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An Employer Perspective

Ron Baragry*

I will attempt to put forward some personal views from the perspective of employers in response to some of the themes taken up by the very eminent panel of industrial intellectuals who have provided plenary papers.

In trying to put forward representative approaches I am falling into the trap of appearing to treat employers as a homogeneous group. This is quite contrary to my own experience that employers come in all shapes and sizes and can have disparate views conditioned by specific industries, economic circumstances, geographic location, objectives, and a myriad of other considerations. What one does at all times in representing employers is to attempt to distill opinions and aims into a strategy that accommodates as much as possible of the stated requirements of those employers you represent. I will bear this in mind in this paper but without doubt there will be employers who would not agree with all of what I have to say.

Professor Ron McCallum is a man of soaring intelligence and unique ability to analyse and anticipate the human condition in his chosen field of industrial law. He has probably contributed more to the understanding and teaching of industrial law than any previous Australian. It is therefore ironic that I must take him to task in respect of his primary statement of the ground-rules of industrial law.

His first substantive statement is that he has always regarded the purpose of labour law to be to ensure that working men and women receive fair entitlements and conditions in return for their labour.

This is a statement that one could accept in respect of earlier years of industrial law when many employers may have been all powerful and self serving. In modern times and in particular the twenty-first century, it has become necessary to qualify the purpose of labour law as stated by Professor McCallum by adding that the consideration for fair employment entitlements should not only be the labour provided by employees, but also it should require them to be fair in their treatment of their employer.

We are in an environment of heavily regulated employment conditions that guarantee minimum entitlements over a wide range of matters through various legislative means. The scope of such obligatory employment benefits is very wide and the benefits received by workers are far superior to those of past years. There are employers who object strongly to this regulation just as there are workers who consider that such benefits are inadequate bearing in mind the perceived profits of employers. There are, however, many employers who welcome regulation as

* Ron Baragry LLB, MLLR (Syd) is a legal practitioner with many decades' experience advising clients in private legal practice. He is presently legal counsel for the Australian Industry Group.

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indicating what are fair standards to provide employees, and who want to know that they are providing the benefits to employees that should be universal. These are the same employers who are providing the means for workers to achieve a standard of living and security that would have amazed our grandparents.

Accordingly employers in this era should be entitled to be treated fairly by their employees just as they are required to treat their employees fairly.

Sadly, employers encounter a minority of workers who engage in practices such as using all sick leave entitlements as additional recreational leave, making false workers compensation claims, exploiting stress leave, refusing fair flexibility requests in performance of work, using false grounds as reasons for stoppages of work etc.

These are complaints that need to be aired as the media and the public are all too quick to condemn employers at every opportunity, and to ignore the transgressions of workers.

There are two particular areas where employers are entitled to fair treatment and those areas involve industrial action and unfair dismissal claims.

The right to strike was a legitimate weapon in long gone days of employer autonomy. In the current time of highly regulated employment entitlements it is a primitive weapon that does not benefit either employer or employee. Even its current highly regulated and limited use is capable of causing critical loss to both employers and employees in the case of a protracted negotiation of a workplace agreement. It is essential that future industrial lawyers find a civilised way of dealing with industrial disputes that does not involve the financial losses imposed on both employers and employees by industrial action.

The much maligned WorkChoices laws introduced secret ballots for industrial action and one suspects that those laws have been greeted with relief by many parties aligned with employee interests who have been concerned at past excessive use of industrial action. The benefits of the significant decline in time lost for industrial stoppages are being felt by employees as well as employers, and are adding to the nation's economic strength.

There was nothing more sapping of goodwill between employers and employees than past periods when some employees in pockets of industries enforced a culture of industrial stoppage after stoppage, on flimsy grounds.

The area of unfair dismissal is one where employees exploited loose legal prescription that led to the former Federal Government's responsive legislation. That legislation has been the subject of extreme political criticism but even among the critics of that legislation there was general agreement that the laws had not been working as they should have and that reform was necessary. As an example of how the pre-WorkChoices unfair dismissal laws were operating, one should read *Brown v Aristocrat Technologies* [2005] AIRC 656 (27 July 2005), where a hearing before the Commission took up four days of hearings with 11 witnesses, and also involved preliminary conciliation hearings. The facts of the matter speak for themselves as constituting a case where termination was clearly justified, yet the employer was put to considerable expense, inconvenience and loss of time of employees acting as witnesses, to defend its decision.

Seen through the eyes of employers, the former unfair dismissal laws reduced the reason for dismissal to a relatively minor consideration in dealing with unfair dismissal claims. The current Federal Government has promised new unfair dismissal laws that avoid the technicalities and delays of the past. Employers encountered by me want to be fair in the dismissal process, but recognise that dismissals are necessary on occasions. They hope very much that the new laws will be fair to all parties.

In his paper Professor McCallum deals at length with collective agreements and the role of unions in the contemporary workplace.

Most typical employer organisations have had long and highly tested relations with many unions, and are prepared to recognise the worth of unions and to deal with them in a way that is productive for all parties. Many industrial disputes have been solved to the mutual satisfaction of all parties by the intervention of employer associations and unions. The past importance of trade unions in achieving gains for employees and the abilities and dedication of many of the officers of the union movement can be acknowledged.

What must be accepted however is that unions must develop according to contemporary requirements. The traditional adversarial aggressive stance against employers taken by some unions in the past has been overtaken by the national need for unions and employers to have a common purpose. Such a common purpose arises from the mutual need for the employer to be successful in a shrinking world of razor sharp commercial competition. Employers who ultimately succeed pass on the benefits of that success to their employees.

In this new world with minimum commercial boundaries, the model for union-employer relationships must be one of support and assistance to advance the success of the business and the consequent benefits to employees. By adopting a policy of adding support to the commercial objectives of the business, unions will guarantee their own recognition and role in workplaces. Too often in the past have unions expected employers to be responsible for facilitating union membership, rather than the union offering services to employees that are attractive to those employees. Employees who see unions as having a good relationship with their employer while still acting as a conduit between the interests of each party in a productive way, will be willing union members. Any approach involving driving a wedge between employer and employees will be counter-productive of willing union membership.

The concept of bargaining in good faith referred to by Professor McCallum, is a difficult concept to apply in practice. It has different meanings for different people and it should never be assumed that it has a defined meaning not related to the context of its use. From an employer's point of view, it is acceptable if it means being required to sit at the bargaining table, listen and make responses either by way of new proposals or by rejection of proposals made.

Equally, any compulsory requirement to make offers or to compromise is unacceptable for the simple reason that most employers are governed by the markets they are operating in so far as the wage entitlements they can offer. Any assumption that a party should be obliged to make an offer or accept an offer, begs the question as to what is a fair barometer of that assessment. To introduce

a third party to set levels is to return to the days of centralised arbitration with all the attendant economic problems that were recognised in the past by governments consisting of both major political parties.

I agree wholeheartedly with Keith Hancock that the industrial agenda has been reshaped from the days of the 1980s but I disagree with some of his ideas developed from this premise.

He states that the AIRC was able both to raise standards over time and to introduce new standards reflecting industrial and social priorities. This is a crucial role and it can be argued that it is easy to be generous with other people's money. Too often we saw the AIRC granting benefits such as annual leave loading that contributed little to either the economy or to workers' improvement. There are arguments available to support the contention that the Federal government is responsible for the Australian economy and it should be the one to set living and working standards. If there is any doubt that the community will reject a government at the ballot box when it is dissatisfied with its industrial policies, such doubt should now have been dispelled.

The AIRC should have a role in resolving disputes with powers greater than under the existing laws, but the return of arbitration powers to it raises a number of major economic problems that have now been dealt with satisfactorily.

I see no reason to disband the AIRC and replace it with another body and I encourage the Government to re-visit this strategy.

Professor John Niland was without a doubt a trail blazer in industrial law theory and I have fond memories of spending long periods over his Green Paper devoted to experimental change. He now can be seen as an academic ahead of his time and his 'rights/interests' model was a precursor of some elements of our current systems.

His experimental legislation was unfortunately seen by the industrial relations family as being too technical for easy absorption. Judged by today's standards that assessment is almost a joke given the complexity of WorkChoices and the *Transitional Forward with Fairness* legislation. It was unfortunate that his system was limited to the NSW jurisdiction as this did not encourage widespread assessment to take place.

I join heartily in Professor Niland's call for a bold transition to a unitary system for the private sector. The economic waste of multiple different industrial systems is entirely unjustified and incomprehensible to our international colleagues. The various State Industrial Commissions have done a wonderful job in a different time, but their role is now overtaken by the need for a cohesive national system.

I also agree with Professor Margaret Gardner that in the light of current constitutional interpretation we are near to having only one industrial relations system for Australia. I cannot continue my agreement with her as to the 'whimsical change' that can be expected from ideological predisposition of parties in power. Once again I make the point that the power of the perceptions of the Australian people has been well demonstrated not to tolerate dissatisfaction with the industrial policies of a ruling party.

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In conclusion I join with Margaret Gardner in recognising the 'Higgins' moment that now exists with the opportunity to create an industrial system that will meet the aspirations of all industrial parties. This is a formidable task but if it is to be achieved it will be by all participants realising that we all have a common objective no matter what our role is in the industrial system. That common objective is to work towards and promote the prosperity and security of the Australian nation.

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