The Public and Private Politics of Industrial Relations – 'Are We In Or Out?'

Address given by the Honourable J.W. Shaw, QC MLC, then Attorney General, Minister for Industrial Relations and Minister for Fair Trading to the Conference of the New South Wales Industrial Relations Society 1998, Bowral, NSW. Assistance was provided by David J Mesman, Policy Officer, NSW Department of Industrial Relations, in the preparation of this paper.

Introduction

The Public and Private Politics of Industrial Relations – 'Are We In Or Out?' – this was the theme at the NSW Industrial Relations Society Annual Conference held at Bowral, NSW, in 1998. This paper addresses the private and public politics of industrial relations and the role Government should play in industrial relations, and examines the following issues:

- the cooperative and constructive role that government can play in Industrial Relations;
- the importance of tribunals in Australian industrial relations; and
- the collective nature of the NSW Industrial Relations system.

Constructive Role for Government in Industrial Relations – The Importance of Industrial Regulation

Work is one of the touchstones of modern life. In fact, it is probably the single most defining factor in our lives. In the post-modern era, work gives meaning to our lives in ways which go beyond pedestrian issues – such as remuneration and working conditions. From the time we get up in the morning, to the amount of money we make, to where we live and with whom we interact – all of these issues are shaped by our work.

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To a large extent, work defines who we are and how we see ourselves. In McCallum's and Pittard's (1995) text on labour law, they note that:

> The employment relationship is also a significant social relationship, not simply because workers and employers have to co-operate harmoniously in the production process, but because the work environment is, itself, central to our culture and quality of life.

For this reason alone, the Government has a responsibility and a duty to ensure that industrial relations are conducted in a civilised fashion. 'Civilised' is emphasised, not to be pedantic, but to draw attention to the fact that without a flexible and well defined legislative regime, industrial relations can devolve into a Hobbesian struggle in which the nasty, brutish and short triumph ...

Industrial regulation serves a large number of conflicting and demanding masters. For example, the *Industrial Relations Act 1996 (NSW)* has a series of competing objectives that are, at times, difficult to reconcile. These objects include promoting efficiency and productivity in the State economy while, at the same time, facilitating appropriate regulation of employment and cooperative workplace reform. However, animating the NSW industrial system is the objective of providing a framework for the conduct of industrial relations that is fair and just.[1]

It is interesting to note that the *Workplace Relations Act 1996* (Cth) ('WRA') has no equivalent objective to promote justice or fairness in industrial relations. Indeed, justice and fairness had little to do with the Federal Government's active participation in:

- the Dubai fiasco;
- the intricate corporate manoeuvring that preceded Patrick's sacking of 2000 workers on the waterfront; and
- keeping the waterfront dispute out of the Australian Industrial Relations Commission ('AIRC').

Moreover, fairness had nothing to do with Mr Reith's appearance on national television, in early April 1998, to make an announcement that Patrick planned to sack its workforce. Beyond the obvious lack of professionalism, these actions underline the Government's contempt for workers and their legitimate concerns. This also serves to highlight the regressive and outdated IR tactics that the Federal Government and the Patricks in this country support.

At the centre of Mr Reith's and Mr Howard's vision for industrial relations in this country is the creation of a culture of fear:

- fear over job security;

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- fear over joining a trade union;
- fear as a spur to make an employee work harder; and
- fear as a way to make workers accept poor employment conditions.

They have already created a culture of resentment and uncertainty in which workers may be sacked – indeed, with the active support of the Federal Government – if they do not bow to management demands. This is not the vision for industrial relations in NSW.

In NSW, a model of flexible industrial regulation that is premised upon encouraging workplace reform and equitable, innovative and productive workplace relations has been developed. It is counter-intuitive to believe that an employee will work productively in an environment that is characterised by uncertainty, fear and bullying. Coercive tactics can at most ensure that employees attend at the worksite. However, it cannot guarantee the *quality* of performance which is required to meet contemporary competitive pressures. Progressive management strategies understand that workers who take pride in their labours, who take an active role in the direction of the company and who are seen as more than simple extensions of cranes and machinery – are empowered and thereby more productive.

Empowering employees and creating an environment of trust and cooperation – this is the approach of the NSW Government. For example, the majority of enterprise level industrial instruments registered in NSW in 1997 contained provisions dedicated to consultation with employees and unions. In the case of enterprise agreements, more than 73 per cent of all such agreements registered in NSW in 1997 contain formal mechanisms, such as consultative committees, to facilitate dialogue between management and employees.

One of the major failings of the Federal Government is that it maintains a 'hands-off' policy in industrial disputes and will not use its power to bring industrial parties together. A case in point is the waterfront dispute. Rather than enabling discussions and brokering a conciliated resolution, the Federal Government carefully chose the maritime industry and engineered the waterfront dispute to break the MUA and the trade union movement in Australia. This is not the proper role for a Government that is meant to represent all Australians.

Considering the economic damage caused by the waterfront and similar disputes – such as Rio Tinto – it begs the question – to what end? The answer, in a word, is ideology.

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From the commencement of the 1998 waterfront dispute, the Howard Government – and the Hon Peter Reith in particular – supported an ideological battle being waged by Patrick Stevedores and the National Farmers Federation (NFF). The emphasis is on 'ideological' as the Federal Government, the NFF and Patrick have never embraced true efforts at waterfront reform, but instead they have repeatedly blamed inefficiencies on the workforce. Studies such as the Federal Government's own Productivity Commission (1998) report do not list poor work practices as a significant factor related to low productivity on the waterfront. A number of factors affect efficiency in Australian ports. These include demand fluctuation, the thinness of Australian shipping lanes, number of cranes used per ship and so forth. This assertion is supported by an analysis of the Productivity Commission's Report by statisticians from the University of New England's Centre for Efficiency and Productivity Analysis (CEPA). CEPA confirms that the Productivity Commission's report did not say that inefficiencies are entirely or even partly due to poor work practices. According to the CEPA's analysis of the Productivity Commission's report, Australian ports perform better than overseas ports by a factor of two crane lifts per hour.

Regardless of the statistics employed, it is clear that waterfront reform is necessary and that a myriad of factors leads to inefficiencies in that sector. Despite this fact, Patrick and the Federal Government are content to demonise the workforce, rather than embrace true reform efforts on the waterfront. This is unacceptable. What is needed at the waterfront is a commitment to reform and to cooperate with the industrial parties.

While a confrontational approach may, in the short term, gain political points for the Federal Government, it is ultimately destructive for industrial relations and industrial relations reform in this country. The NSW Government has made significant efforts to bring the parties together in this dispute. The NSW Premier, The Hon Bob Carr, has offered to make available the President of the NSW Industrial Relations Commission, His Honour Justice Wright QC, to resolve the dispute which, despite the latest High Court ruling, appears to be dragging on. The Premier also proposed a five point plan to end the dispute in addition to making concerted efforts to initiate true dialogue on waterfront reform. The NSW Government already has a model for consultation – the Industrial Relations Consultative Committee (IRCC).

The IRCC was established by the NSW Government to provide a forum for discussion and review of the NSW industrial relations system by major industrial organisations.

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The IRCC brings together representatives from the major private sector employer organisations, unions, academics and government departments. The mission of the IRCC is to find constructive and cooperation solutions to major industrial issues. Like the IRCC, a waterfront consultative committee could examine all the factors that affect waterfront productivity and propose constructive and cooperative solutions. It is the element of cooperation that is missing from the waterfront reform debate.

While it is clear that productivity can be increased on the Australian waterfront, work practices are only one of many factors that must be examined to achieve these productivity gains. True productivity can only be realised in an environment of trust and cooperation and with a true commitment to reform. Reform can and must be a 'win-win' situation for all parties involved. The NSW Government has already shown the way to achieving these reforms.

Companies that enter into the spirit of cooperative workplace reform, rather than the destructive and confrontational methods sanctioned by the Federal Government, promote true gains, both for employers and workers alike.

The Need for an Industrial Referee

Since the turn of the century, the hallmark of industrial relations in this State and Australia has been a strong system of compulsory conciliation and arbitration. In 1901, NSW enacted the *Industrial Arbitration Act* and in 1904 the Commonwealth enacted the *Conciliation and Arbitration Act.* Both statutes emphasised compulsory conciliation and arbitration as a means to minimise industrial conflict. This hallmark continues to animate our current industrial framework in NSW. I draw your attention to object 3(g) of the *Industrial Relations Act 1996*. That object reads as follows: *To provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality.* In other words, industrial law is meant to provide a framework which will maintain industrial peace and minimise disruption to the economy. In that way, ships can move, goods can be sold, people can be employed and the economy can prosper.

When Peter Reith introduced the *Workplace Relations Act,* he made no secret that he was intent on clawing back the powers of the AIRC to the bone. This was all done in the name of removing so-called 'third party' interference – i.e. the role of the AIRC and trade unions – in the relationship between employers and employees. The tragedy is that, under the *Work-*

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place Relations Act, the Australian Industrial Relations Commission has no power to force parties to arbitrate unless the parties agree or where special circumstances warrant arbitration. In the recent Rio Tinto matter, the company did everything in its power to avoid arbitration. The NSW Government successfully argued that the AIRC should arbitrate as the dispute was causing severe economic damage to the Hunter Valley Region. The original judgment was overturned by the Full Bench of the Australian Industrial Relations Commission which refused to intervene and would not grant an order forcing the parties into arbitration. This judgment sat nicely with the Federal Government policy.[2]

Indeed, documents uncovered during the legal battle over the waterfront make it abundantly clear that Minister Reith followed a concerted strategy – since as early as March 1997 – to ensure that the waterfront issue would not be arbitrated by the AIRC.

This policy is in direct conflict with the *Workplace Relations Act* (WRA) which envisages an active conciliation and arbitration role for the AIRC. In particular section 3(h) of the WRA enables: *...[T]he Commission [the AIRC] to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration.* It is clear the federal legislation is aimed at minimising industrial disputes. However, it is also clear that the Federal Government's policies do not support this object. This policy stands in stark contrast to the manner in which industrial relations are conducted in NSW and a key policy theme of the NSW Act – to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

The actions of the Federal Government are anything but co-operative, equitable or innovative and, as discussed earlier, these policies do not lead to true productivity gains. From these matters, it is clear that the men and women of NSW and Australia cannot count upon the AIRC to intervene in and bring about a speedy resolution to industrial conflicts. The Federal Government's inability – and unwillingness – to bring about a swift resolution to industrial conflicts has already had and will continue to have a devastating effect on NSW's and Australia's economy. Indeed, it seems abundantly clear that the Federal Government is willing to sacrifice the economy of this country for little more than advancing its ideological agenda. These deplorable actions would never have occurred under the NSW IR system. Of fundamental importance to the NSW industrial system is an emphasis on the conciliation of industrial disputes in preference to arbitration and, where necessary, fair arbitration through the NSW Industrial Relations Commission.

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The NSW Industrial Relations Commission has appropriate power to deal with industrial disputes. If a dispute ultimately requires arbitration, then the NSW IR Commission has the power and the will to arbitrate. In this way, industrial peace is fostered as is the economic viability of NSW. Sadly, this is not the case in the Federal IR system. The jurisdiction of the AIRC has been so limited by statute and political will that industrial disputes simply cannot be brought to a speedy resolution. As a consequence, the people of Australia can count on the escalation of industrial disputes within the federal system. This will continue to cause unparalleled damage to the economy and the livelihood of decent working people in this country. Again, one has to ask why? If these disruptions served some higher purpose, like the Federal Government claims – to increase productivity, they could be rationalised. However, the truth of the matter is that these are ideological battles being fought for power and money and without thought of simple issues such as fairness and justice.

Collective Nature of the NSW Industrial Relations system – The Legitimate Role for Trade Unions

Another key difference between the NSW and Commonwealth Industrial Relations systems is that the NSW Act explicitly acknowledges the legitimate role of unions and employer bodies.

One of the aims of the NSW Industrial Relations Act is to: *encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies.*[3] Again, there is no equivalent object in the federal legislation.

At the same time, the *Workplace Relations Act* guarantees the freedom of association. However, what is most telling about the WRA is that it guarantees that right in the negative, as well as the positive sense. In particular, section 3(f) of the WRA promotes the following object: Ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, **or not to join an organisation or association**. (Emphasis added)

It is interesting to note that the Federal Government's Office of the Employment Advocate (OEA) was established to ensure that individuals were protected from victimisation both from employers and trade unions alike. However, to date, the OEA has only dealt with victimisation actions against trade unions for pressuring individuals to join a given union. This is yet another example of how the *Workplace Relations Act* is 'in to' the

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protection of workers' rights, but sadly the Federal Government and its policies actively oppose these objectives. It is clear from the belligerent and anti-union activities of the Commonwealth Government that there is no place for unions in its industrial relations framework. This has been made abundantly clear by the Federal Government's active support of Patrick in the waterfront dispute and the underwriting of the now-uncertain redundancy scheme for the wharfies. There is something deeply disturbing in a Government intervening in a private employment relationship and then aiding in the persecution of individuals who are members of a trade union. In light of its actions on the waterfront, there is also a strong assertion to be made that the Federal Government has breached its international treaty obligations by permitting individuals to be victimised for being members of a trade union. This does not sit very well with the objective in s. 3(k) of the *Workplace Relations Act* that reads as follows: *'assisting in giving effect to Australia's international obligations in relation to labour standards'*.

The conflict at the waterfront has sweeping implications – not only for maritime workers, but for all working people in this country. If the federal IR system and its policies prevail, secure employment conditions and the democratic rights of workers will continue to be undermined. Since its introduction, the federal *Workplace Relations Act* has forced many workers into individual contracts and undermined the role of trade unions. It is interesting to note that Peter Reith's own Department of Workplace Relations and Small Business has rejected individual contracts in favour of an award agreement. I draw from one of the objects of the *Workplace Relations Act* (3(b)) that seeks to ensure 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 levels'*. This is a fallacy. Individual workers simply do not have the bargaining power to 'determine matters affecting the relationship' between themselves and their employer.

To quote from Creighton and Stewart's text on labour law:

> ... [W]ith the economic recession of the later 80s and the early 90s, market forces moved in favour of employers. This caused them to try to 'roll back' some of the gains made by the unions in the boom years of the ...70s and ...80s. In particular, they began to assert their so-called 'freedom of contract' – that is, their right to negotiate directly with workers on an individual basis, rather than through the agency of a trade union. Naturally, the employers expected to be able to drive a more advantageous bargain when faced with an individual worker, rather than the collective strength of a trade union.

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The irony is that the quote from Creighton and Stewart was not referring to the 1980s and 90s, but rather the 1880s and 1890s. Regardless of the era, the point is still valid. The Federal Government has enabled employers, through the *Workplace Relations Act*, to roll back gains made by workers in this country. It is interesting how history repeats itself. However, it is tragic that the Federal Government supports policies which are so regressive.

Conclusion

Government has an essential role to play in industrial relations in that it has the power to establish the ground rules under which the industrial parties play. Of fundamental importance to the industrial system in NSW is an emphasis on balance – a balance between the legitimate needs of workers and the need for reform and productivity. This is reflected in NSW legislation and industrial practice in this State.

NSW, is about supporting a pro-active, effective and strong industrial referee that minimises industrial disputes. We support freedom of association in its true sense. NSW also supports cooperative workplace reform that leads to true productivity gains, for all industrial parties. Above all else, the NSW Government aims to provide a framework for industrial relations that is fair and just. Sadly, these basic values are lacking in the federal industrial relations system.

Notes

1 S. 3(a) *Industrial Relations Act 1996.*
2 Subsequently, see *CFMEU and others v. AIRC*, NG 257 of 1998, 6 November 1998, Federal Court of Australia, Spender, Moore and Branson JJ.
3 Section 3 (d), Industrial Relations Act 1996 (NSW).

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