Overmighty Judges

100 Years of Holy Grail is Enough

by Des Moore

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Introduction

In present times, when fact seems increasingly difficult to distinguish from fiction, Dan Brown's highly imaginative book, *The Da Vinci Code,* has inspired renewed speculation about the existence of the legendary Holy Grail and its possible location. Rationalists may be heartened, perhaps, by the report that *The Da Vinci Code* has now lost top place on the US best selling list to the (presumably) factual official US report on the 9/11 attacks. Even so, such has been the response to Brown's book that one possible location identified in it (Rosslyn Chapel built in Scotland) has experienced a 56 per cent increase in visitors looking for clues to finding the chalice (or whatever), which at five pounds a pop is helping the 15th century chapel's rebuilding program no end.

But why such a fresh burst of interest? As one of Brown's characters speculates - "for most, I suspect the Holy Grail is simply a grand idea…a glorious unattainable treasure that somehow, even in today's world of chaos, inspires us".

Believers in grand ideas are found in many places and the bench seem to have no shortage of those prepared to espouse them. Some judges and industrial commissioners will doubtless have been wetting their lips at the possibility that the Federal election will result in a Labor Government with the extraordinarily retrogressive industrial relations platform adopted at the ALP conference in January[2] that provides for, inter alia, increased collective bargaining and increased powers for the AIRC to intervene in disputes, as well as the scrapping of individual agreements. Some judgments – and public comments by judges – even suggest the authors have been inspired by the famous anthem "God who made thee mighty make thee mightier yet" used by Elgar in his composition of *Land of Hope and Glory* at about the very time our own Industrial Relations Commission was established.

Little wonder, perhaps, that *Individualised Justice –The Holy Grail* was the title used by our present Chief Justice, Murray Gleeson, for the article he wrote in 1995 (as Chief Justice of NSW) about the growing trend for judicial decisions to be based on

[1] In this paper "judicial activities", "the judiciary" and "judges" should be read, where appropriate, as including AIRC activities and/or Commissioners.

[2] The platform is almost identical with the policies adopted at the ACTU Conference six months before this. For a critical analysis of the implications, see "Labor Heads Back to Bad Old Days" by John Edwards (AFR 3 August). Mr Edwards wrote the speech, given in 1993 by Prime Minister Keating, enunciating a policy of giving prime emphasis to bargaining at the workplace level. Union opposition then allowed the introduction of only a partial version and a "trade-off" that included the introduction of unfair dismissals regulation. In a separate interview, Mr Edwards pointed out that "the whole point [of the proposals] was to prevent the AIRC from intervening in negotiations between employers and employees".

individualized or subjective assessments of a case rather than the straight application of general rules. In my presentation to the Samuel Griffith Society in September 2001 on *Judicial Intervention The Old Province of Law and Order* I pointed out that, in this article and in subsequent writings and commentary, His Honour identified effects from the more individualised approach with potentially serious adverse implications, including on "the willingness of people to engage in commercial transactions". Indeed, although he was careful to point out that judges have "the capacity, and sometimes, the obligation, to exercise qualities of judgement, compassion, human understanding and fairness", Chief Justice Gleeson appeared to be sending a message that more judicial constraint is needed.

Regrettably, it would be difficult to conclude that His Honour has been heeded, least of all in regard to judicial decision-making on relations between employers and employees. I will shortly outline some examples of grail-like interpretations, but an important question that arises is – how is it that the judiciary is subject to such little serious criticism of its performance?

In the June 2004 edition of Quadrant former Chief General Counsel for the Federal Government, Dennis Rose, suggested that "on important social issues…, there seems to be a curious preference in some quarters for decision-making by unelected judges rather than by elected legislatures. There also seems to be a reluctance to subject judges to the various criticisms to which other public figures are exposed for comparable lapses from proper standards of reasoning". The refusals by several law journals to publish my Samuel Griffith critique of judicial intervention in relations between employers and employees are certainly consistent with these observations.

The sparsity of criticism is the more pertinent given Rose's argument that, as between alternative legally-open conclusions, "judges often need to make choices ("policy choices") ... and will often be influenced, if not determined by personal beliefs on social issues, including morality". Yet, while Rose is himself highly critical of the legal reasoning behind certain judgments by Justices Deane, Toohey and Gaudron, he surprisingly asserts that "it is not useful to indulge publicly in…speculation about the causes of errors in judicial reasoning" except where judges choose to make statements "outside their judicial activities".

Contrary to Rose, my belief is that, whether inside or outside judicial activities, far too many judges leave the clear impression of underlying personal beliefs that, independently of Parliament or the legislation it passes, the judiciary should play a role in determining social policy and, in particular, in ensuring perceived "fair" or socially desirable outcomes. On industrial issues one can readily discern this by reverting 100 years to such notoriously mistaken disparagements of the outcomes of "the higgling of the market place" by Justice Higgins or by drawing on the present day absurd perspectives of Justice Kirby, such as his wide-eyed assertions that the national industrial system has had "big successes" in "avoiding nation-wide strikes" and in "providing rapid response" by "bringing disputing parties around the table". Many other examples of defective pronouncements by judges or commissioners dealing with industrial matters in tribunals and courts leads to the inevitable conclusion that the personal beliefs evident in such pronouncements must have a substantial influence on decisions in particular cases.

Against this background, it is not surprising, perhaps, that judges and commentators on decisions seem to pay little regard to the Acts Interpretation Act of 1901 and the 1981 addition of s 15AA, which provided that "in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object". Also relevant is the 1984 addition of s15AB, which provided that extrinsic materials such as Hansards (and hence Second Reading Speeches) and explanatory memoranda should be used in interpreting legislation.

These legislative additions ought to be highly relevant to interpretations of the Workplace Relations Act 1996, whose principal objects include "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level". It was also clearly the intent of the Act to prevent arbitration on bargaining issues during bargaining periods, and to strengthen the compliance provisions to deal with unlawful industrial action.

Of course, like all pieces of legislation involving political compromises, the 1996 Act gives scope for the AIRC to pursue regulatory paths, including to determine a "fair and enforceable" safety net of minimum wages and conditions of employment, and leaves scope for the exercise of judicial discretion. The basic question, however, is whether there is any real justification for the tribunals and courts to pursue the regulatory and discretionary paths to the extent they have been.

On any overall assessment, both the Commission and the Federal Court have in my view failed in two fundamental ways, particularly in regard to the industrial cases since 1996.

First, their determinations continue to be based on the mistaken beliefs that there is a inbuilt conflict situation that only the judiciary can resolve because of the general imbalance of bargaining power between employers and employees and that there is a capacity of "outsiders" to make informed judgments on employment contracts. These are matters being addressed by other speakers and I do not pursue them here.

Second, and more generally, but particularly in regard to those members of the judiciary who believe judges have social policy responsibilities that require them, as Justice Kirby has put it, to lay down the law where there is none, there has been no substantive response to the greatly changed economic and social circumstances of the last twenty years. The development of, among other things, much more competitive economies and much higher living standards, but in circumstances where social security has been greatly increased to help those who (inter alia) are unable to obtain employment, seems virtually to have by-passed the legal arm.

Let us suppose for a brief moment that social and economic circumstances 100 years ago and for the following 80 odd years could be said to have justified the judicial misinterpretation of s 51 xxxv and the subsequent extensive prescriptions of wide ranging employment conditions. Surely, then, the changes in social and economic conditions, and in government policies, in these last twenty years should have led the judiciary to recognize that, specific legislative requirements and the law of contract

aside, employees in modern societies no longer require to be protected against employers by socially-based judicial determinations and interventions?

Among relevant points in our relatively modern competitive economy is that the over 1.1 million Australian businesses - with the great majority being small businesses that absorb about half of those employed -have virtually no scope to exercise monopsony powers. In reality they actively compete amongst each other for the services of a workforce of around 10 million. The only logical conclusion for the failure of the judiciary to adjust to such realities has to be that the employment regulation market has been captured by the legal arm. That means that the chains can only be removed when the political arm plucks up the courage to initiate a major response similar to that undertaken by the New Zealand Government in the early 1990s.[3] Hopefully, we do not have to wait for a recession for that to occur.

This is not the place to set out the case that socially-based judicial determinations governing employer/employee relations have had extensive adverse effects on the Australian labour market and economy. I did this in some detail in 1998 when, through
Minister Peter Reith, I was commissioned by Federal and State Labour Ministers to make *The Case for Further Deregulation of the Labour Market.* However, I want briefly to draw attention to data indicating the considerable potential for significantly increasing employment and the social futility of industrial determinations that purport to protect wages for those on low incomes.

Some Relevant Data

First, as to employment potential, data in the OECD's Employment Outlook for 2003[4] show that Australia then had 69.3 per cent of the working age population (15-64 year olds) employed, significantly lower than for countries with economic, welfare and political systems that are broadly similar to ours, such as the US (71.2%), the UK (72.9%) and New Zealand (72.5%). These higher proportions are not one-offs but have existed for many years. If in 2003 Australia had had similar proportions employed as in the UK, for example, our employment would have been around 400,000 higher ie equivalent to about two thirds of those officially unemployed. But such comparisons understate our employment potential: with our higher rates of literacy and numeracy than these countries, Australia should have *higher* not lower proportions of working age employed than they have.

Second, Australia's employment includes a very high proportion of part-timers, over a quarter of whom say they would like to work more hours. In 2003 we had 28% employed part-time compared with 13% in the US, 23% in the UK and 22% in New Zealand. The increasing proportion of part-timers (22% were thus employed in 1990) is reflected in the reduction in average annual hours worked by Australians (now down to 34.6 hours per week compared with 35.7 in 1997).[5]

[3] The present Government has, however, taken action to counter unwarranted judicial intervention in the areas of immigration and in regard to the failure of the judiciary to take effective action to deal with union thuggery in the building industry.
[4] Published in June 2004
[5] According to the Workplace Editor of The Age (28 July), a "series of studies", including by the ACTU, suggest that most so-called casual employees, said to now constitute 29 per cent of

Third, the effective unemployment rate is much higher than the so-called official unemployment rate compiled on an internationally comparable basis. The ABS's latest published[6] labour under-utilisation rate (for September 2003) is 12.5% of the labour force compared with the then unemployment rate of 5.9%. These 1.2 million "under-utilised" include those who were working but would like to work more and those who were either actively looking for work (but not available in survey week) or discouraged job seekers. However, there is an additional 700,000 who were *not actively* looking for work but who say they would be available to start work within four weeks if jobs became available.[7] In short, in 2003 nearly 2 million were experiencing "unemployment" of one form or another.

Fourth, the ABS Household Expenditure Survey for 1998-99 shows the relatively small role played by wages in households on low incomes. Households with incomes in the bottom quintile then received nearly 70 per cent of gross incomes from government pensions and allowances but only about 8 per cent from wages and salaries. With other analysis showing that more than half of low wage earners are located in the top half of household incomes, it is difficult to see any social policy rationale for judicial determinations on minimum wages.

Fifth, while a proportion of the work force (perhaps 15 per cent) effectively operates outside the regulatory system, only an estimated 3 per cent (about 250,000) are formally on individual agreements or AWAs. The conclusion of such agreements is subject to regulation and approval by the AIRC.

Sixth, while published industrial disputes statistics of working days lost have in recent years generally been at a relatively low level, this cannot be taken as indicating reduced or low levels of industrial disputation, that is, "disputes" and workplace "disruptions" can (and do) occur without the loss of the ten working days required to qualify as a *statistical* dispute.

Some Grail-Like Interpretations

When I addressed the Samuel Griffith Society in September 2001 I pointed out that, partly in response to considerable adverse public commentary in 2000 on various industrial decisions, some Federal Court judges who had previously been allocated responsibility for cases involving industrial matters appeared to have been moved to other areas and their places taken by "commercial" judges. A combination of this juggling of the bench and the additional court costs involved in cases at the Federal Court (where, unlike the AIRC, court costs are incurred) appeared to have led to some reduction in the role of that court and hence in individualised determinations by its judges. At the same time, I suggested that substantial evidence remained of unwarranted interventionism and of inadequate responses to unions' illegal behaviour and to other aggressive action designed to obstruct needed structural changes by businesses.

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employment, would prefer to be permanently employed. However, the definition of "casual" appears to be the same as that used by the ABS, which counts as casual only those who do not have leave entitlements. Some 13 per cent of these are in fact permanently employed.

[6] In July 2004

[7] See the ABS's "Persons Not in the Labour Force" (6220.0) for September 2003.

Looking at the past three-four years, developments in the Federal Court and the AIRC in regard to industrial cases can be summarised as follows:

First, the reduced interventionism in industrial matters by Federal Court judges has been broadly maintained but remains significant in the case of some judges. It needs to be kept in mind that changed political and legislative circumstances could again lead to changes in the allocation of industrial cases as between judges.

Second, despite attempts by AIRC President, Justice Guidice, to improve the way in which cases are conducted and decided (including some reputed dressing downs of commissioners who publicly exhibited gross biases and/or decided matters in closed sessions), there has been a major increase in such interventionism by the AIRC. Indeed, unions have clearly targeted the AIRC and that body has accommodated them;

Third, most of the appointments to the AIRC appear to have continued to be of members of the industrial relations “club”. Out of 16 appointments since 1996 (excluding the two recent appointments of Commissioners Hamberger and Lloyd), only 4 would probably be regarded as non-clubites. The majority of the 50 or so members of the Commission undoubtedly continue to have club “philosophies”, as indicated by the reported public statements by Justice Munro on his recent retirement about the “enormous lack of understanding in successive governments of the Commission’s behind-the-scenes, sleeves-up role” ;

Fourth, there has been a continued judicial (and police) failure to deal adequately with union unlawfulness and thuggery in the industrial area.

As to the latter, the Inquiry into the Building Industry, and subsequent developments, highlighted failures on many fronts but the judiciary’s performance must surely be regarded as prominent among them. The Inquiry made a point of criticising the “easy” approach adopted by the Commission towards union (pattern) agreements and the national secretary of the construction division of the CFMEU, John Sutton, publicly admitted that “virtually everything we do breaches part of this Act”. Deputy President Munro, on the other hand, used a judgment to defend Commission processes by referring to ”some ill-informed, poorly researched material [that] was the subject of what I would dismiss as a beat-up by counsel assisting the Royal Commission into the Building and Construction Industry”.[8] Perhaps he would also have rejected the statements by Nigel Hadgkiss, the director of the Federal Task Force, to the Senate inquiry that “lawlessness prevails. There has been no rule of law. To me it is both systemic and endemic”. (Sunday Age, 6 June). Hadgksiss also reportedly told the inquiry that unions were involved up to their necks in intimidatory behaviour.

Disgracefully, Labor’s opposition to establishing a special commission to deal with the criminal problems in the industry has limited the powers of the interim task force established by the Government under the Workplace Relations Act. Even the proposed new powers under legislation negotiated with the Democrats fall a good

[8] Moncrieff Fabrications Labour Services Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (PR925 at paras 6 and 7).

way short of implementing the Cole Commission recommendations, which included the need to create new offences.

A notable recent example of judicial failure to adequately punish or at least deter union thuggery was the pathetic June decision by a Victorian County Court judge to actually suspend even his one year jail sentence of AMWU member, Craig Johnston, after that gentleman had pleaded guilty to two counts of affray and one count each of criminal damage and assault when he led a team of unionists on a violent and destructive attack on a labour hire firm in June 2001.[9] While it is not surprising that the Government has appealed the decision as "manifestly inadequate", why was there a need for such action? It can only reflect the continued moral incapacity of the judiciary to handle union thuggery and harks back to, inter alia, the Hancock report of 1985, which described unions as "centres of power" that should not necessarily be treated as subject to the law on the same basis as other "subjects".

I now turn to some examples of unwarranted judicial intervention in industrial cases. It needs to be kept firmly in mind, of course, that decisions that are inconsistent and/or extend intervention create considerable uncertainty in business decision-making that will have adverse effects on needed changes in business structure and employment. Importantly also, while some single judge decisions are over-turned at a higher level, many smaller businesses would be unable to afford appeals.

Industrial Action

While the 1996 Act (s127) provided the power to stop or prevent industrial action, the Commission's interpretation of what constitutes "industrial action", and how it should be handled, has been costly for employers, excessively interventionist and increasingly one-sided. Indeed, the absurd situation has now been reached in which employers are being judged to have taken industrial action – even, for example, when they refuse or deny overtime!

Nor has the Commission met the intent of having orders against unlawful union action made promptly and then – if not complied with – enforced by the Federal Court. Commission members have, for example, been slow to hear s127 applications; have adopted the approach of conciliating union claims that unlawful conduct has not occurred; and have also intervened to determine whether action is protected or unprotected at law. The Federal Court has also tried to re-hear findings made by the Commission and –for a time – issued anti-suit injunctions to stop the Supreme Courts making orders against unlawful behaviour at common law if the matter concerned an industrial dispute. In effect, unions are now being allowed to use this section to obstruct or make more costly attempted workplace changes by employers.

In an alleged case[10] of employer "disruption", in AMWU and CEPU v The Age, Commissioner Whelan responded to a union "initiative" by stopping The Age from making workers redundant when it was closing one of its printing plants on the

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[9] On hearing the decision Johnston claimed a "victory for the cause of fighting for workers and the rank and file". The other 16 unionists involved were released on good behaviour bonds and received fines of only between $1000 and $3000 each.
[10] AMWU and CEPU v The Age Company Ltd (Whelan C, 9 March 2004, Print PR 944258; Guidice J, SDP Harrison, Simmonds, PR946290, 11th May 2004).

ground that redundancies by an employer could be categorised as ‘industrial action’. According to the Commissioner, “industrial action is happening….it involves the termination of employees in circumstances which is both a ban on the performance of work by them and a restriction on their ability to perform work…” Conceding the union case that there was an industrial dispute, Whelan added that “an order will have a practical effect and purpose and may lead to resolution of the underlying dispute.” While The Age appealed, and the Full Bench decided that terminations of employment did not constitute industrial action, it left open the question of what changes by management might be regarded as constituting such action.

Union Right to Strike

As a result of Federal Court decisions in the last two year, it appears that industrial action can now be taken in much wider circumstances than envisaged when the ‘right to strike’ was first legislated in 1993 by the Keating Labor government. Conditions were then laid down, and incorporated in the 1996 Act, designed to limit industrial action to certain circumstances, including that it would only be exercisable during the negotiation of agreements but not during their life. Two relevant decisions suggest there are now few if any limits to strike action.

In the Emwest Case of 2002[11], for example, Justice Kenny decided that protected industrial action could be taken during the term of an enterprise bargaining agreement if the strike was over a matter not contained in the agreement. Despite an express prohibition on such action in the legislation, in August 2003 the Full Court upheld Kenny’s decision.

Again, in the Electrolux Case of June 2002[12] a Full Bench of the Federal Court decided that protected industrial action could be taken over a union demand for any matter so long as the demand was genuinely what the striking party sought, meaning that unions are allowed to engage in industrial action regarding ‘non employment matters’ such as the levying of trade union ‘bargaining fees’ on non-union members. If sustained (the decision is under High Court appeal), this would remove another intended limitation that the right to strike could only be taken over disputes or demands which concerned industrial matters (matters between employers and employees).

Extension of Arbitration Role

Under the 1993 legislation parties to a collective agreement had the power to ask the Commission to settle disputes over the application of the agreement. However, under the 1996 reforms, the Commission’s general power to arbitrate was restricted and it has had to search around for ways of recovering its former glory (sic) role in dispute settling.

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[11] Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing &Kindred Industries Union [2002] FCA 61, 6th February 2002, Kenny J; [2003] FCAFC 183, 15th August 2003, French, Marshall, Von Doussa JJ).

[12] Automotive, Food, Metals, Engineering, Printing &Kindred Industries Union v Electrolux Home Products Pty Limited [2002] FCAFC 199

The starting point for the Commission is that all agreements, whether union collective agreements (s 170 LJ); non-union collective agreements (s 170 LK or individual agreements (AWAs), must contain a dispute settling clause. The next step is to get around the 1996 Act limitations by taking a broad view of the role it can exercise under these dispute settling clauses.

Accordingly, the Commission has done two things. First, by hinting/pressuring when an agreement comes up for certification, it has strongly encouraged parties to confer the power of arbitration upon the Commission. It has done this with the help of the unions and the acquiescence of many employers where they have been persuaded that such a role is a normal part of an agreement. Second, it has then interpreted very broadly the dispute settling power that it has encouraged the parties to give to it.

Untrammelled by the statutory limitations on its general arbitration power, the Commission has thus extended its arbitral role in cases such as Qantas Flight Catering[13] and Telstra v CEPU.[14] In the latter case, Vice President Lawler decided that, provided it was consistent with the dispute settling clause, the Commission could even make orders, and summon documents and witnesses. This view was confirmed by the Full Bench, although it overturned Lawler's decision on other grounds. In AMWU v Holden Limited,[15] Commissioner Foggo used the dispute resolution power as a basis for issuing orders preventing Holden from continuing with plans to outsource the manufacture of brakes for the export model Monaro and for requiring that the union be provided with documents relating to the outsourcing. The order was subsequently revoked on application by the parties.

The Commission has thus to a considerable extent restored its statutory powers to arbitrate, including those that were removed by the 1996 Act. In a sense, it has already achieved at least part of what the Labor Party platform proposes. This power has been interpreted to be not even limited to the allowable arbitral matters for award arbitration set out in s89A of the Act.

2004 Redundancy Case

The most striking example of the recent resurgence of interventionism by the Full Bench of the Commission is its decision in the redundancy "test case" initiated by the union movement through a safety net claim under s 88B(2).[16] Despite the opposing submissions of every industry body, the Federal Government and the State Labor governments of NSW, Queensland and Western Australia, the Commission not only decided to end a 20-year exemption of smaller businesses from severance pay obligations but increased the national scale of severance payments from 8 weeks pay per employee (with 4 weeks notice) to 16 weeks (including the 4 weeks notice), with a maximum of 20 weeks depending on years of service and age (maximum 8 weeks in the case of small business). The Commission also ignored the failure of unions to

[13] ASU v Qantas Flight Catering Limited PR939695.
[14] Communications, Electrical, Electronic, Engineering, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Telstra Corporation PR940569 (Full Bench); CEPU and Telstra PR933892 and PR934321 (Lawler VP).
[15] AMWU v Holden Limited PR944673, 17th March 2004.
[16] See Redundancy Case, Decision PR32004, Guidice J, Ross VP, Smith C and Deegan C; and Redundancy Case Supplementary Decision PRO62004, Guidice J, Ross VP, Smith C and Deegan C.

observe undertakings given at the previous "test case" in 1983-84 not to take industrial action to try to increase the standard of redundancy pay then mandated. In practice, unions had succeeded in "forcing" larger companies to concede much higher rates of redundancy pay (most of Ansett employee "entitlements", for example, were redundancy pay).

This use of the "safety net" provision by the Commission confirms its readiness to interpret the legislation to expand its own social policy agenda and to ignore the potential for adverse effects on employment. As the June 2004 OECD Employment Outlook pointed out, "in deciding whether to hire new workers, the firm will take into account the likelihood that firing costs will be incurred in the future. Assuming that wages cannot be fully adjusted to compensate for the fact that firms may have to incur firing costs, hiring decisions will be affected" and "youth, as new entrants into the labour market, and women with intermittent participation spells, will primarily be affected by any reduced hiring". The July 2004 report by Access Economics to the Business Council of Australia reached a similar conclusion.

The government has submitted legislation to set aside the decision insofar as it concerns small business redundancy obligations.

Bias in Approval of Agreements

The contrast between the Commission's approach to the approval of non-union agreements (under s 170LK) and agreements with unions highlights its interventionist and one-sided attitude in regard to non-union arrangements. Whereas consent arrangements with unions are readily approved, those made directly with staff are subjected to a strict rather than commonsense interpretation of the requirement (section 170LK(4)) to give every employee notification that they have the right to be represented in negotiations by a union if they are a union member.

In the April 2004 case Re S J Weir Certified Agreement[17] the Commission's Full Bench ruled that the agreement directly with employees could not be approved despite the notice to employees saying that "If you are a member of a union you can if you choose to do so require the union to represent you during the bargaining period, however this is not mandatory". In June in Re St Hilda's Anglican School[18] the agreement for 68 non tuition employees was not approved despite the notice to employees stating "if you are a member of the union you may wish to discuss the draft agreement with your union representative…if there is a demonstrated need a meeting of affected staff and negotiating representatives will be arranged." Similarly, in Re Electrical Elite Services[19] the Commission rejected a certification application despite the company notice saying that "any employee (if you so wish) has the right to be represented by a member of an organisation."

In effect, employers taking the 'innovative' approach of trying to make agreements directly with staff are not only compelled to spell out union rights - but to do so in a way that requires forensic translation of words in the statute into a dialogue with staff.

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[17] CFMEU and SJ Weir Pty. Ltd., PR947609, 7th June 2004 (Full Bench) PR 945564 (Grainger C)
[18] Re St Hilda's Anglican School (AIRC Thatcher C., Print PR947966, 14th June 2004).
[19] Elite Electrical Services (Australia) Pty Ltd Certification of Agreement 2003-06 PR 947907.

Commercial Disputes

The increasing use by businesses of independent contracting arrangements to avoid industrial regulation has produced not unexpected responses from State Labor Governments, State industrial tribunals and unions designed specifically to extend industrial regulation into contract or commercial arrangements. This important issue is being addressed by another speaker and I want to draw attention to only one or two aspects that indicate the extent of resistance to attempts by the business community to enter the forbidden world of reduced regulation.

First, although there is some doubt as to the extent to which in practice it can be made to apply to contractors, s275 of the Queensland Industrial Relations Act, 1999 now purports to give the Queensland Commission a power to deem independent contractors to be employees.

Second, unions in NSW are seeking orders from the NSW Commission to impose restrictions on the use of contractors, to compel union involvement in decisions to outsource labour or to contract for the performance of work (as well restraints on the hiring of casual staff). The unions have presented this as a test case for 'security of employment' and that is how it is being treated by the Commission.[20]

Third, although the NSW Court of Appeal determined in the Solution 6 case[21] that, under the unfair contracts provision of the NSW Act (s106), the NSW Commission can only consider contracts with an industrial character that are "closely related to the performance of work", it remains to be seen how this works out in practice. The case was about the sale of shares and some suggest that it is only contracts such as collateral arrangements, share sale deals, sales of businesses, leases and finance agreements that would be excluded from the NSW Industrial Relations Commission's jurisdiction.

However, the judgments in this case (Chief Justice Spigelman, Justices Keith Mason and John Handley gave three separate but supporting judgments) are of particular interest in regard to assessing the capacities of Commissioners to make decisions affecting "commercial" matters. Spigelman CJ said the NSW IRC's power to void or vary contracts or arrangements "does not extend to a provision which has no relationship whatsoever to the performance of work". "Specifically, the formula for computation of the purchase price, in my opinion, has no such relationship and the Commission has no power to vary it". On this basis the Court concluded that the Commission had overstepped its jurisdiction in a manner that was "patent, plain or clear" and suggested the Commission had few capacities to determine commercial matters, viz;

> "The Commission is comprised of judges drawn in large measure from the specialist industrial law bar. Few, if any, of the members of the commission

[20] Secure Employment Test Case C4330 of 2003.

[21] Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW & Ors [2004] NSWCA 200. In the earlier Mitchforce case (Mitchforce Pty Ltd v Industrial Relations Commission of NSW and Others (NSW Court of Appeal, Spigelman CJ, Mason P, Handley JA [2003] NSWCA) the same full bench had also decided against the NSW Commission having the power to intrude into "commercial" matters.

> have substantial experience of commerce or of commercial law. Where, as here, relief is sought with respect to matters which do not relate to the performance of work, the Commission is not a 'specialist tribunal' of the kind referred to in the authorities, whose expertise should be accepted by a court with supervisory jurisdiction"

One cannot help thinking that these observations might also be relevant to so-called industrial matters, given that they have clear "commercial" implications that do not always seem to be adequately taken into account.

Secondary Boycotts

As mentioned, some Federal Court judges continue to allow their imbalance of power "philosophy" to dominate their attitudes. Justice Gray again highlighted this with his obiter dicta in the Transfield/Patricia Baleen case[22], which involved industrial action by unions against the engagement of contractors engaged under Australian Workplace and non-union enterprise agreements (under s 170LK). However, although the unions established a picket, mounted a purported 'community protest' and engaged in secondary boycott activity, orders by the Commission and the Federal Court were not complied with and it was only after months of economic damage and unlawful activity that, for once, the Australian Competition and Consumer Commission became involved.

The ACCC concluded that breaches of the secondary boycott provisions of sections 45D and 45E of the Trade Practices Act had occurred and then reached an agreed position with the unions for penalties on each union of $100,000 plus certain processes to prevent future secondary boycott activity. The agreed settlement had to be approved by the Federal Court.

While Justice Gray had little alternative but to approve the agreement, he took the opportunity to deliver a scathing assessment of the agreed penalty of $100,000. In his view, despite the maximum penalty being $750,000 under the legislation, this was too far high, particularly as unions do not engage in unlawful conduct for their own gain – but for the gain of their members. In short, never mind about the rest of the community! Gray J even asserted that the ACCC, in pursuing penalties at that level, had gone close to acting beyond its proper charter as a regulator.

Union Right of Entry

Under the 1996 Act there is a limited and conditional right of union entry to businesses operating with non-union and/or individual Federal agreements (AWAs).[23] Under State industrial laws such entry is also allowed. However, in BGC Contracting v CFMEU[24] Federal Court judge, Justice French, held that unions could exercise

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[22] Transfield/Patricia Baleen Case Gray J, [2004] FCA 517, 30th April 2004.
[23] The right of entry is to investigate breaches of awards, union agreements or the Act. As most non-union agreements, and many AWAs, have an award underpinning them, unions are able to argue that they need to investigate a breach of the underpinning award.
[24] BGC Contracting v CFMEU (Federal Court of Australia, French J, 29th July 2004, Matter No. W38 of 2004).

rights of entry under State industrial laws notwithstanding that the employees were employed under federally approved Australian Workplace Agreements.

According to Justice French, there is no inconsistency between the State and Federal laws that would invalidate the State laws through the operation of section 109 of the Constitution … "the fact that each Act deals with rights of entry is insufficient to demonstrate either direct inconsistency or entry by the State legislature into a field covered by the Federal Act." It would be surprising if this decision survived an appeal to the High Court.

The CFMEU, the union most "interested" in rights of entry to "persuade" non-unionists of the error of their ways, not surprisingly publicly applauded a decision that potentially allows unlimited use of State entry laws. Potentially, it provides an entrée into rights of entry conferred on unions by State industrial relations and occupational health and safety laws regardless of the nature of the employment agreements.

Safety Net Wage Case

The 2004 safety net wage case[25] decision predictably took the mid point between Commonwealth government submissions and a union ambit claim and increased the minimum by 4.2 per cent to $467.40 per week, making a 34 per cent increase since 1997 ie well above inflation. And the decision also increased over 20,000 separate arbitrated award classifications ranging up the income scale, resulting in the absurd situation of arbitrated "minimum" award wages in excess of $1000 per week.

This is not the occasion to analyse the economic and social implications of continuing Commission decisions that produce the highest or second highest minimum wage relative to the average (and the most regulated) in the developed world. The difficulty of justifying any minimum from a social policy perspective has already been mentioned and that is enhanced once it is understood that those not employed – the over 1 million who say they would like a job but do not have one – do not seem to be taken into account by the Commission.

Indeed, while acknowledging that its decision may result in job losses in award reliant industries, the Commission reached the remarkable conclusion in the 2004 case that: "It ought now be regarded as well established that the expression 'low paid' in s88B(2) refers to the low paid in employment and does not extend to include the low paid who are not employed."[26] Leaving aside the internal contradiction (those not employed cannot be "low paid"), by contrast with some other Commission interpretations giving itself powers, the Commission seems thus to be interpreting the Act as not providing it with authority to take account of the position of the unemployed. This raises the question as to whether the position of the unemployed was adequately argued by the Federal Government during the case, let alone why no public comment on the issue was made after it. There would appear to be a strong case for amending the Act to require that, when considering the safety net under s88B 2, there are no adverse effects on the unemployed.[27]

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[25] 2004 Safety Net Review (AIRC Full Bench 5th May 2004, Print PR 002004).
[26] Ibid page 73.
[27] The Federal Government has introduced legislation - the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003 – designed to achieve this.

The Commission's fall back justification is that it needs to deliver minimum wage increases because 'not all employees are capable of bargaining and bargaining is not a practical possibility for those employees who lack bargaining power'. But even if this extraordinary justification were accepted, it would surely apply to an even greater extent to those *outside* employment. On any substantive assessment, the Commission's pronouncements in this area have no basis and are clearly discriminatory against the unemployed.

Of course, the Commission can also fall back on the legislative requirement to provide a "safety net" and the Government's continuing (and regrettable) support for an annual minimum wage increase. But, given the potential adverse effects of having a high minimum and the social policy futility of it, a Commission that was more cognizant of the realities might reasonably be expected to produce increases that are much more moderate and at least below the inflation rate.[28]

Conclusion

While the judiciary is an important institution of government, this does not mean it should have an unlimited or quasi-policy role or that a reduction of its role in some area constitutes an unwarranted attack on its independence. Moreover, as the Chief Justice himself has implied, the trend in judicial decision-making has potentially damaging implications.

Nowhere is this more evident than in the area of workplace relations. Moreover, the recent record of decision-making I have outlined suggests that the trend is both worrying and indicates the relevant institutions are out of touch with what is happening in the rest of society. I am referring here, of course, to the increasing desire of individuals to make their own independent decisions and their increasing capacity to do so. The decline in union membership to around 17 per cent of private employees is but one indication of this. Yet the industrial judiciary continues unabated to attempt to make more and more decisions for employer/employee arrangements or at least to prescribe what should be included in those decisions.

What is the solution in the industrial area? Dennis Rose concluded that "citizens are entitled to be, and indeed ought to be concerned (and even outraged) by judicial behaviour" of the kind displayed by Justices Deane, Toohey and Gaudron in a judgment he analysed. One wonders what he might say about some of the judgments in the AIRC or the Federal Court. But the reality in that area is that the hides are thicker than those of the proverbial rhino and even a savage critique is likely to have no more than a marginal effect on judicial behaviour.

Another option is to improve the appointments that are made to the relevant institutions and, in particular, to their heads. But while this is certainly something to which a re-elected Coalition should give priority, it seems unlikely that much improvement could be achieved if the existing institutional and legislative framework

[28] Real minimum rates of pay fell over the twenty years from 1975-76 to 1995-96. See my "The Case for Further Deregulation of the Labour Market", p37.

is maintained. Lawyers (and others) cannot resist using and "developing" powers they are given.

The only way to effect a major reduction in the role of the judiciary in industrial relations is for the political arm of government to make a major change in existing institutional arrangements. Closing down the AIRC is probably too large a political step in one go but it should be possible to convert it into a mediatory body with no legal powers of arbitration or intervention. The ACAS approach in the UK, which is widely used and which unlike the AIRC has established itself as impartial as between employers and employees, has many attractions. A wholesale revision of legislation would also be required.

Finally, whatever institutional changes are contemplated will require a very major political exercise to persuade the community that 100 years of holy grail in industrial relations is more than enough.