee of the target.

Conduct

The conduct must hinder or prevent the supply of goods or services by a third person to a fourth person. It is not necessary that those acting in concert should engage in exactly the same type of conduct. For example, a union may be liable even though it is not capable of physically participating in the picketing. Mere expressions of sympathy are, however, insufficient. For example, if the employees state that they support the picketing but only participate for a few days at an early stage of the dispute, and then quit their jobs, taking no further part in the dispute, they would not be liable. If these were the only employees of the target, the fact that they had no significant connection with the actions of the union and/or union officials, would indicate that the union and/or officials would be unable to rely on the defence in section 45D(3)[72] as the employees would not be acting in concert with them. This was held

72. See text accompanying n 99ff.

by Morling J of the Federal Court in *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union & Ors*,[73] ("*Mudginberri Station* case") one of a series of cases stemming from a protracted industrial dispute which continued from 1984 to 1987. Mudginberri conducted an abattoir and export meat processing business near Jabiru in the Northern Territory. They engaged independent contractors to do the work and the contractors employed workers. The dispute arose because a federally registered union, the Australasian Meat Industry Employees Union (AMIEU), sought payment of wages to its members in accordance with the "tally system" which the union alleged was more favourable to the worker than the existing payment by results or "productivity system" insisted upon by Mudginberri.

In June 1984, the union set up a picket line on the road leading to Mudginberri Station. As a result of the picketing, members of the Meat Inspectors Association (MIA) refused to enter the premises to inspect the meat and production ceased. The picket line was removed after an injunction was granted by the Federal Court[74] to prevent a breach of section 45D(1) and the Australian Conciliation and Arbitration Commission agreed to hear an application for an award to cover meat industry employees in the Northern Territory. In April 1985, a new award was handed down but did not implement the tally system. In accordance with the award, Mudginberri negotiated an agreement directly with the majority of employees who were not represented by the AMIEU. The picket line was reestablished in May 1985 and an interim injunction was granted for one month by Beaumont J in the middle of June 1985. The AMIEU failed to negotiate as directed by a Deputy President of the Conciliation and Arbitration Commission, an interlocutory injunction was granted by Beaumont J[75] against the AMIEU and its officials in the middle of June 1985, and a permanent injunction by Morling J in July 1985.[76] The AMIEU lost its appeal to the Full Court of the Federal Court.[77]

73. (1985) 61 ALR 280.
74. *Mudginberri Station Pty Ltd v Australasian Meat Industry Employee & Union & Ors* (1985) 27 AILR 245 Beaumont J. ("*Mudginberri Station Pty Ltd*").
75. Ibid.
76. Supra n 73.
77. *Australasian Meat Industry Employees' Union & Ors v Mudginberri Station Pty Ltd* (1985) 9 FCR 425.

The persistence of the AMIEU in maintaining the picket line led in turn to Mudginberri relying increasingly on other sanctions. The Federal Court imposed substantial fines for contempt on the AMIEU and its officials ($10,000 in respect of the breach of Beaumont J's order and $2,000 per day from that date, a total of $44,000,[78] plus $100,000 for breach of Morling J's order).[79] In addition, sequestration of the AMIEU's assets was ordered. The AMIEU's appeal to the High Court was dismissed on the ground that the Federal Court did have the power to fine for civil contempt where the disobedience is wilful rather than merely casual, accidental or unintentional.[80] Finally, the case made legal history as the first one in which an action for damages under section 82(1) of the Trade Practices Act for breach of the secondary boycott provisions succeeded against a union.[81] The damages awarded in July 1986 amounted to the staggering sum of $1,759,444.[82] The AMIEU had previously sought to prevent this decision by seeking leave to appeal against an interlocutory order refusing adjournment of the damages claim. This was rejected by the Full Court of the Federal Court.[83] Substantial costs were also incurred by the AMIEU. Other relevant aspects of this momentous series of cases will be investigated below.

The purpose

The purpose must be directed at the target (fourth person) whether it is the target or the third person that is the corporation. Where the third person is, and the fourth person is not, a corpora-

78. *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union & Ors* (1985) 27 AILR 311 Bowen CJ.
79. *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union & Ors* (1985) 10 FCR 385 Lockhart J; also reported at (1985) 13 IR 408.
80. *Australasian Meat Industry Employees' Union & Ors v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; also reported at (1986) 66 ALR 577. The Full Court agreed with the reasons for judgment of the majority, but thought (Brennan J dissenting) that that part of the order of Beaumont J which imposed a daily fine could not operate in the future as it could in the past
81. *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees Union & Ors* (1986) 15 IR 272. The claim for damages against AMIEU officials was dismissed since, 45D(6)(a) and (b) provided a defence. The loss or damage was deemed to have been caused by the conduct of the union provided it was a body corporate.
82. Damages were reduced to $1,458,810 on appeal: (1987) 18 IR 355, 396.
83. *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union & Ors* (1986) 28 AILR 403.

tion, a purpose of causing substantial loss or damage to the business of the fourth person or a substantial lessening of competition in any market in which the fourth person acquired goods or services is required. Where the fourth person is a corporation the purpose must be to cause substantial loss or damage to the business of the fourth person or related corporation, or a substantial lessening of competition in any market in which the fourth person or a related corporation supplies or acquires goods or services.

It is thus irrelevant that the dominant motive might be the pursuit of genuine union objectives.[84] It would also seem that the long-term purpose is irrelevant whereas the immediate one is crucial.[85] It was argued in *Mudginberri Station*[86] that the conduct engaged in by the respondents was for the ultimate purpose of achieving the adoption by Mudginberri of the tally system. This proposition was rejected in the light of the decision of Northrop J in *Barneys Blu-Crete Pty Ltd v Australian Workers Union & Ors*[87] as, on the evidence, one of the immediate aims of the respondents in *Mudginberri Station* was to shut down the applicant's business, which would inevitably cause substantial loss or damage to the applicant.[88]

The effect

Where the fourth person is a corporation the effect that the conduct "would have or be likely to have" of causing substantial loss or damage is the same as for "purpose". On the other hand, where the third person is a corporation and the fourth person is not, it is necessary to prove not simply the effect on the fourth person but also the effect on the third person, that is, that the conduct would have, or be likely to have, the effect of causing substantial loss or damage to the business of the third person or a related corporation, or a substantial lessening of competition in any market in which that third person or a related corporation, supplies or acquires goods.

84. Trade Practices Act s 45D(2).
85. *Utah Development Co & Ors v Seaman's Union of Australia & Ors* (No 2) (1977) 17 ALR 15; *Tillmann's Butcheries* supra n 71; *Barneys Blu-Crete Pty Ltd v Australian Workers Union and Ors* (1979) 43 FLR 463 Northrop J, 473.
86. Supra n 73.
87. Supra n 85.
88. *Mudginberri Station* supra n 73 Morling J, 283.

The meaning of the phrase "would have or be likely to have" was discussed by the Federal Court in *Tillmann's Butcheries*.[89] Deane J held that it meant that there must be a real chance or possibility that the conduct would, if pursued, cause substantial loss or damage to the target,[90] although neither Bowen CJ nor Evatt J thought it was necessary to decide the point as, in the circumstances, all possible meanings were satisfied.[91] The fact that the means of proving whether the conduct did actually cause substantial loss is within its power is also no reason for preventing the target from arguing that the conduct would be likely to cause substantial loss.[92] There is a substantial loss if the damage would be likely to be more than trivial or minimal.[93] This requirement is not concerned with the measure of damages,[94] only with the likely effect of the prohibited conduct.

Union liability

The anti-union nature of the secondary boycott provisions is revealed by an examination of sections 45(D)(5) and 45D(6), which have been described by Sykes as "Draconian".[95] These sub-sections extend liability to a union even where the union has not participated in the conduct of its officers, if it has not taken any preventative steps. Section 45D(5) deems a union to be engaging in conduct in concert with its officials and members if two or more union members or officials are engaging in concert. A defence is provided if the union has taken all reasonable steps to prevent the participants from engaging in the action. Section 45D(6) places sole liability on the union for loss or damage caused by it engaging in conduct or conduct which "is deemed to be engaged in by sub-section (5)", in concert with its members or officers in contravention of section 45D(1). If the union is a body corporate no action to recover the loss can be brought against the officials or members.

89. Supra n 71.
90. Ibid Deane J, 380-385.
91. Ibid Bowen CJ, 376 Evatt J, 377.
92. Supra n 71 reversing first instance decision of St John J.
93. Supra n 71. See also *Wribass Pty Ltd v Swallow & Australasian Meat Industry Employees' Union* (1979) 38 FLR 92; *Springdale Comfort Pty Ltd v Electrical Trades Union & Anor* (1986) 28 AILR 470.
94. *Barney's Blu-Crete* supra n 84.
95. Supra n 10, 253.

The harsh tenor of these provisions appears to have been somewhat mitigated by the case of *Actors and Announcers Equity Association of Australia & Ors v Fontana Films*[96] in which a majority of the High Court held that sub-section (5) and the corresponding parts of sub-section (6) were invalid as beyond the corporations power of the Commonwealth.[97] The consequences of the decision on sub-section (6) are, however, uncertain. It would seem that if the words "or is deemed by sub-section (5) to engage in conduct in concert with its members or officers" are ignored it is still, under what remains of the sub-section, possible for the union to be solely liable if it does in fact engage in the prohibited conduct with its officers or members. This was the approach taken by Morling J in *Mudginberri Station* where the applicant succeeded in its action for damages against the AMIEU but failed against the AMIEU officials and members. Yet it has been held, in *Springdale Comfort Pty Ltd v Electrical Trades Unions & Anor*[98] that the effect of the *Fontana Films* case on sub-section (6) was that the applicants must show that the first respondent (the union) engaged in relevant conduct in concert with someone other than its union members.

Defences

The defences available are very limited[99] in operation and have sometimes been very narrowly construed by the courts. An individual will not be liable under section 45D(1) if the dominant purpose for which the conduct is engaged in is substantially related

96. (1982) 150 CLR 169 per Mason Stephen Aickin Murphy Brennan JJ; Gibbs CJ and Wilson J dissenting.

97. S 51(xx) of the Constitution. The High Court did uphold the constitutional validity of s 45D(1)(b)(i) (where the target is a corporation). In *Seamen's Union of Australia & Ors v Utah Development Co & Ors* (1978) 144 CLR 120, s 45D coupled with s 6 was held to be a valid exercise of the trade and commerce power (s 51(i) of the Constitution). The Court did not consider s 45D alone but it is generally accepted that s 45D is a valid exercise of the corporations power with the exception of s 45D(1A) (interstate and overseas trade boycotts) which is based on the trade and commerce power. Also in *Australasian Meat Industry Employees Union & Ors v Mudginberri Station Pty Ltd* supra n 77 it was held by the Full Federal Court that there is no inconsistency between s 45D and the industrial power to conciliate and arbitrate for the prevention of industrial disputes mainly because the processes of dispute settlement, conciliation and arbitration could be engaged in to the full despite the restraints imposed by s 45D.

98. Supra n 93.

99. Trade Practices Act s 45D(3)(a).

to either the remuneration, conditions of employment, hours of work or working conditions of that person, or of another person employed by the same employer, or to the action of the employer of that person in terminating or taking action to terminate the employment of that person or of another person employed by the same employer. A similar defence is provided for a union where the conduct involves concert between an organisation or organisations of employees (including the officials thereof) and an employee, or two or more employees employed by the same employer.[100]

In order to prove the union defence the conduct must be undertaken in concert with the named parties, not in concert with any other person.[101]

The dominant purpose must be connected to the employment conditions or termination of the defendant employee or of a fellow employee employed by the same employer, or where a union organisation is implicated, to the working conditions or termination of the employee with whom the union or its officers or both is alleged to have taken concerted action or of a fellow employee. It does not apply to a case where there are a number of employees employed by different employers.[102]

It will also not cover, as we have already seen in *Mudginberri Station*, the situation where the connection with the picket line organised by the union and officials is so slight and transient as to prevent them from establishing that they are acting in concert.[103] The same case also held that the words "an employee or two or more employees who are employed by the one employer" will extend to persons whose employment has been terminated by their employer but not to persons who have voluntarily given up their employment.[104]

The onus is on the defendant to establish the dominant purpose.[105]

100 Trade Practices Act s 45D(3)(b)

101. *Ascot Cartage Contractors Pty Ltd & Anor v Transport Workers Union & Ors* (1978) 32 FLR 148

102. Ibid, *Industrial Enterprises Ltd & Ors v Federated Storemen & Packers Union of Employees of Australia (Queensland Branch)* (1979) ATPR 40-100; *Mudginberri Station Pty Ltd* supra n 74

103 *Mudginberri Station* supra n 73 Morling J, 287.

104. Supra n 73 Morling J, 288

105. *Wribass* supra n 93; *Mudginberri Station Pty Ltd* supra n 74.

Section 45E

Section 45E was enacted as a direct consequence of *Leon Laidely Pty Ltd v Transport Workers Union of Australia & Ors.*[106] The case arose out of an industrial dispute between Laidely and members of the Transport Workers Union ("TWU") employed by Amoco, a major oil distributor, as to who should have the right to deliver fuel supplies in the Sydney metropolitan area. The TWU members took industrial action and succeeded in persuading Amoco not to supply fuel to Laidely. The latter obtained an injunction for alleged breaches of section 45D by the New South Wales branch of the TWU, its members and officials. This in turn led to further widespread industrial action in New South Wales and Victoria and consequent fuel shortages. The dispute was eventually settled by the Australian Conciliation and Arbitration Commission with the resumption of supplies to Laidely, although at one stage it appeared that the dispute would be settled without resumption, and Laidely gave up its action against the TWU under section 45D. In any event it was clear that no action would lie against Amoco under section 45D as the section imposed no duties on the "third person". One of the consequent amendments introduced by the government was section 45E, of which subsection (1) is its main provision. It states that

> [A] person who has been accustomed, or is under an obligation, to supply goods or services to, or to acquire goods or services from, a second person shall not make a contract or arrangement, or arrive at an understanding, with a third person (being an organisation of employees, an officer of such an organisation, or another person acting for and on behalf of such an organisation or officer) if the proposed contract, arrangement or understanding contains a provision that — (a) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person or, as the case may be from acquiring or continuing to require any such goods or services from the second person.

It is not necessary for present purposes to consider this extremely tortuous section in any detail. The only defence, provided by subsection (2), is where there exists a contract, arrangement or understanding in writing and the second person is a party to the

106. (1980) 28 ALR 129; on appeal *Transport Workers Union of Australia & Ors v Leon Laiddey Pty Ltd* (1980) 28 ALR 589.

contract, arrangement or understanding, or has consented in writing to the transaction being made. Sufficient has been explained to demonstrate that a party in Laidely's position would now be able to sue.

Remedies for breach of sections 45D or 45E

These are the same as for other breaches of Part IV of the Trade Practices Act, that is, pecuniary penalties, injunctions and damages.

Pecuniary Penalties

Proceedings for a pecuniary penalty under section 76(1) for a contravention of sections 45D or 45E are non-criminal in nature and may be brought by the Minister or the Trade Practices Commission. If the union is a body corporate the fine may be as much as $250,000. The same maximum is applicable where the union is not a body corporate and the penalty may be recovered against an officer or officers of the union as representative or representatives of all the members, although the officials and members private property cannot be attached.[107] No penalty may be imposed on any individual.[108]

It does not seem that any pecuniary penalty has yet been imposed for a breach of the boycott and secondary boycott provisions. A monetary penalty may also result from aiding, abetting, counselling or procuring a contravention of sections 45D or 45E.

Injunctions

For the target there are many advantages in securing injunctive relief. The most important is the resumption of business and, with that aim having been achieved, the avoiding of a costly and time-consuming action for damages. It is not, therefore, surprising that the greatest number of actions brought against unions have been those where the target has sought, and has usually been granted, an injunction from the Federal Court under section 80.

Section 80AA was added in 1980 permitting the Federal Court to stay the operation of an injunction it has granted where there

107 Trade Practices Act s 45D(6)(c).
108. Trade Practices Act s 76(2).

is a proceeding pending under the Commonwealth Conciliation and Arbitration Act or under corresponding state or territory legislation. The injunction may only be stayed if the court is satisfied that it would be likely to assist in the settlement of a dispute by conciliation and that in all the circumstances it would be just to order it. The mere fact of the existence of remedies through the conciliation and arbitration tribunals is insufficient to prevent the issue of a Federal Court injunction in respect of a breach of sections 45D or 45E.[109]

Damages

A person who suffers loss or damage "by conduct of another person" in breach of sections 45D or 45E may recover the amount of the loss or damage by an action against that person or against "any person involved in a contravention". This would include persons inciting or encouraging the breach.[110]

In contrast to monetary penalties, no special protection is given here to individuals who are not associated with a union. Nevertheless, the same protection as is provided in the case of pecuniary penalties, is given to union officials and members who, whether or not the union is a corporate body, cannot be made personally liable even though they may have participated in the boycott.[111]

Although *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees Union & Ors*[112] was the first case in which an action for damages against a union for breach of boycott or secondary boycott provisions succeeded, the general principles underlying an action under section 80(1), for example, the measure of damages, were already well-established in respect of other breaches of the Act.

Having found that the conduct in which the respondents (including the AMIEU) were engaged was, indeed, conduct proscribed by section 45D(1) the next question was whether the applicant's losses were caused "by" that conduct. "By" means that there must be some causal connection between the conduct in contravention of the Act

109. *Industrial Enterprises* supra n 102.
110. Trade Practices Act s 82(1).
111 Trade Practices Act s 45D(6)(iv) and (v).
112. Supra n 81.

and the loss or damage claimed.[113] Morling J held that there was such a connection as the applicant's losses from 10 May to 8 September 1985 flowed from the disruption of its business, caused by its inability to carry on normal operations at the abattoir. It was impossible for the applicant's business to be carried on without inspection of the meat, which was mostly for export, and the setting up of the picket line by the respondents caused the Commonwealth inspectors to refuse to cross the line to perform their duties, thus closing Mudginberri Station's business. He thought that it must have been apparent to the AMIEU, in the light of what had occurred when the 1984 picket line was set up, and given the well-known reluctance of union members to cross picket lines set up by other unions, that it was likely that the inspectors might well refuse to cross the line. Any doubt was removed when this did actually occur.[114]

Two further arguments were put by the respondents. The first was that there were two causes of the applicant's losses; the AMIEU's conduct and the failure of the Secretary of the Department of Primary Industry to appoint Northern Territory inspectors to do the work at the request of the applicant on the refusal of the Commonwealth inspectors. The AMIEU relied on the opinion expressed by Smith J in *Haber v Walker* that for an intervening act to relieve a wrongdoer from liability it must be "an occurrence which is necessary for the production of harm and is sufficient in law to sever the causal connexion".[115] Morling J held, however, that the Secretary's failure was not "necessary" for the production of the applicant's losses. The losses commenced when the meat inspectors refused to cross the picket line and continued until the picket was lifted. It would not necessarily have followed that the applicant's losses could have been avoided since whether the Secretary could have found inspectors who would have crossed the line must remain a matter of conjecture. In addition, if the government had realised there was a statutory obligation[116] to appoint inspectors it

113. *Brown & Anor v Jam Factory Pty Ltd & Anor* (1981) 35 ALR 79, Fox J, 88; *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23 Northrop J, 59; *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509 Lockhart J (affirmed on appeal to the Full Court).
114. Supra n 81, 274-277.
115. [1963] VR 339, 358.
116. (Cth) Export Control Act 1982 s 20.

would have acted quickly to change the law. As regards the second part of Smith J's opinion, Morling J held that the respondent's conduct was of itself sufficient to and did in fact, cause all the applicant's loss.[117]

His Honour did not consider that there was any substance in the AMIEU's second argument that no damages could be awarded for the period after the date of judgment (12 July 1985) as the breach of section 45D(1) related only to the period up until that date. He was satisfied that the maintenance of the picket line was further conduct in contravention of Part IV of the Trade Practices Act.[118]

As the case was held to be akin to a claim in tort, damages were assessed by applying the words of Fox J in *Brown & Anor v Jam Factory Pty Ltd & Anor*[119] and comparing the position in which the applicant might have been expected to have been if the contravention of Part IV of the Act had not occurred with the position it was in as a result of the contravention. An appropriate method of calculating Mudginberri's losses was to determine the amount of revenue it lost in 1985 as a result of the picket, to deduct from that sum an amount equivalent to the reduction in its costs due to the diminished production while the picket was in place, and then to add certain additional costs which it incurred as a result of the picket. If the applicant had persisted in its claim for additional general damages for loss of goodwill caused by its inability to service the needs of its overseas customers in 1985, the amount might have been substantially higher.

Earlier cases in the Mudginberri series illustrate the considerable interest of the business community in remedies, such as fines for contempt of court and sequestration of union assets, which are not expressly covered by the Trade Practices Act. On the other hand, from the union viewpoint, the centre of their anxiety is not the plethora of business remedies but the very existence of sections 45D and 45E. Despite continual union pressure to have the sections deleted from the Act, particularly in 1987 when the Commonwealth

117. Supra n 81, 276-279.
118 Ibid, 279.
119. Supra n 113, 88. See also *Mister Figgins* supra n 113 Northrop J, 59; *Brown v Southport Motors Pty Ltd* (1982) 43 ALR 183, 186.

Industrial Relations Bill[120] was being debated, sections 45D and 45E remain extant.

Thomas and section 45D

In respect of the colliery gate picketing, it would seem that if the picketing arose in Australia no liability would have flowed from section 45D(1). The fact that the plaintiff employees succeeded in getting to work would mean that if they were each regarded as the fourth person (target) they would be unable to prove that one picketing employee combined with a second picketing employee so as to prevent the acquisition of services by a third person (the NCB) from the fourth person.

Even if we assume that the plaintiff employees are prevented from working there are further questions. There would be no problem with the requirement that the fourth person target must not be an employer of the first person (that person is a fellow employee) and since the fourth person would not be a corporation while the third person (such as the NCB) would be, the situation seems to fit neatly into section 45D(1)(a), but the remainder of that subsection would have no relevance whatsoever. It is concerned with the "purpose" and "effect" of the conduct in terms of loss or damage to business or substantial lessening of competition, not only in relation to the third person but also in relation to the fourth person and the fourth person here would be an employee without a business.

In *Thomas*, all the picketing was performed by Lodge officials and members who, with Lodges established for each colliery with 50 or more men employed, were all employees of the NCB, even the officials. Yet Scott J still held the South Wales branch of the NUM vicariously liable for the acts committed by the Lodges because the picketing was done in the name of, and on behalf of, the South Wales NUM. The same would be true in Australia. Such activities of committees of union members in the work-place would be the responsibility of state branches of a federally registered organisation or of a union registered under a state industrial arbitration statute.[121] There is no doubt that a registered union

120. The Bill proposed the creation of a new Industrial Relations Court to replace the Industrial Division of the Federal Court but this was omitted from the 1988 Bill and is not in the (Cth) Industrial Relations Act 1988.

121. *Hursey* supra n 24.

could be a "person" for the purposes of section 45D(1), although a state branch of a federal organisation has no personality, and is merely a part of the federal body.[122] The federal or state union could therefore be acting in combination with the picketing employees. Nevertheless, in view of the narrow scope given by the courts to the defence, the organisation would be unlikely to succeed in proving that the dominant purpose for which the conduct was engaged in was substantially related to their working conditions, or termination of employment.

Section 45E would impose certain duties on an Australian employer in the NCB's position, but is not pertinent to *Thomas*[123] and will not be considered.

Conclusions

1. The argument in *Thomas* that the individual offences of watching or besetting and intimidation in section 7 of the English Act automatically create tortious liability has never been tested by an Australian court. It would appear from *Fongold v Farrell*,[124] and to a lesser extent *Re Van der Lubbe*,[125] that an independently wrongful act, whether criminal or tortious, is a pre-requisite to a section 7 conviction, following *Ward, Lock*[126] rather than *Lyons v Wilkins*.[127]

The effect, therefore, of state statutory equivalents to section 7 in Tasmania, South Australia and Western Australia is that persuasional picketing is unlawful if it is otherwise wrongful, whereas informational picketing is not an offence, although it could be tortious or criminal at common law or under another statute. With the repeal of the Employers and Employees Act in Victoria, persuasional picketing is not a crime merely by virtue of any parallel provision to section 7 and informational picketing is no longer protected.

In New South Wales, there is no immunity for picketing for the purpose of communicating information. On the other hand, persuasional picketing will not give rise to criminal prosecution as a

122. *Hursey* supra n 24, 54-55.
123. Supra n 1.
124. Supra n 9.
125. Supra n 9.
126. Supra n 5.
127. Supra n 6.

watching or besetting unless the activity results in a breach of the peace, obstruction or intimidation, although the requirement of an independently unlawful act may be supplied by the Act of 1825. The position in Queensland is that informational picketing is lawful and it cannot result in tortious liability or conviction. Persuasional picketing in that state, however, may be a besetting without the necessity of an initially wrongful act.

Had the facts of *Thomas* arisen in Tasmania, South Australia or Western Australia, a prosecution for a section 7 type crime would be successful since proof of tortious liability (intimidation and unreasonable harassment of a lawful highway user) would trigger the section.

A watching or besetting would also have arisen in New South Wales either because the picketing amounted to a breach of the peace (though not to intimidation or obstruction) or because it constituted molestation under the 1825 Act. The offence of besetting would have been committed in Queensland since the intention of the pickets in *Thomas* was persuasional rather than informational and this would have been sufficient even if the court were to hold that there was no liability in tort.

Prosecutions under federal and state criminal statutes, particularly for unlawful assembly, are also a possibility. Where the Acts permit investigation of what is reasonable conduct, as in the Public Order (Protection of Personal and Property) Act, it is likely that mass picketing of the type illustrated in *Thomas* would be found to be an "unreasonable obstruction", unlike *Bolwell v Jennings*.[128]

2. No liability would be incurred by virtue of the secondary boycott provisions in section 45D. Although some of the elements of the main section (s 45D(1)) could be proved by employees who were succeeding in getting to work (the victims), the whole purpose of the section is directed to prohibiting loss or damage to business or lessening of competition, which could not be shown by those victims.

3. There is no difficulty in Australia with Scott J's ruling on tortious assault. His Honour's definition is a standard one and has been applied on many occasions by courts here.[129]

128. Supra n 20.

129. Eg *MacPherson v Beath* (1975) 12 SASR 174 (Full Court); *McClelland v Symons* [1951] VLR 157; *Brady v Schatzel; ex parte Brady* [1911] QSR 206.

4. In regard to the inapplicability of the tort of interference with contractual relations due to the lack of any evidence of a breach of a primary obligation, it is apparent from the High Court decision in *Hursey*[130] that even if there is a breach of a primary obligation, that is, the employees are being prevented by the pickets from performing their primary contractual obligations, the workers still could not sue for this tort, only the employer.

5. Intimidation, it is submitted, was erroneously found to exist in *Thomas* without any consideration of the tort's fairly subtle requirements. Although the making of a threat to do something unlawful or illegal as between plaintiff and defendant could be shown and, possibly, the demand that the plaintiff do something likely to do damage to him, the fact that the miners were not prevented from working by the threat meant that the other elements, particularly the need for the threat to be successful, were not fulfilled.

The *Thomas* case is unique for it appears to be the only reported example of two-party intimidation. It would seem that, if *Hursey* had been decided today in Australia, two-party intimidation might have provided the unlawful element for civil conspiracy since the Hurseys were prevented, by unlawful threats, from performing their contracts.

6. As regards public nuisance through obstruction to the highway, it is submitted that Scott J rightly followed the general approach of Lord Denning in *Hubbard v Pitt*[131] in upholding "reasonable" picketing as an exercise of the freedom to assemble as against the more restrictive view of Forbes J in that case. On the other hand, the Australian decisions in *Sid Ross Agency*,[132] *Dollar Sweets*[133] and *David Jones*[134] are suspect since they assume that obstruction and besetting render the nuisance unlawful at common law without any reference to the "reasonableness" of the picketing or "ordinary use" of the public highway.

7. In the light of accepted English and Australian definitions of private nuisance emphasising the need for the unreasonable in-

130 Supra n 24.
131. Supra n 55.
132. Supra n 23.
133. Ibid.
134. Ibid.

terference to be in connection with the plaintiff's use or enjoyment of land or easements belonging to the plaintiff, it is incomprehensible that Scott J should describe his new tort of unreasonable harassment of lawful users of the highway as a species of private nuisance. Since it differs from private nuisance in this fundamental respect it cannot derive its validity from principles underlying that tort. Moreover, the general precept of unreasonable interference with the rights of others, on which Scott J relied, is not supported by any English or Australian authority.

If mass picketing of the type familiar in the United Kingdom should ever become a normal feature of industrial disputes in Australia it is to be hoped that courts here do not add to the many grounds of tortious liability to which unions and their members are already subject.