IS THIS THE END OF THE LINE?

A REVIEW OF PICKETING IN THE NEW MILLENNIUM

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Since the Federal Government began its campaign to reform industrial relations in late 1996, we have seen a number of high profile industrial disputes have gained the attention of the general public. In many instances, the old style picket line has been used as a means to apply strategic pressure, with varying degrees of success. To demonstrate that the Federal Government's industrial agenda is seen by many as a real threat to all unionised workforces, there has been picketing in a range of industries, including the waterfront (during the Patrick dispute), the mining industry (Hunter Valley, Gordonstone, et al) and wholesale trade (Davids Distribution).

The mining industry is a regular forum for picket action, mainly due to the traditional solidarity of its workers and the strong union presence which continues to resist the push for workplace reform. While that formidable presence continues to exercise an influence, it is unlikely that this well-used arrow in the union quiver will pass into history without a struggle.

Although an unbiased commentator could be forgiven for thinking that the boundaries of lawful picketing have been set for some time and that the rights and wrongs of these practices are clear, the courts continue to face applications by employers and other affected groups whose trade is disrupted by picket lines. With the Federal Government's reform process looking to make further inroads into industrial principle and practice, it is timely to review not only those well recognised boundaries, but also some interesting lessons which have presented themselves in recent times.

GENERAL GUIDELINES

In the pure sense, picketing involves nothing more than a collection of people standing outside an establishment to make a protest, to dissuade employees, suppliers, clients or customers of the employer from entering the site.[1] That practice might fairly be described as peaceful picketing. The law has never had a problem with peaceful picketing, as it does not interfere in any serious or illegitimate way with other people's business. Any employee, supplier, client or customer is free to ignore the protest and go about their business in any manner they think fit.

Because this form of mild persuasion rarely achieves the desired result, picket lines inevitably resort to more coercive strategies which, from time to time, have involved violence, blockades, threats, abuse, and damage to property. It comes as no surprise that these strategies will usually amount to tortious conduct, allowing the employer or other affected persons to bring a claim before the courts for compensatory damages and orders requiring the conduct to stop.

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1 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 IR 198; *Coal & Allied Operations Pty Ltd v AMWU* (1997) 76 IR 50; *Mine Management Pty Ltd v CFMEU* (unreported, Supreme Court of Queensland, Moynihan J, 23 March 1999).

A wide range of torts could well be committed in these circumstances, such as nuisance, interference with trade, trespass, conspiracy and intimidation.[2] For affected third parties, picketing may also infringe secondary boycott provisions in the *Trade Practices Act* 1974 (Cth).

Employers must accept that peaceful picketing will need to be tolerated as it does not infringe any principle of law. However, once a court is satisfied that tortious picketing is involved, the prospect of receiving the court's assistance is improved substantially.

A classic example of picketing in a mining context was the Hunter Valley No. 1 dispute in late 1997. During strike action, the mine workers positioned themselves in the path of vehicles, preventing their access to the mine entrance. After some minutes, and at the insistence of police, the picketers allowed a vehicle to pass and then repeated the dose on following vehicles. The Supreme Court of New South Wales[3] had no difficulty in deciding that the conduct was unlawful and ought to be stopped.

ENTERPRISE BARGAINING AND PICKETING

Those familiar with the enterprise bargaining process will have experience of bargaining periods and protected industrial action. In essence, a union may lawfully organise industrial action against an employer as a legitimate bargaining strategy, in the hope that the employer will agree to the union's terms.

Provided appropriate notices are given, a union can organise and participate in action which would, but for the protected status conferred by the legislation, be unlawful. This protected status would inevitably tempt unions to argue that tortious picketing might be protected action if occurring during enterprise negotiations. The argument almost held sway as North J in the *Davids Distribution case* considered picketing capable of being sanctioned in this way.[4]

Inevitably, the employer appealed and was successful. The appeal court drew the traditional distinction between peaceful picketing and tortious picketing, and saw no reason to treat picketing as industrial action capable of being protected. Importantly, there would be no need for protection if the employees were engaging in peaceful picketing only. In the case of tortious picketing, protection was considered both unintended and inappropriate.[5]

It is hard to be critical of the appeal court's decision. With other forms of protected action, it is technically possible for the employer to protect itself by using other resources in place of those involved in taking action. Had tortious picketing received protected status, it would be possible for a union to organise a total blockade of premises preventing any trade at all. This would appear to exceed the level of persuasive pressure anticipated by the enterprise bargaining process.

In the end, the appeal court concluded there is no room for qualifying the general principles relating to picketing to take into account the statutory regime which regulates enterprise bargaining.

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2 *Patrick Stevedores Operations Pty Ltd v MUA* (1998) 82 IR 87; *Patrick Stevedores Operations Pty Ltd v MUA* (1998) 79 IR 276.

3 *Coal & Allied Operations Pty Ltd v AMWU* (1997) 76 IR 50.

4 *National Union of Workers v Davids Distribution Pty Ltd* (unreported, Federal Court of Australia, North J, 1 December 1998).

5 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 IR 198.

TAKING A CLAIM TO COURT

The usual approach for employers when faced with tortious picketing is to apply for urgent orders from the court. The function of the court is to consider the legal issues in light of the facts which are put before it by the parties and to decide whether, on a temporary basis, the court should interfere by making orders requiring the picketing to stop. If successful, the orders would normally stay in place until a full trial of the dispute. As one would expect, the need to have that trial becomes less important if urgent orders bring the picketing to an end.

- **Section 166A**

At one time, it was generally thought that, because picketing arises out of an industrial dispute, an employer could not immediately apply to the court as a matter of right. Under s166A of the *Workplace Relations Act* 1996 (Cth), an employer cannot bring an action in tort in connection with an industrial dispute unless the Australian Industrial Relations Commission has first provided a certificate stating that attempts to stop the unlawful conduct have been unsuccessful. Usually, this hiccup would guarantee the union a period of 72 hours during which time it may continue picketing without the interference of the courts.

However, because of a technical reading of the words of s166A in a number of cases, it is now generally accepted that an employer may apply immediately for an injunction to prevent tortious picketing without a certificate from the Australian Industrial Relations Commission.[6] If, after having obtained the injunction, the employer intends to continue with a damages claim, a certificate will then be necessary. Usually, the employer's objective is to restore the workforce and, having won the battle through a temporary court order, the employer will also have won the war.[7]

- **Practicalities**

Balance of convenience

It is not enough for an employer to show that there is unlawful behaviour on the picket line. The courts will apply a two stage process when deciding whether or not to grant urgent relief. First, the employer must show an arguable case that tortious picketing is continuing. Having heard evidence sufficient for that purpose, the court must then consider the balance of convenience. In other words, what are the competing consequences for all affected parties which will flow from a decision of the court either to grant or refuse the injunction? For example, unchecked picketing could cripple a business if the effect is to shut down its operations for an extended period. Conversely, interference which does not have serious financial consequences for the employer is unlikely to be a strong catalyst for injunctive relief.

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6 *Patrick Stevedores Operations Pty Ltd v MUA* (1998) 82 IR 37; *Patrick Stevedores No. 1 Pty Ltd v MUA* (1998) 79 IR 268; *Patrick Stevedores Operations Pty Ltd v MUA* (1998) 82 IR 87.

7 *Australian Paper v CEPU* (1998) 81 IR 15.

Claims which have greater prospects of success at trial will be entitled to the benefit of any doubt when the court assesses the balance of convenience. Weaker claims would normally need the balance to lean strongly in their favour.[8]

On many occasions, the courts have developed a reluctance to become involved in industrial disputes. In the first place, specialist industrial tribunals have been established to deal with industrial disputes, and the general attitude is that they should be utilised where possible. Second, the courts have emphasised the importance of the continuing relationship between the employer and its employees. Imposing a solution on the parties has generally been considered an inappropriate means of resolving disputes for parties who must continue to live together. Unfortunately, these philosophies tend to discount the fact that unlawful means are being used by one party towards the other, and to legitimise unlawful behaviour because of a focus on the wider issues. In substance and in effect, precisely the same conduct receives greater tolerance if committed in the context of an industrial dispute than between ordinary litigants. While paying due regard to this general tendency, recent cases have shown a willingness to uphold the law and restrict tortious picketing in cases where the usual business activities of the employer are severely and unlawfully restricted.[9]

Identification

Sometimes, obtaining the necessary orders is the easy part. It can then be more difficult to take the next step and implement the order of the court when the picket line is determined to exploit any available loophole.

The national coal strike taken in sympathy for the Oakdale workforce in August 1999 demonstrates the lengths to which unions are prepared to go in pursuit of their agenda. The Supreme Court of Queensland was faced with an application by a number of mine operators for orders to prevent the CFMEU from inducing strike action by its members.[10] Although not a case concerning picketing, it demonstrates a clear strategy to make life as difficult as possible for the employer at a practical level. In an attempt to avoid the Court's intervention, the CFMEU closed its offices before 5pm so as to make itself unavailable for the receipt of court process or notification of the application to the Court.

Court procedure makes it extremely difficult to obtain orders which bind every person who is participating in a picket line. It would be necessary to identify each person, involve them in the court action by serving each with a copy of the documents to be put before the court, and prove in each case their personal involvement in the unlawful activity. The system is simply not designed to cope with disputes of this nature.

Usually, the employer will take action against participating unions and key organisers only. Once the court takes those players out of the game, the picket line collapses more often than not.

However, that is not always the case and the Patrick dispute is an excellent example of the legal process being unable to cope with determined and committed picketing. Faced with the problem of picketers who

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8 *Bullock v Federated Furniture Trades Society of Australia (No. 1)* (1985) 5 FCR 464.

9 *National Workforce Pty Ltd v AMWU* (1997) 76 IR 200; *Citipower Pty Ltd v CEPU* (unreported, Supreme Court of Victoria, Chernov J, 6 June 1997); *Patrick Stevedores No 1 Pty Ltd v MUA* (1998) 79 IR 268.

10 *Capricorn Coal Management Pty Ltd v CFMEU* (Unreported, Supreme Court of Queensland, Williams J, 12 August 1999).

were neither members of the MUA nor terminated Patrick employees, the Supreme Court of Victoria made orders against unidentified people who might engage in picketing, effectively making the injunction against the public at large.[11]

A number of high profile figures appealed against the breadth of the orders, claiming the court was not entitled to make orders against people who were not party to the action. The Court of Appeal agreed and reversed the original decision.[12] The obvious practical problem with this result is that unlawful picketing was able to continue. The participants could hide behind anonymity and constantly changing personnel on the picket line.

To get around the problem, the employer has a number of choices when bringing a claim:

- The first option is to name each and every person who is involved in the picket line. If the line is small and the active participants are known to the employer, that remains fairly practical. However, that would simply not have been an option in the Patrick dispute.

- The second option is to follow the usual practice of naming the union and key organisers. In most cases, organisation of the picket line will be difficult without the involvement of the union and its organisers. Once those orders are made, other participants could be in contempt of court if they continue picketing in association with those named in the orders. In effect, other picketers can be seen by the court as aiding and abetting a breach of the orders.

- The third option is to apply to the court for a representative order, so that a single person can be named to represent a class of employees. If orders are made requiring unlawful picketing to stop and those orders are ignored by any person within the represented class, that person will be in breach of the court's orders, even though they were not personally involved as a named party in the court action.[13]

Representative orders have been made occasionally, although the general principles are not applied by the courts with any real sense of consistency.[14] A possible compromise solution arose in *Electricity Commission of New South Wales v Arrow*,[15] where the Judge refused to make a representative order but granted an injunction against a number of unknown people "who directly or indirectly by themselves or their agents committed" a listed series of acts. It remains to be seen whether this approach is favoured by the Courts in future disputes.

Evidence Gathering

All of the issues discussed so far have involved the law and the principles which are applied by the courts. It is important to remember that an application to the court will not even reach first base if the evidence available is inadequate. It is all very well for an employer to know that access is being blocked or that

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11 *Patrick Stevedores Operations Pty Ltd v MUA* (1998) 79 IR 276.
12 *MUA v Patrick Stevedores Operations Pty Ltd* (1998) 79 IR 317.
13 *MUA v Patrick Stevedores Operations Pty Ltd* (1998) 79 IR 317.
14 *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597; *Doyle v Commonwealth* (1985) 156 CLR 510; *A-G (Vic) v City of Brighton* [1964] VR 59; *News Group Newspapers Ltd v SOGAT '82* [1986] IRLR 337.
15 Unreported, Supreme Court of New South Wales, Hodgson J, 7 December 1990.

threats have been made. However, the court will need sworn evidence from people who were there when these things happened before it will be satisfied that orders should be made.

Once it becomes clear that an industrial problem is building, it is prudent to begin recording each and every important exchange with the union and the picketers so that it will be relatively simple to recount these events for the benefit of the court. Quite commonly, an employer will know that certain statements were made or that certain access was denied but is unable to recall the specific source of the information, making it extremely difficult to present a persuasive case to the court if the facts are disputed. The best approach is to implement a journal, which records each incident by date, time, place, individuals involved, source of the report, and the events which took place. If each event can be chronicled in affidavit material with this level of detail, a court is more likely to accept that unlawful conduct is taking place. This in turn gives the employer the high moral ground and puts pressure on the picketers to explain why the court should not interfere.

THE POLICE

The role of the police in controlling unlawful behaviour on a picket line has never been clearly defined. For the same reason which makes courts reluctant to interfere with industrial disputes, the police have been reluctant to appear to be siding with one side or the other, even in circumstances of clearly unlawful behaviour.

In at least one case, the Supreme Court of Tasmania expressed the view that the police should have a very limited discretion to refuse to interfere when a specific offence such as an assault or a breach of the peace occurs.[16]

When faced with an argument that police numbers were insufficient to control the picketers on that occasion, the Court pointed out that such a suggestion was truly frightening, carrying the implication that the State lacked sufficient resources to enforce the law; that it was tantamount to endorsing the law of the jungle and anarchy.

Since that case in 1992, the police have maintained a relatively low profile in politically sensitive industrial disputes. While intervention can be expected in extreme cases, it would be speculative to think that the police will offer a means to counter unlawful conduct on a picket line free of technicality, delay and inconvenience.

CONCLUSION

At the end of the day, employers should take comfort from the growing tendency of the regular courts to interfere with industrial disputes. On occasion, the courts have gone so far as to say that the need to apply to the regular courts is very much acknowledged under current legislation. Legitimate bases for defending tortious picketing are close to exhausted and a remaining challenge for employers is to identify a procedure which will accelerate the desired result. Whether or not representative actions, or a variation on that theme, are the answer remains to be seen.

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16 *R v Commission of Police* (1992) 44 IR 214.