COMMENTARY ON RECENT DEVELOPMENTS IN INDUSTRIAL LAW AND RELATIONS IN THE MINING INDUSTRY

By J.E. Murdoch*

Edward Hargraves who discovered gold at Turon River, New South Wales on February 12th, 1851 later wrote of the day . . . '"This" I exclaimed to my guide "is a memorable day in the history of New South Wales. I shall be a baronet, you will be knighted and my old horse will be stuffed, put into a glass case and sent to the British Museum".'[1]

I do not suggest that the mining industry will go the way of Hargraves' horse. But there can be little doubt that the industry, which has given great expectations to Hargraves and countless others who came after him, has been harmed by the recession. Shrinking markets and low prices have taken their toll.

Professor Brooks had emphasized the diversity of the mining industry, and I agree. But there is a common characteristic which runs across all phases of the industry. Whether it is coal, copper, aluminium or mineral sands, the future of the mining and mineral processing establishments in Australia is locked into the international trade cycle, and dependent upon it. That is not new. But amid the frenzy of new discoveries, construction projects and plant expansions during the 1960s and 1970s, the reality of the fluctuating fortunes of the industry had little impact on industrial relations.

Things are now different. Brooks stresses redundancy and increasing retrenchment in his exposition of emerging issues in the industry. The steel industry and the New South Wales coal mines provide ample evidence to support his views. As I see it, the industry has important lessons to learn from the experiences of the past year; lessons which should not be forgotten when production and price levels recover. Mass retrenchments of staff are politically and industrially unpopular in Australia. The use of new jargon, such as 'dehiring' to 'sugarcoat' announcements of the sacking of surplus staff, does little more than create cynicism and mistrust in the community.

Recent developments in industrial relations reveal a new focus and emphasis on policies which spare an enterprise from the trauma of retrenchment. These developments are fresh but they may well represent a long-term theme through industrial relations in the mining and mineral processing industries. The aim is to build buffers, which will absorb the effect of downturns, and thereby avoid sackings.

The creation of a buffer is likely to precipitate close scrutiny of the following areas of labour relations:

(a) Superannuation, long service and other leave schemes may be adjusted to permit management to put together 'early retirement packages' which, with an extra cash component, can be *offered* to staff in older age groups when the workforce needs to be reduced; Utah has used this technique effectively and

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1 Wannan W.F., *The Australian* (1974) 166.

in the words of Jim Curry, the Managing Director, it 'provides a favourable alternative to possible retrenchments'.[2]

(b) Manning scales are likely to be reduced with improved cost efficiency countering some of the effects of production decreases. Manning scale reductions call for a cautious approach. They may be accepted by unionists anxious to hold their jobs in a recession. However, during periods of high production, reduced manning may provide a basis for unions to win 'trade-offs' in improved benefits. Further experience has shown that manning changes, without agreement with the workforce, can produce industrial problems, such as occurred at the Yabulu nickel treatment plant earlier this year.[3]

(c) Overtime provides a useful variable. During peak production, overtime may provide an alternative to building permanent staff levels to their maximum. On a down-swing, reduction or elimination of regular overtime reduces costs and delays the need to retrench. While awards prescribe penalty rates for overtime, they rarely limit the extent to which it can be worked. Trade union policies on regular overtime are not uniform. Union members frequently find the additional income attractive. However, union leaders may be wary lest the hard won benefits of reduced working hours (thirty five hours per week in the coal industry; thirty eight hours in many metalliferous and mineral processing plants) be negated by overtime work.

(d) Contractors can also be used to supplement day labour on maintenance and some operational functions during periods of peak production. In a recession, they are not used. Japanese corporations, which give high priority to security of employment to their own staff, often let contractors and suppliers bear the brunt of down-turns in orders. However, the uneven bargaining positions of contractor and principal may account for the marvellous flexibility which the Japanese companies have with their local suppliers. Japanese practices do not always hold good in Australia. So caution is again required.

(e) 'Roll backs' of employee benefits during recession look attractive on paper. In the United States of America, this has occurred in recent labour contract renewals. For example, in the automobile industry. While there is scant evidence that there may have been agreed reductions in benefits in some of the smaller metal trades shops in Australia, there is no precedent for this practice in any major establishment in Australia. If there is, it has not been made public.

(f) Flexible working hours is another anti-retrenchment measure. The practice of rationing work by employer and employees agreeing that ordinary hours worked, and pay, be reduced proportionally is novel in the unionized industries in Australia. The industrial awards are not geared to the practice and would require variation to enable it to be introduced. This has recently happened in the vehicle industry through the decision of a Full Bench of the Australian Conciliation and Arbitration Commission on a claim for part-time work.[4]

2 *Courier Mail* (Brisbane) 1 May, 1983.
3 *Courier Mail* (Brisbane) 28 February, 1983.
4 Decision Re: Vehicle Industry (Repair, Services and Retail) Award, April 21, 1983, Print 2280.

Because of the options which are available, I am more optimistic than Brooks in my view of retrenchments. Given that the options need development and refining, I expect that the mining industry will handle future downturns without the mass sackings which have occurred on this occasion.

However, in another area, I take a more pessimistic view than Brooks. He looks forward to changes in the Conciliation and Arbitration Act 1904 (Cth.) to facilitate union amalgamations and sees amalgamations as one of the cures for demarcation strife. The dual state and federal systems of conciliation and arbitration produce the result that unions function within both state and federal tribunals. Hence, they register under both state and commonwealth law and, to amalgamate, they need to meet the conditions of the Acts of the Commonwealth and one or more States.

The trend is toward tightening up Acts to make it more difficult for unions to amalgamate. The 1983 amendments to the Industrial Conciliation and Arbitration Act (Qld.)[5] introduced a requirement that the ballots in both amalgamating unions produce a 50% return of ballot papers and, of those returned, there must be a 50% vote in favour by those recording formal votes. Because of the low voting figures in union elections, few large unions can achieve this level of participation.[6]

The demarcation problems, which Brooks discussed, are likely to increase as the size of the unionized workforce in traditional 'blue collar' industries shrinks.[7] A trade union's finances and influence are directly related to its membership roll. Competing claims for the right to operate any new plants which come on stream are likely to be hard fought, on the job, and in the Courts. The vagueness and poor drafting of the *description of industry* and *eligibility rules* of some unions provides the basis for much litigation.

A related development is manifested by the moves of some unions to extend their coverage out of their traditional classifications into supervisory, managerial and head office staff. Over the past two years, the Australian Colliery Staff Association has been party to protracted litigation before the Coal Industry Tribunal,[8] the Industrial Registrar[9] and the Federal Court in pursuit of its claims for coverage of capital city office staff employed by coal companies.

Finally, I turn back to that part of Brooks' introduction in which he highlighted the impact of the mining industry on the history of industrial litigation in Australia. I agree that the mining industry has sent and continues to send major cases to the Courts. However, the mining industry has an impressive record of non-arbitral industrial awards and agreements, expecially in metalliferous mining and mineral processing. Frequently, recourse to the tribunals is merely for the ratification of a consent award through the formal mechanism of the dispute settling process or the sanctioning of an industrial agreement.

Prior to the mid-1960s, the mining companies were staunch adherents to the industrial arbitration system. Broken Hill was an exception because of the use of direct bargaining processes with occasional access to Mr. Justice Taylor, in the New

5 Industrial Conciliation and Arbitration Act and Another Act Amendment Act 1983. s. 25 amending s. 53 of principal Act.

6 Rimmer M., 'Long-Run Structural Change in Australian Trade Unionism' (1981) 23 *Journal of Industrial Relations* 323, 327.

7 Rimmer, *op. cit.* 341.

8 Coal Reports, 2997.

9 Decision of J. McMahon, Industrial Registrar, January 7, 1983, R. No. 68, 69 of 1981.

South Wales Industrial Commission, when there was a stalemate between the parties.[10]

The parties to other mining awards showed little desire to emulate the Broken Hill Mine Managers Association and the Barrier Industrial Council. The former President of the Australian Workers' Union, Edgar Williams, who had a thirty year association with mining in Queensland, described the attitude of Mount Isa Mines Limited during the period 1950–1964 in this way

'The mines would not co-operate, and commonly said, "If you want anything, take it to the Court."'

He labelled it 'the hard shelled attitude of the mines'[11] and expressed the view that it did much to bring about the 1961 and 1964/65 close-downs at Mt. Isa. After the 1964/65 dispute, Mt. Isa changed to a bargaining approach with major negotiations conducted every two years. The fruits of the bargaining are partly included in the award, by consent, and the remainder recorded in an unregistered memorandum of agreement. Man hours lost through disputes have dropped greatly and stayed down. J.S. Lacey, the former General Manager-Personnel/Industrial Relations for Mount Isa Mines Limited spoke favourably of the direct approach method when he reviewed the record of the 1970s.[12]

Most metalliferous mining and mineral processing companies deal directly with the unions. Not all have emulated the Mt. Isa success story. Though, even in the case of the Pilbara iron ore province where the industrial record has been poor, Frenkel notes that the parties have preferred to reach agreement through the direct approach.[13]

The widespread use of direct bargaining in the mining and mineral processing industries creates a favourable environment for the handling of the new issues which I listed above. There are various reasons why arbitration should be a last resort for manning scales and other issues. Not the least of these is the jurisdictional maze which confronts the federal commission in handling disputes that concern 'management prerogatives' rather than 'industrial matters'. Three High Court cases, over a four year period, were required to determine the Commission's powers in the 'one man bus' dispute in Melbourne: the demand that all buses be crewed by two men was *ultra vires*; but a demand that 'an employee shall not be required to drive a bus without the assistance of a conductor' gave rise to a dispute within jurisdiction.[14]

The limitations upon the federal arbitral power, as illustrated, explain in part the drift away from industrial litigation to industrial bargaining in the mining industry. It is likely that the character of emerging industrial issues, which I have discussed, will reinforce the trend toward this direct approach.

10 Taylor S.C., 'Industrial Relations in the Broken Hill Mining Industry' (1965) 7 *Journal of Industrial Relations* 101.

11 Williams C.W.E., *The Isa, Yellor Green and Red*, 160.

12 Lacey J.S., 'The 1970's in Retrospect' (October 5, 1980) Paper delivered at Industrial Relations Society of Queensland Annual Convention.

13 Frenkel S.J., 'Industrial Conflict, Workplace Characteristics and Accommodation Structure in the Pilbara Iron Ore Industry' (1978) 20 *Journal of Industrial Relations* 386, 405.

14 'The One Man Bus Cases'; see *The Commonwealth Conciliation and Arbitration Commission; Ex parte The Melbourne and Metropolitan Tramways Board* (1962) 108 C.L.R. 166; *R. v. The Commonwealth Conciliation and Arbitration Commission; Ex parte The Melbourne and Metropolitan Tramways Board* (1965) 113 C.L.R. 228 and *R. v. The Commonwealth Conciliation and Arbitration Commission; Ex parte The Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443.