ON THE *WATERFRONT*

Margaret Lee

Union busting and 'reform' on the docks.

Late on the night of 7 April 1998, teams of uniformed, masked security guards, armed with automatic weapons and accompanied by guard dogs, suddenly and forcibly removed workers from every Patrick Stevedores dock in Australia. Some security guards told a few workers they were sacked. By morning they were locked out of the docks, and oncoming shifts were refused entry. About 2000 workers were affected. No notice was given to the workers, nor were they favoured with reasons for their removal. The provisions of the Federal Stevedoring Award and certified agreements requiring consultation in the event of proposed workplace change were ignored. The workers were all members of the Maritime Union of Australia.

On 8 April, non-union workers employed by P & C Stevedores (PCS) began work on the Patrick docks. PCS is a stevedoring company new to the Australian waterfront owned by the National Farmers Federation (NFF). It emerged in proceedings before the Federal Court the same day that the Patrick group of companies had been secretly restructured in September 1997. This had ultimately enabled the Patrick Operating Companies to place the companies that employed the MUA workers in administration. They had not yet been dismissed, but their dismissal was imminent because the employing companies had no assets and no way of continuing in business. The Minister for Workplace Relations and Small Business, Mr Reith, presented a Bill (fortuitously to hand) designed to establish a government-run redundancy scheme for retrenched waterfront employees based on a government guaranteed loan of $250 million.[1] It appeared that Patrick had successfully de-unionised its docks.

These alarming events are a part of a bitter and ongoing industrial dispute on the waterfront which began in earnest in September 1997, when an unsuccessful attempt was made in Cairns to replace MUA stevedores with non-union workers.[2] However, the situation had been transformed by mid-May. The MUA workers were back on the job in accordance with interlocutory injunctions issued by the High Court. The injunctions returned the parties to the pre-April 7 position but were expressed not to prejudice administrators' functions under the Corporations Law. The MUA had claimed, among other things, that Patrick, the NFF, various officers associated with both companies, and Minister Reith had together conspired to dismiss the union workers in breach of the *Workplace Relations Act 1996* (Cth) (the WR Act). Chris Corrigan, Managing Director of Lang Holdings which owns the Patrick group of companies, was now seeking a negotiated settlement with the union and asking the MUA to terminate the legal proceedings it had instituted. Mr Reith was facing action in the Federal Court alleging that he was part of a conspiracy to breach the legislation he himself had introduced just over a year previously. Now it was the non-union workers who had employment contracts, but no work to perform.

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Background

The legislative framework

The waterfront dispute follows hard on the heels of major disputes about union rights and 'reform' which have occurred in the coal and transport industries since the WR Act became law on 31 December 1996. The skirmishes in the coal industry demonstrated that the previously unthinkable tactic of dismissing a whole workforce might now be a real option under the WR Act.[3]

The WR Act reduces union rights in a number of ways, limits the powers of the Australian Industrial Relations Commission's (AIRC) to arbitrate, requires the stripping back of awards to the so called 20 core matters, increases sanctions for industrial misbehaviour by unions and introduces a perverted version of freedom of association. All of these aspects of the Act were significant in this dispute. The Act renders the closed shop unlawful and union preference clauses in awards unenforceable. The freedom of association provisions focus on a 'right' not to join a union, rather than on the positive right of workers to organise. They seemed to offer scant protection against union busting. The provisions in 'Part XA Freedom of Association' prohibit conduct by employers, employees and industrial associations for prohibited reasons, which are mainly associated with union membership status and the taking of industrial action.

Section 298K(1) WR Act is the key section in the waterfront dispute. It prohibits conduct by an employer, including dismissing an employee and altering an employee's position to his or her prejudice, for a prohibited reason. Section 298L(1)(a) lists a number of prohibited reasons, one of which is membership of an industrial association. Section 298U empowers the Federal Court to order penalties, reinstatement, injunctions and other consequential orders. Section 298V reverses the onus of proof. It effectively provides that if an application is made alleging conduct was or is being carried out for a prohibited reason, then it is presumed that this is so, and it is up to the respondent to prove otherwise. Such a clause was thought to make much union conduct an easy target.

The waterfront dispute demonstrates that the freedom of association provisions might offer some protection to unions and their members after all. However, it also suggests just how limited the circumstances may be in which this protection will usefully apply.

The MUA, the employers and 'waterfront reform'

The MUA is a small but well organised, democratic and militant union, formed in 1992 by the amalgamation of the former Waterside Workers Federation of Australia and the Australian Seamen's Union. It has 100% union membership of stevedores, but after decades of technological change, its stevedoring membership now numbers only about 4000 Australia-wide. Where waterside work was once considered to be mainly labouring, it now involves the skilled operation of large complex equipment, and remains hazardous. Prior to the dispute, there were two large stevedoring companies — P & O Stevedores and Patrick Stevedores. The dispute mainly concerns Patrick and the new entrant, PCS.

Until September 1997, there were four Patrick companies carrying on the business of stevedoring: Patrick Stevedores No. 1 Pty Ltd, Patrick Stevedores No. 2 Pty Ltd, Patrick Stevedores No. 3 Pty Ltd and National Stevedores Tasmania Pty Ltd. These are the companies which employed the MUA members — the Patrick Employers. They had historically made substantial profits, for example, in 1996, PS1's after tax profit was $20,431,000. The majority shareholder was Patrick Stevedores Holdings Pty Ltd, which itself was wholly owned by Lang Corporation Ltd.

Around September, 1997, the Patrick Employers sold their stevedoring businesses to Patrick Stevedores Operations No. 2 Pty Ltd (also wholly owned by Patrick Holdings), and their only business then became the selling of their employees' labour to Patrick Operations. The Labour Supply Agreements allowed Patrick Operations to terminate the agreements if there was any interference with, delay in or hindering of the supply of labour, and also to obtain labour otherwise than from the employing companies. Any industrial action by the MUA members could thus trigger their own dismissals. All of this was kept secret from the employees and the union. The financial dealings and share transfers were also complex, but between $60 million and $70 million of the capital of the Patrick Employers was returned to shareholders, and between $16 million and $17 million was still owed to the Patrick Employers by other companies in the Group when they were placed in administration. Other key players apart from Mr Corrigan are Messrs McGauchie, Houlihan and Ferguson who are Directors of PCS Resources and associated companies.[4]

Mr Corrigan, the NFF and the Minister insist that this dispute is about waterfront reform, that current productivity performance is well below world's best practice, that the MUA is opposed to and is preventing real reform and that therefore its 'monopoly on the supply of labour' must be broken.[5] The MUA contests this, pointing out that they have participated in workplace reform for many years, and between 1989 and 1992 negotiated a 50% increase in container handling rates, a reduction in the permanent workforce of 57% and a 29% fall in stevedoring costs. In March 1998 they offered further workplace change, including substantial wage reductions (with lucrative overtime being reduced in an annualised wage), presumably with some costs to employees but some benefits in extra jobs. The MUA also point to independent studies which refute the Minister's productivity figures.[6] More fundamentally, though, the crux of their case is that the corporate restructuring together with related events amounted to a conspiracy to de-unionise the waterfront.

Corporate restructuring and union busting

Inciting industrial action

Following the Cairns events mentioned above, an attempt was made to train non-union stevedores in Dubai in the last few months of 1997. Most of the trainees were former SAS officers and army members, and all were working under Australian Workplace Agreements (AWAs) with another new company called Fynwest. The NFF and Mr Corrigan were involved in the Dubai exercise, and Fynwest has alleged that advisers to Mr Reith were also involved. Both these forays into de-unionising the waterfront were stymied by threats made by international waterfront unions to black ban any ship loaded by non-union labour at Cairns and to similarly influence operations at Dubai.[7]

Then, in January, 1998, Mr McGauchie of the National Farmers Federation announced the formation of PCS, and it commenced training non-union labour at No. 5 Webb Dock in Melbourne, the use of which was leased to PCS by Patrick. MUA members employed by Patrick at Webb Dock did not attend for work for a few days because the gates were locked.

Patrick maintained that they were open for business, wrote to employees requiring them to attend for work and applied to the AIRC for an order pursuant to s.127 of the WR Act. This section gives the AIRC a discretion to order that industrial action cease or not take place, but gives it no power to settle the dispute in question. On 13 February the AIRC granted the order. The order was made in spite of a finding that Mr Whiteway, Manager of General Stevedoring for Patrick, had 'misled' the employees about the plan to lease the wharf and equipment to PCS and an admission by Mr Corrigan that he had been involved in the Dubai training scheme, contrary to earlier denials in media interviews. However, the AIRC still held there was insufficient evidence to conclude that Patrick had embarked on a strategy aimed at provoking industrial action with an intention of replacing its labour force.[8]

The MUA commenced action in the Federal Court, alleging breach of the Award and of the Patrick-Melbourne Enterprise Agreement 1996, and that the lease of Webb Dock was part of a wrongful plan to replace the union workforce. The MUA also notified the Patrick Employers of its intention to commence negotiations to reach certified agreements, of the commencement of a bargaining period, and of its intention to take protected industrial action under the certified agreement provisions in the WR Act.

Ironically, the industrial action which attracted the s.127 order and the limited protected action actually taken enlivened the power of Patrick Operations to terminate the Labour Supply Agreements with the Patrick Employers. Although they were still unaware of the agreements, the MUA obtained information a week or so before Easter of an intention to dismiss all the Patrick employees after Easter, and made this known to the media. Both Mr Corrigan and Mr McGauchie emphatically denied that there was any such plan.[9] On 6 April, relying on its information, the MUA filed a notice of motion seeking orders to prevent the dismissal of the employees, and it was set down for Wednesday, 8 April.[10]

The next day, contrary to the earlier denials, Patrick Operations released a press statement, saying it had terminated the Labour Supply Agreements, and entered others with PCS and associated companies. The security guards removed the union workers, the PCS companies moved in and Patrick Employers, having no assets but the labour supply agreements, were put into administration.

The actions in the courts

It was only on 8 April that the MUA learned of the corporate restructure, the labour supply agreements and the triggering effect of their own industrial action. The Federal Court granted the MUA an interim injunction restraining the Patrick Employers under administration from dismissing the employees, but it did not have the effect that the employees returned to work. The hearing resumed on the first day after Easter, 15 April.[11]

Against a background of pickets on all Patrick docks involving thousands of supporters, the MUA started fresh proceedings, brought against the Patrick companies, the NFF companies, individuals associated with both companies, and the Minister. They alleged a breach of the Award, breach of the Patrick–Melbourne Enterprise Agreement 1996, breach of the MUA members' employment contracts, breach of s.298K(1) of the WR Act and contraventions of the Corporations Law. The MUA also commenced actions in the tort of conspiracy, including a conspiracy to breach s.298K(1), and claimed damages against some of the Patrick companies, and against the NFF companies for the tort of inducing breach of the employment contracts. The Minister, they alleged, was part of the conspiracy. Finally they pleaded that the Patrick restructure transactions themselves were void or voidable for fraud. An interlocutory injunction was granted by North J with respect to the alleged breach of s.298K(1) and the alleged tort of conspiracy by unlawful means. An appeal to the Full Court was dismissed and a further order added. Special leave to appeal the Full Bench's decision was sought from the High Court, which then decided to hear the whole appeal.

The injunction

The Federal Court's injunction returned the parties to their respective positions prior to 7 April, requiring the Patrick Employers to continue to employ the union workforce and the restoration of the Labour Supply Agreements. Technically, the injunction went further as the Patrick Employers were ordered to refrain from any attempt to use the trigger clause in the Labour Supply Agreements. North J held that there was a serious question to be tried that the corporate restructure, cancellation of the Labour Supply Agreements and appointment of administrators injured the employees or altered the employees' position to their prejudice, and there was evidence that this was done because they were union members in breach of s.298K(1) and s.298L. There was also a serious question to be tried that Patrick Owners and Patrick Employers and others agreed on these unlawful acts as part of an overall plan to replace the union workforce with non-unionists, and thus were engaged in an unlawful conspiracy.

The balance of convenience part of the test posed greater difficulties, involving as it did the issue of making orders which had the effect of forcing an insolvent company to continue trading and which might affect third parties, such as PCS and creditors. North J decided first that monetary compensation would not be an adequate remedy for union workers. It was also possible that at a final hearing reinstatement might be ordered and if an order were not made now, it would be impossible to order reinstatement because so many irreversible changes would have flowed from the absence of the employees in the workplace. An important consideration was the MUA's undertaking not to hold the administrators personally liable for wages and other benefits and not to take industrial action. North J decided on balance to make the order.

The High Court held that the Federal Court did have jurisdiction to make the orders it did.[12] It also considered the interaction of the Corporations Law and the WR Act and a majority found that the injunction prejudiced the administrators' exercise of their powers under the Corporations Law. It varied the orders so that they did not do so. This allows the administrators to decide whether if trading resumed it would be feasible to retain the whole workforce of the employing companies, prior to a full hearing of the case.

The MUA members returned to work, but final decisions by the administrators and creditors have yet to be made. The Federal Court intends to proceed to full hearing quickly, with a directions hearing on 25 June. North J rejected the submission made on behalf of the Federal Government that there was no need for an early trial and the submission that a long period was necessary to collect the necessary documentation and proof from government witnesses. With a federal election looming, such a move to delay the trial was perhaps expected.

Actions against the MUA also remain on foot. Picket lines had been immediately set up at every Patrick dock, with

picketers sometimes numbering in the thousands. Injunctions against the MUA and various picketers were sought and were granted in some States. One injunction was even granted against the whole world by a single judge of the Supreme Court of Victoria, but this was overturned on appeal, the Court holding that an injunction must be directed against specific persons.[13] The Australian Competition and Consumer Commission commenced action alleging breach of the boycott provisions in the *Trade Practices Act 1974* (Cth) by the MUA, John Maitland, a national official of the CFMEU and other persons, several weeks after the High Court's decision, even though the pickets had by then been lifted. Breaches of the relevant sections attract penalties of up to $750,000 against organisations as well as damages and injunctions. Proceedings have also been commenced in the Federal Court seeking deregistration of the MUA.

A great advantage to the MUA was that much of the evidence regarding breach of the freedom of association provisions was in the public domain. For months, Corrigan, the Minister and the NFF had been making public statements to the effect that the MUA would have to be removed from the wharves before any effective reform could take place. Furthermore, since the High Court's decision, evidence regarding the involvement of an adviser to the Minister has been publicly offered 'for sale' by disgruntled officers of Fynwest. Those in industries not subject to such public scrutiny may find good evidence more difficult to collect, and the WR Act assists de-unionisation plans in several important ways.

Union busting and the law

AWAs and award avoidance

The Patrick strategy is a sophisticated version of the strategy of replacing union workers with non-union individual independent contractors or non-union workers from labour hire firms. Examples abound of this strategy in genuine union strongholds in the building industry and in coal, where workers wish to retain their membership and award/certified agreement conditions. Outlawing preference alone has not had much effect so far on such workforces. An anti-union campaign faces organisational difficulties in such workplaces, not least of which is the time it may take, even if there is some turnover and new employees don't join the union. A faster option is to dismiss the whole union workforce and introduce a new, non-union workforce. But the availability of a trained non-union workforce ready to step in is essential.

The work on the waterfront is hazardous, and requires skill and training, especially on the massive cranes which lift the containers. Union workers on the waterfront are presently covered by a Federal Award which includes a preference clause and gives the MUA exclusive rights concerning workplace change and training. The preference clause is now void and unenforceable, but training on the equipment can only be obtained on the wharves. Existing employers were bound by the award, and any new company, such as PCS, could expect to be either roped in to the current Award or be made party to an employer specific award.[14] In either case, union involvement in training would be likely, and secrecy impossible. The Award itself appeared to be a barrier to replacing unionists with non-unionists.

The WR Act offers a solution to this difficulty. It provides for agreements with individual employees — Australian Workplace Agreements — as alternatives to awards and collective agreements. AWAs displace all awards. They do not require prior respondency to an award and are secret as to their making, their substantive terms and the identity of the parties. They may be made prior to the commencement of work and unions have no right of intervention or involvement unless the employee requests their assistance. PCS entered into AWAs with the workers at No. 5 Webb Dock, enabling PCS to train its workers and to avoid the training provisions in the Award. AWAs are revealed as an essential ingredient in a de-unionisation strategy in many union strongholds.

Unfair and unlawful termination provisions

An obvious imperative for Patrick and any employer is to avoid dismissals which might attract reinstatement orders from the AIRC or the Federal Court. Injunctions or orders to prevent unlawful or unfair dismissals are not available under the WR Act termination provisions. They only operate after the fact of dismissal. Putting the Patrick Employers in administration with no means to continue in business could be expected to lead to retrenchments by the innocent administrator for apparently valid commercial reasons. Reinstatement orders would then have been 'inappropriate' if not impossible. Even if the Court or the AIRC determined that the dismissals were in breach of the Act, compensation rather than reinstatement was the most likely outcome. The maximum compensation is only six months pay, which for a large corporation may be an acceptable price for de-unionisation. In this dispute, it should be noted that a 'shell' company would be unable to pay compensation, hence the political need for an industry-funded redundancy pot.

The practical uselessness of the termination provisions against union-busting tactics was demonstrated in the coal industry. Although the CFMEU successfully argued that the whole workforce at Gordonstone Mine had been retrenched in breach of the termination provisions, the remedy ordered was compensation, because the mine had ceased production and was up for sale. While the compensation was in the order of millions, this is a drop in the bucket for a mine ultimately owned by the huge multinational, Atlantic Richfield. The real victory in that case was the granting of an exceptional matters order in separate proceedings to the effect that any re-hiring by Gordonstone must be from amongst the retrenched workers, which effectively stopped the mine working with 'staff labour'.[15]

The AIRC's powers to prevent and settle the waterfront dispute

Perhaps recalling the origins of compulsory arbitration in this country, some commentators called on the AIRC to settle the dispute. However, the restrictions on the AIRC's jurisdiction in the WR Act are so extensive that it is doubtful that it had jurisdiction to hear and determine it. Many matters at issue were probably not allowable award matters under s.89A. Insofar as the dispute was about waterfront reform or even just ordinary wages and conditions, the AIRC could not arbitrate because the Act now contemplates that such matters should be left to the parties themselves. In addition, wages and conditions were matters at issue between the parties and were the subject of negotiation in the bargaining period notified by the MUA in February 1998. Section 170N specifically excludes arbitration on a matter that is at issue between the negotiating parties.

Nevertheless, the AIRC did play an instrumental role. The s.127 orders confined the actual harm to Patrick Employers caused by the industrial action over the Webb

Dock issues, but the hearings provided some important evidence for the MUA for its later actions. It also issued the required s.166 A certificate, paving the way for Patrick to commence tort action against the MUA.

Many commentators suggested mediation or conciliation of this dispute. Conciliation or mediation is rarely successful in industrial disputes when one party is intransigent, because the process is not compulsory and is predicated on a desire to reach agreement. Patrick and the other parties could be confident that the AIRC would not have the jurisdiction to arbitrate in the event of a failure to reach agreement, and indeed wished to sever the relationship with the MUA. In the absence of any chance of an arbitrated settlement, conciliation by the AIRC or even mediation by anyone else had nothing to offer Patrick, at least prior to the High Court injunction.

Freedom of association and the MUA comeback

In the light of the above, the tactical resurgence of the MUA from the position it was in on 8 April with half its stevedoring members on the verge of dismissal by companies in liquidation is astonishing. The Federal Government may not have envisaged much use being made of the freedom of association provisions by unions, and certainly underestimated the effect of s.298V when a union is alleging a breach against an employer. However, the facts of this dispute underline the critical importance of the evidence and of precisely identifying a respondent. It is only conduct by employers, employees and industrial associations that is prohibited. Hence, actions against the Minister, the NFF, Mr Corrigan himself and the non-employing Patrick companies were based on a conspiracy to breach s.298K, rather than on a direct breach by those persons.

The tactic of avoiding national strike action and spontaneous strike action was inspired. It was unexpected and it worked because of the discipline of the MUA and its members. It was also an essential partner to the legal strategy. The result was that the dispute as a whole took place against the background of Patrick's secrecy and deceit and a lock out enacted by security guards and dogs in the middle of the night, rather than in the context of a national strike by workers thought by many in the community to be overpaid, underworked and resistant to reform. It also minimised the extent of financial penalties associated with industrial action, which range from lost earnings to injunctions, penalties, fines for contempt and damages.

Conclusion

The 'Patrick strategy' lends itself to refinement and application in many unionised workplaces, a similar strategy being recently announced in the newspaper industry. The only real solution is legislative reform. The Labor Party, with support from the Democrats, introduced the *Employment Security Bill 1998* on May 29.[16] The injunctions do not ensure that the MUA members will not be dismissed prior to the Court's final decision. However, MUA success at trial now looks increasingly likely. The risk of an unfavourable outcome in these proceedings probably explains Mr Corrigan's sudden wish to reach an agreement with the MUA. Weighing the likelihood of winning in Court but perhaps seeing his members sacked beforehand, against retaining their jobs by agreement with a person who does not hesitate to breach awards and agreements will be a tough call for MUA National Secretary, Mr John Coombs.

However, the MUA has the ultimate bargaining chip. Any agreement reached now which does not include all the 'reforms' said to be absolutely crucial by Corrigan, the Minister and the NFF, will of itself reveal that those demands were but a furphy for the agenda the MUA has alleged in the Federal Court: a conspiracy to de-unionise the waterfront. The MUA is in a good position to refuse such demands.

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4. The history of events is drawn from the decision of the High Court, *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30, 4 May 1998.
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