The Role of Judges in the 1998 Waterfront Dispute

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A view has emerged in recent years, particularly in certain political and employer circles, regarding a tendency within the Federal Court to shelter unions from the realities of workplace reform by handing them favourable rulings. Unease with this pro-union inclination came to a head in February last year when *The Australian Financial Review* ran an editorial expressing its concern with 'the growing tendency for the Federal Court to interpret the *Workplace Relations Act* in ways that help unions.' The newspaper's action was prompted by a significant ruling from Justice Gray, a Hawke appointee, which had prevented BHP from offering non-union agreements to its iron ore workers in the Pilbara.

While the extent of the Federal Court's sympathies towards the union movement has now become difficult to measure, it is worth examining more closely whether a correlation has existed between the political complexion of the government making an appointment to the Federal Court and the rulings which that judge subsequently makes—particularly in cases of conflict between employers and organized labour. A useful case study in which to explore the possibility of such a link is the waterfront dispute of 1998—the most significant conflict in workplace relations this country has experienced in many decades. While other analyses of this dispute have examined the court rulings delivered (see Glasbeek, 1998; Dabscheck, 1998) it is worthwhile to consider the judges themselves and the role they played in determining the outcome.

The waterfront dispute began on the night of 7 April 1998 as a consequence of Patrick Stevedores locking out its entire workforce of 1,400. The years of frustration with the lethargic pace of reform had finally bubbled over and by the end of that night the only workers at Patrick's wharves were a large contingent of hired security guards. The Maritime Union of Australia (MUA), having already suspected Patrick's intentions, went to the Federal Court the day before seeking an injunction to prevent the company from terminating its workforce. The judge selected to hear this crucial application was Justice Tony North. Justice North had been appointed to the Court in 1995 by the former Keating Government and had considerable experience in representing unions as an industrial barrister. He granted the MUA a stay on Patrick's action the following day, ruling that the company could not terminate the employment of its workforce until he had heard the union's injunction.

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A fortnight later, on 21 April, Justice North handed the MUA its first significant victory in the dispute by ordering Patrick to reinstate its entire workforce. In his ruling, the Labor-appointed judge found, amongst other things, that there was an arguable case that Patrick had dismissed its workforce simply because its employees were members of a union. The judge came to the conclusion that, as this was part of a grander plan by the company to de-unionize its workplace, Patrick had engaged in an unlawful conspiracy.

Meanwhile, the wharves from which Patrick had been operating had been effectively cut off by large numbers of picketers and demonstrators, many of whom saw violence as an integral part of their campaign. In Victoria, on 16 April, the Melbourne Ports Corporation sought an injunction stopping the protest action of the MUA at its docks, claiming that it was an innocent third party in the dispute. The judge hearing this particular case against the maritime union was Justice Rosemary Balmford, appointed to the Victorian Supreme Court in 1996 by the former Kennett Government. She granted the Corporation an interim injunction against the MUA and eleven other individuals restraining them all from 'occupying or remaining upon the Corporation's land, preventing or interfering with access to and egress from the land, threatening or intimidating any person entering or leaving the land' until 21 April.

An application was then brought before the Victorian Supreme Court seeking a continuation of the injunction against the MUA. It was then ▶

amended so that it would become much broader in its effect. It sought to ban from the picket lines former Premier Joan Kirner, and prominent union officials Bill Kelty, Greg Combet, Leigh Hubbard and Dean Mighell. The judge hearing the application was Justice Barry Beach, appointed to the court by the former Liberal government of Premier Sir Rupert Hamer in 1978. On 20 April, Justice Beach granted Patrick a very broad injunction to clear the picketers. In fact, it was so broad that it banned from the picket lines not only the MUA's members and officials but anyone who had participated in the first picket on 8 April and anyone who had been part of the picket line since that date. The Liberal-appointed judge had given Patrick its first significant victory in the dispute.

Justice Mary Gaudron was appointed to the High Court by the former Hawke Government in 1987. On 21 April she presided over an appeal by Patrick and PCS Stevedores challenging the Federal Court's jurisdiction to hear the MUA's allegations of unlawful action. Justice Gaudron rejected the stevedores' application for special leave. She stated that

> there is nothing in this case to suggest that the jurisdictional questions which arise … should not be determined, in the first instance, by the Federal Court … there is much to suggest that it would be inappropriate for them to be determined without the benefit of relevant factual findings by that Court … there is little, if anything, to commend any of the applications for removal, applications which, if granted, have the potential to delay or disrupt the proceedings presently before the Federal Court.

By dismissing this application for special leave and preserving the jurisdiction of the Federal Court in this dispute, Justice Gaudron gave the MUA an important victory.

On 23 April, another injunction was granted against the MUA, this time by Western Australian Supreme Court judge, Justice Kevin Parker. Justice Parker, appointed by the former Government of Richard Court, held that the MUA's picket at the Fremantle port raised a serious question to be tried against the MUA in relation to public nuisance, intimidation, unlawful interference with trade and business and interference with contractual relations. In His Honour's view, there was a clear prospect that Patrick would succeed at trial, at least against the MUA and its State Secretary. Justice Parker granted Patrick an injunction, although not as wide-ranging as the company had wanted.

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Already three weeks into the waterfront dispute a clear trend had been established. The MUA was gaining favourable rulings from judges appointed by Labor governments, and Patrick Stevedores was gaining favourable rulings from judges appointed by Liberal governments. As the conflict between the company and the union wound its way through the appeals system, this trend remained significant.

Back at the Federal Court, Patrick appealed Justice North's decision to a Full Bench of the Federal Court. On 23 of April 1998, the Full Bench, comprising a majority of Labor-appointed judges (the Hawke-appointed Wilcox and Von Doussa) and an early Howard Government appointee, Justice Ray Finkelstein, upheld Justice North's ruling. The justices stated that 'it is appropriate to say we have read, and carefully considered, the whole of North J's reasons for judgement but we find them free from appellable error.' Justice Finkelstein's concurrence in this ruling proved to be the only occasion throughout the entire dispute where a Liberal-appointed judge had handed a completely favourable ruling to the MUA. Patrick's lawyers immediately appealed for a stay but the Labor-appointed majority, once again joined by Justice Finkelstein, refused to grant it. Before the union movement could be given the opportunity to celebrate this victory, Patrick went directly to the High Court.

Justice Kenneth Hayne was appointed to the High Court by the Howard Government in 1997. On the evening of 23 April, he had the task of deciding whether to grant Patrick a stay on the Full Court's ruling. In *Waterfront* by Helen Trinca and Anne Davies, Counsel for the MUA, Mr Julian Burnside QC, is quoted as arguing before Justice Hayne:

> even if it is only for symbolic effect, it would be, to say the least, unkind and at worst extreme, potentially unsettling at the waterfront, if the symbolic victory were taken away from them [the MUA], when there is no apparent need to take it away from them.

Justice Hayne was not convinced and granted Patrick the stay. The following day, Justice Hayne extended the stay and told the parties that the High Court would hear Patrick's special leave to appeal. Just when it appeared that the Federal Court would hand the MUA victory in the dispute, the Liberal-appointed Justice Hayne threw Patrick a desperately needed lifeline.

The wide-ranging injunction granted to Patrick by Justice Beach was appealed in Victoria's Court of Appeal by the MUA and other parties, including Mrs Kirner. The Court of Appeal was established in 1995 by the Kennett Government with all ten of its current members having been appointed by that Government. On 28 April, Justices Winneke, Brooking and

Charles upheld Justice Beach's injunction against the MUA and its officials. The Full Court stated that 'the behaviour of many of the MUA members and picketers was extremely violent and dangerous and we think fully justified the terms of His Honour's order, which, as now amended, will remain in effect against the MUA and the other defendants'. The three Liberal-appointed judges, noting the 'persistent lawlessness by both members of the MUA and numerous others' stated that 'the learned judge in his reasons described the situation as alarming and said that the material before the Court demonstrated that many of the persons picketing East Swanson Dock and Webb Dock had been guilty of serious criminal behaviour. His Honour's statement was wholly justified.' Concerning Mrs Kirner and the other appellants, the Full Court upheld their appeal stating that Justice Beach's injunction 'cannot be granted against the world at large.'

Neither the MUA nor Patrick could claim victory when the full High Court handed down its decision of 4 May. The ruling comprised three separate decisions. One of those decisions, by the Labor-appointed Justice Gaudron, let Justice North's original ruling stand, which would have permitted the maritime union to claim victory. The decision by the Liberal-appointed Justice Callinan upheld Patrick's appeal and would have given the stevedores victory. The remaining justices, a mix of Liberal and Labor appointees, came down in the middle. Essentially, they altered Justice North's order so as to give the administrators the responsibility to decide the fate of the workforce. The majority decision found that 'it is one thing to restrain Patrick Operations from giving effect to the termination of labour supply contracts and restraining those companies.... But it is a very different thing to fetter the discretion of the Administrators (and of the creditors) in the exercise of the powers they possess under the Corporations Law.' The majority stated that 'It is for the Administrators and the creditors (including the majority creditors, the employees) to take the decisions about continued trading.' By placing the final decision with the Administrators the majority concluded 'In the orders which follow, priority is given to the powers of the Administrators of the employer companies but, subject to those powers, the orders seek to restore the position that existed prior to 7 April 1998.' And with that, one of Australia's largest industrial conflicts had finally come to an end.

With the exception of Justice Finkelstein, there was a relatively strong correlation in this dispute between the political background to a judge's appointment and the type of ruling which either the company or the union received. It is clear that judges play a vital political role in our society. The very fact that all appointments to the Federal Court must be approved at the highest echelon of the political sphere in the Commonwealth, the Cabinet, means that short-listed candidates must endure a formal and informal vetting campaign. Judicial appointments have always been an intrinsically political process. In fact, it would be naïve to expect judges, especially those overseeing cases involving workplace relations, not to harbour from time to time a certain philosophical bias in their considerations. Whether or not such a bias explicitly manifests itself in a ruling is another matter, but to assume that judges are entirely insulated from political influence is unrealistic. In the case of the waterfront dispute, the evidence reveals that the philosophical expectations of the appointor were transmitted in the rulings of each of his respective appointees. This is a natural product of carefully screening judicial appointments, and there is little one can do to prevent certain members of the judiciary from time to time following the line pursued by those responsible for raising them to the Bench.

In the end, not even the Courts could contain the pressing need for waterfront reform

The waterfront dispute may well be an isolated example, but the supposition of bias in the Federal Court remains. This is despite the fact that employers have recently gained some significant victories in the Federal Court from Labor-appointed judges (see *BHP Iron vs AWU and others*, where a Full Court of Labor appointees permitted non-union contracts; and *Stellar Call Centres vs CEPU*, where a Full Court of Labor appointees handed employers a key victory regarding outsourcing).

In the end, not even the Courts could contain the pressing need for waterfront reform. Today, the shares of Patrick's parent company, Lang Corporation, have increased fivefold since the dispute; crane lifts on the waterfront recently reached the supposedly unattainable level of 25 containers per hour; the MUA's membership has been devastated and it is now contemplating a merger with the CFMEU; and the level of casual labour on the docks has increased dramatically.

REFERENCES

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