Weipa and the Wharves: Australian Strike Law and its Effect on Trade Union Power

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Throughout much of 1998, the attention of most Australians was focused on the national strike on Australia's waterfront. At the heart of the dispute were two conflicting 'rights': the right of workers to belong to a union and the right of employers to restructure their businesses as they see fit (probably with a view to de-unionising their work force). The waterfront dispute was not the first time this conflict had arisen. The Weipa dispute of 1995, in which the Construction Forestry Mining and Energy Union (CFMEU) took strike action against the mining 'giant', Comalco/CRA, was another national strike to which this issue was central.

However, there were important differences between the two disputes. The Weipa dispute was one of the union movement's great success stories of recent times. Significantly, it was also fought when the law pertaining to strike action was contained in the former *Industrial Relations Act* 1988. That statute had effectively removed the ban on secondary boycotts, which may be regarded as a union's most potent weapon for advancing its claims. Consequently, unions had real 'clout' in their own right.

In contrast, the wharves dispute of 1998 was the first major industrial dispute to arise during the currency of the *Workplace Relations Act* 1996, which re-introduced the prohibition on secondary boycotts contained in the *Trade Practices Act* 1974. Robbed of its most effective weapon, the union struggled to survive in this dispute. Ultimately, their continued existence depended more on the decisions of judges, rather than any pressure they could exert themselves.

This article is published on the first anniversary of the wharves dispute and on the eve of a second wave of *Workplace Relations Act* reforms, to which debate as to the role of trade unions is contentious. Therefore, it is appropriate to discuss Australian strike law and its ef-

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fects on trade union power, particularly through an examination of the position of unions in both the Weipa dispute of 1995 and the wharves dispute of 1998. In furtherance of that aim, consideration will be given to the following matters:

- The notion of a 'right to strike' derives from Australia's international legal obligations to give workers a right to organise so as to have a 'voice' in the employment relationship. However, the possible enactment of such a 'right' in Australian domestic industrial law is problematic. When the conciliation and arbitration system (which aimed at peacefully resolving disputes) dominated, strikes were seen by some as anomalous. The latter day rise of competition law, economic rationalism and enterprise bargaining has seen industrial action, when used to support broad union causes, further criticised as an unnecessary interference with market forces.
- An analysis of Australian strike law (under both the *Industrial Relations Act* 1988 and the *Workplace Relations Act* 1996) is undertaken, particularly regarding secondary boycotts. It will be established that there is not, and never has been, a guaranteed right to strike in Australian law and that any freedom to take industrial action free from legal penalty is limited and in no way entrenches union power.
- Finally, an overview of the two great strikes of the 1990s (at both Weipa and the wharves) will be undertaken in order to provide the foundation for an analysis of the effect of strike law on trade union power. The argument will be advanced that the very existence of trade unions is under threat and that their capacity to use traditional 'weapons' of self-defence and self advancement (particularly secondary boycotts) has been curtailed and leaves them vulnerable.

The ultimate conclusion of the article is one that urges the taking of a 'middle ground' between the two extremes of either effectively prohibiting or allowing all secondary boycotts - which has been the stance adopted in legislation up to the present time. The origins of this 'middle ground,' may be found in the early writing of the luminaries Hall[1] and Byrne[2] and later by commentators such as Otlowski;[3]

1 DR Hall, 'Secondary Boycotts in So many Words' (1984) 10 *Sydney Law Review* 275.

2 R Byrne, 'Secondary Boycotts: section 45D and its aftermath' in *Secondary Boycotts and section 45D* (Canberra: Attorney-General's Department AGPS, 1982).

3 M Otlowski, 'The Demise of Conspiracy by Unlawful Means? Future Directions for Australia' (1989) 2 *AJLL* 107.

Jolly;[4] Pittard[5] and McCarry,[6] that is, to examine the *purpose* of the secondary boycott before determining its legality. Where the purpose of the secondary boycott is to preserve the legitimate existence of a trade union and where it is not unduly detrimental to the national interest, then the union initiating the boycott should be afforded a defence to (what should be) a prima facie prohibition on secondary boycotts. If, however, the issue motivating the boycott is not essential to the survival of the union and is unduly damaging to the national interest, then no defence is to be made available and the union is to be prosecuted.

Clearly, this article is premised on the view that unions should maintain a role in Australian industrial relations. However, it is acknowledged that unions should not have carte blanche power to achieve their ends and that there have been times where unions have abused the 'privileges' they have been given. It is also acknowledged that there are other recent factors that have contributed to the decline of trade union power, such as the casualisation of the work force, computerisation and blue collar unemployment.[7] Further, although strikes have been banned all this century, there have been times when unions have flourished despite those bans. It is submitted that the reason why the *Workplace Relations Act* prohibitions on strikes (especially boycotts) are so damaging to unions is because those bans have been enacted at a time when the union movement is under attack at so many levels (by such things as casualisation) and when the political climate seems particularly disposed towards competition law and policy such that there is a culture in which employers are more likely to challenge union dominance.

Part One: Australia's International Obligation to Enact a Right to Strike and the Practical Problems with its Adoption

Australia has an obligation under international law to enact a right to strike. This obligation derives from two International Labour Organisation (ILO) Conventions to which Australia is party: *Freedom of*

4 G Jolly, 'The Defence of Justification and Industrial Action' (1992) 5 *AJLL* 262.

5 M Pittard, 'Trade Practices Law and the Mudginberri Dispute' (1988) 1 *AJLL* 23.

6 G McCarry, 'Sanctions and Industrial Action: The Impact of the Industrial Relations Reform Act' (1994) 7 *AJLL* 198.

7 Macken, *Australian Trade Unions: A Death or a Difficult Birth?* (Federation Press, 1997). Other factors include an appearance that the leadership of some unions 'grew out of touch'.

Association and Protection of the Right to Organise Convention 1948 (No. 87) and the *Right to Organise and Collective Bargaining Convention* 1949 (No. 98). The combined effect of these two Conventions is that States parties must legislate to protect workers' rights to join and form trade unions. Essentially, workers are seen to be in an imbalance of power with their employers, as employers traditionally owned the means of production and had the discretion to hire and fire staff. When workers gained the freedom of association and right to organise, their power to collectively bargain began to equalise their position and gave them more power than existed in the era of individual contracts: in other words, the combined power of unionisation improved working conditions. It was argued that equality was finally achieved when the workers not only gained the power to unionise, but also to collectively withdraw their labour in support of their demands. Only when the freedom to strike exists can there truly be freedom of association and equality between employees and employers.[8]

While the right to organise is specifically promulgated at international law, the right to strike is an implied right. However, its implied nature is not an indication of inherent weakness. On the contrary, a study by Ruth Ben-Israel found that the right remained implicit so as to *broaden* its scope, the fear being that 'providing a [written] right to strike would inevitably lead to a restriction of the scope of activity'.[9] The strike is the 'essential weapon for workers and their organisations to promote and protect their economic occupational interests'.[10] As such, a general prohibition on industrial action cannot be justified except in a genuine crisis. However, there can be a limit on particularly damaging strikes, such as secondary boycotts.[11] Boycotts involve the taking of strike action against more than simply the employer of the striking unionists: they involve the spreading of industrial action to numerous sectors of the economy. Consequently, and as indicated in the introduction to this article, boycotts are particularly effective union weapons; they raise the profile of the union demands and create a powerful 'bargaining chip'. However, they also damage 'innocent' third parties, not directly involved in the dispute, and

8 Valticos, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, 1979) pp 26-28.

9 R Ben-Israel, *International Labour Standards: The Case of Freedom to Strike*. A study prepared for the International Labour Office (Kluwer Law and Taxation Publishers, 1988).

10 Id at p 94.

11 Id at p 117.

consequently spread damage throughout the national economy. Once its parameters have been decided, International Law requires that the right to strike is to be supported by further measures designed to protect and promote trade unionism (trade union security measures), particularly freedom from anti-union discrimination (which is discussed again in the context of the wharves dispute in Part Three of this article).

Despite its international obligations, and despite its enacting union anti-discrimination measures (s298K *Workplace Relations Act* 1998) and allowing preference in employment to be given to trade unionists (until the enactment of the *Workplace Relations Act* 1998), Australia is arguably non-compliant on the issue of the right to strike. There is not and never has been a right to strike in Australian law.[12] The most there has ever been is a freedom to strike free from legal penalty, one that, it is argued, does nothing to entrench the position of unions in this country or fortify their influence.

Some of the reasons for this position were discussed by MacIntyre and Mitchell in their work, *The Foundations of Arbitration*.[13] The authors discuss how the system of conciliation and arbitration, which dominated Australian industrial law for the first eighty years of this century, was designed to peacefully resolve disputes and enshrine the place of trade unions in industrial law, so as to overcome the problems that arose due to the Great Strikes of the 1890s. The Great Strikes were borne out of the economic hardship and worker oppression of the 1890s. In the context of a depressed economy, workers, particularly on the wharves, would attend work places in the morning and almost beg for work. If they gained work, it was only for that day, during which time they felt they were 'treated like dogs'.[14] There was no job security, no humane conditions of work, no set rates of pay - life was perhaps a lottery, and a cheap one at that. In a bid to attain fair conditions and security of employment, workers attempted to unionise and took industrial action in the series of Great Strikes, which affected almost every sector of the Australian economy. These strikes ended as a crushing defeat for unions. Employers were better

12 Glen Martin QC at Griffith University Labour Law Conference Brisbane, May 1998.

13 S MacIntyre and R Mitchell, *The Foundations of Arbitration* (Oxford University Press, 1989).

14 Cf John Coombs Secretary Maritime Union of Australia appearing on *Sixty Minutes* Nine Network (26 April 1998). Such episodes are also recounted in MacIntyre and Mitchell, Id at pp 59-60ff; and Macken, note 7 above.

able to mobilise than unions, the latter often comprising casual labour who were at a socio-economic disadvantage. (As suggested earlier, such factors bedevil unions again today). At day's end, employers simply refused to recognise unions and negotiate with them. The forces of law and order as they then stood, tolled heavily against the unions.[15] As MacIntyre and Mitchell note, conciliation - whereby workers, represented by unions, and employer bodies would come before an impartial arbiter to settle terms and conditions of employment - was a response to the Great Strikes. That response was designed to bring peace order and dignity where previously there had been chaos. It was to give workers and their representatives a guaranteed role and place in Australian industrial law.[16]

Despite this strengthening of the existence of unions due to their holding an enshrined place in the conciliation and arbitration system, the upholding of the unions' important strike weapon created difficulties, ironically due largely to the very nature of the conciliation and arbitration system itself. As conciliation and arbitration was designed to resolve difficulties, some scholars questioned the need for freedom to strike.[17] The 'problem' posed was alluded to by Henry Bourne Higgins:[18]

> the process of conciliation with arbitration in the background is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the state is to enforce peace between industrial combatants as well as between other combatants; and all in the interests of the public.

Today, the practicality of legislating to allow strikes has been further complicated. Opposition to the very existence of trade unions has emerged through the rise of globalisation and economic rationalism. Nowadays, Australian businesses have to compete internationally and not simply within Australia (globalisation). Competition law (eg attempts to rid business of bureaucracy) has gained the ascendancy over trade union law in order to support business in its quest. Consequently, trade union notions of collectivism (of going to the impartial

15 MacIntyre and Mitchell, note 13 above, at p 156.

16 Id at pp 156, 157. The system was said not to be able to function procedurally without the unions because they were the representatives of workers' interests before the arbitrator, the Conciliation and Arbitration Commission.

17 See for example G Smith, 'Should there be a Freedom to Strike' in *No Vacancies* (1989-90) p 10 (Proceedings of the HR Nicholls Society).

18 H B Higgins, *A New Province for Law and Order* (Constable and Company, 1922) as cited in M Gardner and G Palmer, *Employment Relations and Human Resource Management in Australia* (Ram Press, 1995) p 25ff.

arbiter, the Australian Industrial Relations Commission, to gain an award of employment conditions to ensure all workers are treated the same) are often seen as an unnecessary and undesirable market interference - negotiation between individuals at particular workplaces (enterprise bargaining) being seen as commercially sound. Enterprise bargaining has been grafted on to the system of conciliation and arbitration and, to that extent, it still recognises unions to a degree. It even allows unions to take some strike action as a bargaining chip when negotiating enterprise agreements for members. However, that freedom does not necessarily strengthen the position of unions. Ironically, it allows them to use their traditional strike weapon to support a system in which they are less relevant. As enterprise bargaining expands towards the use of private individual contracts, the problems facing unions continue to grow. The difficulty for unions, then, is that against the background of competition law, many of the strikes on which they seek to embark today are about the very survival of the trade union movement as a recognised force in Australia, that is *they are about causes and not simply the terms and conditions of employment* (as happened at both Weipa and the Wharves discussed in Part Three). The unions' place is no longer promoted but often attacked, and it is now that they most need to take dramatic industrial action, such action being the most effective way to make their point (eg that without the continued existence of unions, as worker advocates and employment watchdogs, workers' conditions might regress to those prevailing in the 1890s). It is for these reasons that the prohibition on strikes (particularly boycotts) found in the *Workplace Relations Act* 1996 is pivotal to the question of trade union power. These laws are discussed in Part Two of this article. Their severity should perhaps be considered in the context of the warning of the International Labour Conference 1994:[19]

> More than any other aspect of industrial relations, strike action is often a symptom of broader and more diffuse issues, so that the fact a strike is prohibited by a country's legislation or by a judicial order will not prevent it from occurring if economic or social pressures are sufficiently strong. In addition, while the judicial authorities generally have to confine themselves to applying existing legal rules to strikes, it is not unusual for workers and their unions to launch strikes precisely with the aim of having these rules changed, which inevitably leads to differences of opinion and even further disputes.

[19] International Labour Conference 81st Session, *Freedom of Association and Collective Bargaining* (ILO, 1994) paragraph 138.

Such a statement proved particularly significant in the case of the dispute between Patrick Stevedoring and the Maritime Union of Australia (MUA) (discussed in Part Three and the Conclusion of this article).

Part Two: Prohibition of Secondary Boycotts: The Need for a New Purpose Defence

It follows from Part One that the right to strike, clearly part of international law has caused problems in Australian domestic law and is now being attacked (along with the very power of trade unions themselves). This section of the article deals with Australian strike law: the law relating to industrial torts; secondary boycotts; strikes that occur in pursuit of enterprise bargaining claims and the capacity of employers to seek injunctions against anticipated strike action. However, the section does not simply list the laws. The clear emphasis of this discussion is on the severity of Australia's prohibition on strikes, even when the purpose of that action is to preserve the unions' existence. This section is used as the basis for the article's ultimate proposal, namely, that strike laws in this country should be relaxed when the industrial action is taken for crucial and legitimate industrial ends such as the trade union's survival and reaction against the perceived unfair or possibly illegal acts of an employer. That relaxation should take the form of a new defence (to secondary boycott prohibition) in circumstances where the unions' industrial action is for the *purpose* of preserving its legitimate existence (Limb one) and where the action is not unduly prejudicial to the national interest (Limb two). As noted in the introduction to this article, the origins of that view lie in the early writings of Hall and Byrne and later in the commentaries of Otlowski, Jolly, Pittard and McCarry.[20] The writings of those commentators are discussed in this section of the article along with an analysis of the relevant cases.

Industrial Torts: A Brief Definition of those Torts Relevant to the New 'Purpose' Defence

The Relevance of Purpose

As Ewing noted in his article,[21] 'one of the interesting features about Australian industrial law is that the statutory system of conciliation

[20] Hall, note 1 above; Byrne, note 2 above; Otlowski, note 3 above; Jolly, note 4 above; Pittard, note 5 above; McCarry, note 6 above.

[21] 'The Right to Strike in Australia', (1989) 2 *AJLL* 18.

and arbitration operates along side rather than to the exclusion of the common law'. The employment relationship is, therefore, one of contract (a contract of service between the employer and the employee). A strike, being a disruption of the supply of labour by an employee to the employer, interferes with that supply of labour - it disrupts the contract. Whilst the employer might not want to rely on the disruption to end the employment relationship,[22] the law has long considered that a strike may well give rise to an action in tort by the employer against the striking union.

The law pertaining to industrial torts was analysed by Professor Sykes in his seminal work, *Strike Law in Australia*.[23] This section of the article does not aim to reproduce Sykes' work, but rather to provide an analysis of tortious judgments in which the possibility has been raised that in the event that the *purpose* of industrial action is to further legitimate union ends, rather than to predominantly damage the business of the employer, then liability may not arise.

The industrial torts, themselves, were listed in brief compass by Jolly in his article 'The Defence of Justification and Industrial Action':[24]

- *Interference with contractual relations*. By inducing the union members to breach their employment contracts and by interfering with the employer's supply contracts;
- *Conspiracy to injure or conspiracy by unlawful means*. This type of conspiracy is largely dependent on members causing damage to the plaintiff by means involving contractual interference and probably also breach of statute; and
- *Interference with trade or business by unlawful means* and the closely related tort of intimidation which arises when the union first threatens the strike action.

It is in the context of the torts of interference with contractual relations and conspiracy that judicial comment on the relevance of the motives and purpose of trade unionists and the effect this has on the legality of strike action is discussed.

22 The view was taken by Lord Denning in *Morgan v Fry* [1968] 2 QB 710 at 729 as cited in Ewing, note 21 above, at p 19, the employer may regard the labour force as too difficult to replace en masse or may view the dispute as insufficient to terminate what may have been a long term relationship.

23 (Law Book Co, 1982).

24 Jolly, note 4 above.

Interference with Contractual Relations

The tort of interference with contractual relations was first established in the English case *Lumley v Gye*[25] on the basis that 'he who maliciously procures damage to another by violation of his right should be made to indemnify'. This was later modified by Lord Macnaughton in *Quinn v Leathem* such that the requirement of malice was broadened to that of intention.[26] Essentially, the tort was committed where a person intentionally interfered with a contract without justification. That interference, as alluded to above, could be either direct, where the union members were induced to breach their employment contracts, or indirect, by interfering with the employer's supply contracts.[27]

The traditional defence to the tort of interference is justification. This defence was enunciated by Lord Romer LJ in *Glamorgan Coal Company Ltd v South Wales Miners' Federation* in these terms:[28]

> in analysing the circumstances ... regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the relation of the person procuring the breach to the person who breaks the contract; and...to the object of the person in procuring the breach...

The broad nature of this statement left much scope for the courts to interpret the breadth of the defence. Two Australian cases are often cited as instructive in this regard: *Ranger Uranium Mines Pty Ltd v Federated Miscellaneous Workers Union of Australia*,[29] and *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Airline Pilots*.[30]

Whilst in the interlocutory decision of *Ranger Uranium*[31] the Court accepted the defence of justification to find that a picket in support of a health and safety issue could be justified, the defence of justification

25 (1853) 118 ER 749 at 756, per Erle J as cited ibid.

26 [1901] AC 495 at 510 as cited in Jolly, note 4 above.

27 Jolly, note 4 above relying on the cases of: *Torquay Hotel Co Ltd v Cousins* [1969] Ch 106; *Merker Island and Shipping Corporation v Laughton* [1983] 1 WLR 778; and *JT Stratford and Sons Ltd v Lindly* [1965] AC 269. Reliance is also placed by Jolly on the commentary of Lord Wedderburn in 'Procuring Breach of Contract - Intimidation - Unlawful Interference - Conspiracy - Trade Disputes' in R W M Dias (ed), *Clerk and Lindsell on Torts* (Sweet & Maxwell, 1989) at pp 802-7.

28 [1903] 2 KB 545 at 573-4 as cited in Jolly, note 4 above.

29 (1987) 54 NTR 6 at 9.

30 (1990) 95 ALR 211.

31 Note 29 above.

was not accepted in the *Pilots*[32] case. Real doubt, therefore, is left as to whether justification is really an effective defence in Australia in the event that action for the tort of interference is taken against industrial action. In the view of scholars, such as Jolly,[33] this interpretation of the defence by Australian courts severely restricts the capacity of a union to strike and calls into question Australia's compliance with international law. As 'the strike is the necessary ultimate sanction without which collective bargaining could not exist',[34] Jolly suggests the courts interpret the defence widely, taking into account: the conduct and *objectives* of the parties; the gravity of the unlawfulness; the existence of alternative means for resolving the dispute; the likely damage to the plaintiff and society; the fairness of the contract; and the role of the right to strike in the conciliation and arbitration and enterprise bargaining systems.[35]

Conspiracy

There are two types of conspiracy: conspiracy to injure and conspiracy by unlawful means. Significantly, conspiracy to injure actually takes into account the *purpose* for which the union concerned has taken the industrial action to which the legal action relates. Conspiracy by unlawful means does not, prompting commentators, such as Otlowski, to suggest that this latter tort forms an unreasonable constraint on the capacity of a trade union to bring industrial action and, therefore, pursue its legitimate industrial ends.[36]

The leading Australian authority on the tort of conspiracy to injure is *McKernan v Fraser*.[37] That case had the effect of recognising some legitimacy in industrial action where that action was taken by the union in the pursuit of a legitimate industrial goal. The plaintiffs were unfinancial members of the Federated Seamen's Union (which had once been registered under the relevant industrial relations statute) who refused to pay their membership dues until the union again became registered. The plaintiffs also joined a 'rival' union that attempted to become registered. The Adelaide Branch of the Seamen's Union re-

32 Note 30 above.

33 Jolly, note 4 above.

34 O Kahn-Freund, *Labour Relations: Heritage and Adjustment* (Oxford University Press, 1979) at 77 as cited in Jolly, note 4 above.

35 Jolly, note 4 above, at p 284ff. The author eventually suggests the system that has since been adopted in relation to enterprise bargaining, that is that trade unions can bargain in order to settle terms and conditions of an enterprise bargain.

36 Otlowski, note 3 above.

37 (1931) 46 CLR 343.

solved that members should refuse to sail with members who refused to pay their contributions. Subsequently, the Adelaide Steamship Company selected the plaintiffs for work on one of their ships. The defendant was the secretary of the Seamen's Union at Port Adelaide. He informed an officer of the shipping company 'You can't sign them on. They are unfinancial. If you take these two men, the other crowd won't sign on'. When a representative of the shipping company asked members of the union whether they would sail if the plaintiffs signed on, the union secretary repeated his earlier words and the men ultimately refused to sail with the plaintiffs. Action was taken against the defendants for, inter alia, conspiracy.

The High Court gave judgment in favour of the defendants. Of particular significance were the words of Justice Dixon in his discussion of the relevance of trade union intention. His Honour stated:[38]

> But on behalf of the respondents the cause of action in conspiracy was also supported on the ground that the appellant was party to a combination which had for its object the wilful infliction of damage upon the respondents. This assumes that the end is not in itself unlawful, that the means are not unlawful, and that no threat of an illegality is made in furtherance of the combination. It appears now to be settled that, for a combination or acts done in furtherance of the combination to be actionable in such circumstances, the parties to the alleged conspiracy must have been impelled to combine, and to act in pursuance of the combination, by a desire to harm the plaintiff, and that this must have been the sole, or the true, or the dominating, or main purpose of their conspiracy. At any rate so I understand the doctrine which has slowly won its way to final acceptance by the House of Lords in *Sorrell v Smith*. To adopt a course which necessarily interferes with the plaintiff in the exercise of his calling, and thus injures him, is not enough. Nor is it enough that this result should be intended if the motive which actuates the defendants is not the desire to inflict injury but of compelling the plaintiff to act in a way required for the advancement of the defence of the defendants' trade or vocational interests.

In the view of His Honour, although there might have been some embitterment in the conduct of the parties concerned, considered on the whole of the evidence, what actuated the conduct 'was the desire and the purpose of compelling the promoters of the rival union to desist from the project by depriving them of employment and making manifest to their followers the unwisdom of adhering to them'.[39] This construction by the High Court means that the tort of conspiracy to

38 Id at 361-2 per Dixon J.

39 Ibid.

injure has 'little practical significance ... as a weapon against industrial action'.[40]

However, the purpose of the union's action is not accorded weight in the case of conspiracy by unlawful means. Rather, liability only requires proof of combined action where either the object of the combination or the means used to attain the object are unlawful and damage results. No motive can excuse unlawful behaviour and the possible defence of justification is irrelevant.[41]

Scholars such as Otlowski argue that this position of Australian Courts on the irrelevancy of the motive and purpose, undermines the right to strike in Australia and constitutes a real threat to the activities of trade unions. Otlowski notes the English decision of *Lonrho Ltd v Shell Petroleum Co Ltd*[42] in this regard. The case involved the contravention by the respondents of sanctions prohibiting the supply of oil to Southern Rhodesia - such was to become a criminal offence. Those who had abided by the sanctions argued that a conspiracy had been committed on the basis that the respondents had acted to promote their own commercial interest. It was not argued that the respondents had so acted for the purpose of injuring the appellants. The House of Lords rejected the argument, implying that 'a predominant intention to injure the plaintiff is now an essential ingredient of liability even where unlawful means are involved'.[43] Otlowski suggests that such an approach should also be adopted in Australia and that the question of motive should be relevant. If such an approach is not adopted, Otlowski argues that the right to strike is too severely curtailed.

The Present Australian Position and the Need for a New Defence

The industrial torts, prime facie, cannot be prosecuted under the current Australian law, s166A *Workplace Relations Act 1996*, until a 72 hour 'cooling off' period has elapsed. The aim of that provision is to encourage the negotiation of disputes. However, to interpret that situation as indicating a growth of trade union power would be to provide an unsophisticated view for the law. An accurate picture can only be drawn by appreciating the manner in which the present law

40 Otlowski, note 3 above. That author also notes that the High Court's approach is similar to that of the House of Lords in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435.

41 Otlowski, note 3 above, at p 109ff referring to the cases of *Williams v Hursey* (1959) 33 ALJR 224 and *Coal Miners Industrial Union of Australia* (1959) 103 CLR 30.

42 [1982] AC 173.

43 Otlowski, note 3 above.

came into being. Such appreciation also supports the view that a new defence for industrial action is required.

Despite the volume of Australian cases concerning the industrial torts, which were decided in the early part of the century, 'civil actions more or less fell out of favour' from about the 1960s.[44] This trend was thought to be exemplified in the conclusions of the Swanson Committee Review into the Australian Trade Practices Act,[45] namely that common law liabilities were a 'dead-letter in practice' as employers did not wish to apply legal sanctions to the detriment of their industrial relations (that is, the threat of legal action would provoke and exacerbate conflict, and prejudice the likelihood of successful conciliation).[46]

Although they were not used widely during this period, the industrial torts were not, however, forgotten. Academics and lawyers were aware of the benefits that could be achieved from remedies that flowed from the use of the industrial torts. Even if a case did not proceed to a full trial and the possible award of damages, if an employer could present a prima-facie case that a strike amounted to, for example, interference with their business relations, then an interlocutory or interim injunction would usually be issued until the matter could be tried. The effect of the granting of an injunction was at the very least a 'strike breaker'.[47] Further, there were those who felt the unions had too much power - that they should be made subject to the general (common) law of the land 'like anyone else'[48] - and that it was economically in the interests of business to place emphasis on commercial concepts, such as the contract of employment.[49]

The full effect of the industrial torts was finally exploited and demonstrated in two cases, which represent 'landmarks' in modern Aus-

44 A Stewart, 'Civil Liability for Industrial Action: Updating the Economic Torts' (1983-1985) 9 *Adelaide Law Review* 359 at 382.

45 Australia, Trade Practices Act Review Committee Report (Swanson Chairman) 1976.

46 Hence the recommendation of the committee to introduce sections 45D and 45E as being necessary to punish non-competitive union activity.

47 Stewart, note 44 above, at p 359; and Ewing, note 21 above, at p 30ff.

48 B Creighton, 'Trade Unions, The Law and The New Right' in K Coghill (ed), *The New Right's Australian Fantasy* (Penguin Books Australia, 1987) p 74 at 81.

49 Ibid. Note that the industrial torts were lauded in P Costello, 'Legal Remedies Against Trade Union Conduct in Australia' in *Arbitration in Contempt* (Proceedings of the H R Nicholls Society) (Melbourne, February 1986). Unions, of course, argued industrial relations was a separate field and that workers were not to be subject to the financial severity of the common law system.

tralian industrial law: *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia and Others* (hereinafter referred to as 'Dollar Sweets'); and *Ansett Transport Industries (Operations) Pty Ltd and Others v Australian Federation of Air Pilots and Others*. Both of these cases have been the subject of extensive commentary, so it is only necessary to note that the Pilots' dispute ended with a court order for the payment of $6 million by the pilots' union. Such enormous damages prompted the ILO to call on the Australian Government not to enforce the crippling penalty, but rather to review the Australian anti-strike provisions.[50]

These calls were eventually heeded when changes were effected by the former Labour Government to the *Industrial Relations Act* 1988 through the passage of the *Industrial Relations Reform Act* 1993. This statute aimed at giving effect to Australia's international legal obligations. It introduced the 72 hour 'cooling off' period before action could be taken using the industrial torts (s166A).[51] The Second Reading Speech of the *Industrial Relations Reform Act* 1993 began with words which seem the antithesis of the competition policy of the late 1990s:[52]

> This Bill starts with a confession that it is based on a humanitarian interpretation of the principles and obligations which form the very basis of civilised society. It leaves to its opponents the creed whose God is greed, whose devil is need, and whose paradise lies in the cheapest market.

As stated above, under the *Workplace Relations Act* 1996, the limitations on the initiation of tortious action against striking workers remains. It is significant, however, that pursuant to the first draft of the *Workplace Relations Bill* 1996, the provision was to be repealed.[53] The Explanatory Memorandum described the purpose of the new industrial action provisions as aiming to 'strengthen the Industrial Relations Commission's powers to stop or prevent industrial action, and to remove the current restrictions on action under State or Territory

50 K McEvoy and R Owen, 'On a Wing and a Prayer: The Pilots' dispute in an international context' (1993) *AJLL* 1.

51 The law was changed through use of the constitutional foreign affairs power and the requirement of giving effect to Australia's international legal obligations - *Victoria v Commonwealth* (1996) CLR 416.

52 L Brereton, then Minister for Industrial Relations, Parliamentary Debates (Hansard) House of Representatives 28 October 1993 at p 2777. As discussed below, there is a freedom to strike free from legal penalty in the context of enterprise bargaining, but it is questionable as to whether that actually promotes trade union power.

53 See Schedule 14 of the Bill, especially clause 7.

law in respect of industrial action involving federal organisations.'[54] Section 166A was only retained when the Government was forced to negotiate changes with the Australian Democrats, the party holding the balance of power in the Senate, in order to ensure the final passage of the Bill.[55]

Due to the manner in which s166A was retained and its conflict with basic principles of present day competition policy (which favour the rights of business over the rights of trade unions lauded in the second reading speech of the *Industrial Relations Reform Act*), it is submitted that its existence should not be taken for granted, nor should its continued presence as part of Australian industrial law be presumed. This is particularly the case given that the pursuit of common law remedies for industrial disputation has long been the policy of the Liberal party.[56]

In the conclusion of the discussion of the industrial torts, then, two matters become clear:

- If ever the 72 hour cooling off period was repealed, trade union power could be curtailed and unions would possibly be less likely to take strike action. Further, Australia's compliance with international law would be brought into question. There is ample basis in the decided cases and commentaries that a new defence to a prohibition on torts could be/should be found by examining the purpose of the action;
- There is effectively a total ban on secondary boycotts (discussed below). This has the effect of jeopardising the very existence of trade unions. This is so because (as discussed in Part One), recently, unions have been involved in disputes regarding the rights of workers to join unions without being discriminated against for so doing. Secondary boycotts have often been effective weapons in such situations (as will be shown in Part Three of this article in the discussion of the Weipa and Wharves disputes). A new defence based on purpose should be enacted. There is ample authority for such defence in the secondary boycott cases and commentaries and, by analogy, in the industrial torts sphere. Because secondary boycotts are in fact illegal, they are the focus of this defence. The prohibition on secondary boycotts is especially significant to trade

54 Explanatory Memorandum of the Workplace Relations Bill 1996 Schedule 14.

55 See the *October Agreement* and *Report of the Senate Economic Review Committee* AGPS (1996).

56 Creighton, note 48 above, at p 83; Refer also Stewart, note 44 above, for a discussion of other means employers can adopt to sue unions.

unions and freedom of association because it is a law that regulates the conduct of trade unions, but which is contained in a trade practices rather than industrial statute. Further, it provides a penalty against unions which does not naturally flow from the employment relationship (as is the case with tortious remedies), but is instead imposed on unions by the Government's competition law and policies.

Secondary Boycotts

Secondary Boycotts are similar to some of the industrial torts discussed above in that the industrial action is aimed 'at someone other than the employers of the person taking the action' (that is the 'target' employer).[57] For example, a union, which is engaged in a dispute with the plaintiff (the operator of a chain of butcher shops) might take steps to have those of its members employed by the plaintiff's supplier (an abattoir) black ban the slaughter of the butcher shop's beasts.[58] The result is that a secondary boycott is a potent weapon against a target but also harms innocent third parties.

Since the mid-seventies, the issue of legislating in this area has been the topic of lively, even heated, debate. Unionists who instigate such boycotts often do so believing that they are pursuing a 'legitimate industrial objective', such as the unionisation of a particular workforce.[59] In fact, in recent years, it has most effectively been used in the context of unions fighting for their survival at certain workplaces (refer to the discussion of the Weipa and Wharves disputes in Part Three of this article). However, as stated, the conduct will cause loss to an employer *with whom members of the union have no direct dispute*. The difficulty for legislators is well expressed by commentators, such as Byrne, as:[60]

> striking an acceptable balance between the need to ensure that the target is provided with an adequate protection in the form of access to civil remedies on the one hand, and, on the other hand, the need to protect unions and unionists from civil suit arising out of actions taken in pursuit of legitimate industrial objectives.

As a possible solution to this problem Byrne along with Hall and Pittard and McCarry have emphasised the importance of the *purpose* be-

57 Byrne, note 2 above, at p 1.

58 Compare Byrne, note 2 above, at pp 1 and 2, discussing *Tillmann's Butcheries Pty Ltd v Australian Meat Industry Employees Union* (1980) 42 FLR 331.

59 Compare Byrne, note 2 above, at p 1.

60 Byrne, note 2 above, at p 3.

hind the taking of the secondary boycott action. This section of the article analyses these legal commentaries and decided cases and ultimately supports the taking of a middle ground in which secondary boycotts are prime facie illegal but where a defence is afforded to unions where the secondary action is taken in pursuit of a vital union goal (such as ensuring its survival) (Limb One) and where the action is not unduly detrimental to the Australian economy (Limb Two). In the course of the discussion, Australia's secondary boycott laws will be outlined. It will be seen that the current law, the *Workplace Relations Act* 1996 re-enacts s 45D *Trade Practices Act* 1974 (which remained in force from 1976-1993) which all but prohibited the taking of all secondary boycotts regardless of their purpose. The only respite unions have had from that severe legal stance arose in the period 1993-1996 when the former *Industrial Relations Act* 1988 provided for a 72 hour cooling off period similar to that arising in the context of the industrial torts.

Secondary Boycotts: The Law

The *Workplace Relations Act 1996* amended the *Trade Practices Act* 1974 to include the following provision s45D:

> (1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
>
> (a) that hinders or prevents:
>
> (i) a third person supplying goods or services to a fourth person (who is not employer of the first person or the second person); or
>
> (ii) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person);
>
> (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.
>
> (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
>
> (3) Subsection (1) applies if the fourth person is a corporation.
>
> (4) Subsection (1) also applies if:
>
> (a) the third person is a corporation and the fourth person is not a corporation; and
>
> (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

The statute, in similar terms, prohibits conduct in concert for the purpose of substantially lessening competition in any market in which

the fourth person supplies or acquires goods or services.[61] Furthermore s45DB prohibits boycotts:

> preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce...between Australia and places outside Australia; or ... among the states; or ... within a Territory, between a State and a Territory or between two Territories.

Section 45DC attributes liability to organisations not to individual union members because it regards unions as the prime movers of industrial actions and seeks to curtails their activities. The extent of liability is dealt with in s76 of the *Trade Practices Act* 1974 and it can range up to millions of dollars, clearly enough to financially destroy any union engaging in such conduct. As with the old s45D there are some permissible boycotts, but these are limited to strikes regarding terms and conditions of employment - they do not extend to protect, for example, unions that conduct sympathy strikes or those promoting broad union causes.[62]

The current law, as stated, substantially re-enacts the former s45D of the *Trade Practices Act* which was in force between 1976 -1993. To that end, the section reflects competition policy, the original review committee being one to examine 'the application of the Act to anti-competitive conduct by employee or employer organisations'.[63] Conversely, s45D represents a rejection of the ILO's views of strike law.

It is interesting that the views of the ILO were embraced by the interim provision - that which was enacted between the first and the second incarnations of s45D – namely the regime of the *Industrial Relations Act* 1988. That legislation which operated between 1993 and 1996 adopted a position similar to that governing the industrial torts (ie it required the expiration of 72 hours 'cooling off period' before legal action could be taken). Parliamentary debate reflects criticisms of that position as being unfairly pro-union. It was argued that in the 72 hour period enough damage could be done to a business to destroy it, if it did not capitulate to union demands.[64] Further, it was argued that the provision was so difficult for a business to fulfil that 'one

61 Section 45DA, although there is no equivalent to s 45D(4).

62 Clearly the argument put forward in this article supports the extension of a defence to such strikes.

63 See terms of reference Swanson Committee - *Trade Practices Act Review Committee - Report to The Minister for Business and Consumer Affairs* (Australian Government Publishing Service, 1976).

64 Howard and Costello in Hansard (Canberra: AGPS 28 October 1993) at p 3034.

would have to be an absolute mug to ever get caught legally for engaging in a secondary boycott' under that provision.[65] To support that view, some scholars pointed to the fact that only one secondary boycott proceeding was ever bought under the *Industrial Relations Act* 1988 (in relation to the Weipa dispute considered in Part Three) and that was later settled.[66]

Law Reform: The New Purpose Defence

It follows that the law in Australia on secondary boycotts has fluctuated from a pro-union extreme to a pro-competition law and business extreme. It is submitted that this situation should no longer be tolerated, a moderate and more stable option being put in place, instead. Given the importance of secondary boycotts to unions and the damage that such action can do to innocent third parties, it is submitted that the prohibition should be retained, but that a new defence should be introduced. The availability of that defence would turn on the *purpose* for which the secondary boycott was taken. Where the action was for the legitimate union purpose of preserving the union's existence (Limb One) and where that action did not cause undue damage to the national economy (Limb Two), then the defence would be available. To appreciate the rationale for that defence, how it might work in practice, and why it should be adopted, the following section of the article discusses the cases which were decided under the former s45D. The relevant part of that section is also set out:

> Subject to this section, a person shall not, in concert with another person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a corporation (not being an employer of the first mentioned person), or the acquisition of goods or services by a third person from a corporation (not being an employer of the first-mentioned person), where the conduct is engaged in for the purpose and would have or be likely to have the effect of causing -
>
> substantial loss or damage to the business of the corporation or of a body corporate that is related to the corporation; or
>
> a substantial lessening of competition in any market in which the corporation or a body corporate that is related to the corporation supplies or acquires goods or services.

[65] Id at 3318.

[66] J Sloan, 'CRA dispute spotlights the need for IR finetuning' in *The Australian* (23 November 1995). Note that McCarry, note 6 above, discusses the significance of purpose in relation to the *Industrial Relations Act*. As that Act is no longer law, it is not considered in depth in this article. However, it is important that his views add further justification for the feasibility of a new defence.

> ... a person shall be deemed to engage in conduct for a purpose mentioned in ... subsection (1) if he engages in that conduct for the purpose that includes that purpose.
>
> A person shall not be taken to contravene, or to be involved in a contravention of, subsection (1) by engaging in conduct where -
>
> (a) the dominant purpose for which the conduct is engaged in is substantially related to -
>
> (i) the remuneration, conditions of work or working conditions of that person or of another person employed by an employer of that person...
>
> If two or more persons ... each of whom is a member or officer of the same organisation of employees ... engage in the conduct in concert with one another, whether or not the conduct is so engaged in concert with other persons, the organisation shall be deemed to have engaged in the conduct for the purposes for which that conduct is engaged in by the participants, unless the organisation establishes that it took all reasonable steps to prevent the participants from engaging in that conduct.

Tillmanns' Case

The first case in which the various concepts that comprise s45D were discussed was *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union and Others*.[67] Essentially, the manager of Tillmanns refused a request by union officials to see Tillmanns' employees. The union official persisted with the request, making it plain that his purpose was to unionise those employees. When he was restrained, the official retaliated by saying that he would black ban the shop. He then made a telephone call. Shortly after this, the manager of the Canberra Abattoir (where most of Tillmanns' meat was processed) declared that there was to be no more processing of livestock.[68]

Before the Full Federal Court, the various elements of s45D were considered in the two leading judgments, namely those of Bowen CJ (with whom Evatt J concurred) and Deane J.

In considering whether the proscribed purpose could be said to exist, Bowan CJ acknowledged the difficulties involved in determining the purpose of unionists in circumstances where their dominant purpose was to extend union coverage or gain further union fees.[69] His Honour was at pains to point out, however, that the existence of a union purpose was not mutually exclusive to the existence of a purpose of causing substantial loss or damage to a targeted employer. His Hon-

67 (1979) 27 ALR 367.

68 Id at 372 per Bowen CJ.

69 Id at 374.

our referred to the words of Sir Godfrey Lushington as cited in *McKernan v Fraser*:[70]

> In special reference to combined action against employers or non-unionists on the part of unionists ... to ask the question whether they acted to defend their own trade interests or to injure their economic adversary for the time being is equivalent to asking of a soldier, who shoots to kill in battle, whether he does so for the purpose of injuring his enemy or of defending his country. The analogy is sound because combined strike action is usually undertaken for the purpose both of causing harm to the employers and for the improvement or maintenance of the standards of unionists.

In the view of Bowen CJ, the unionists were aware that the only pressure that would be effective against Tillmanns (in obtaining their union purpose) was the prospect of actuality of loss or damage. To cause it was one of their purposes'.[71] Pursuant to s45D, it was only necessary for the proscribed purpose (of causing substantial loss or damage) to be *one* of the purposes concerned.

Deane J also considered the concept of purpose at length. His Honour determined that the 'purpose' referred to in s45D was the 'operative subjective purpose of those engaging in the relevant conduct in concert'.[72] His Honour continued that:[73]

> the question to be answered ... is ... to be answered not by reference to whether it was appreciated that the relevant conduct might have the specified effect but by reference to the real reason or reasons for, or the real purpose or purposes of, the conduct and to what was in truth the object in the minds of the relevant persons when they engaged in the conduct in concert.

In His Honour's view, the black ban was:[74]

> plainly imposed as a means of bringing pressure to bear upon the appellant to accede to Union demands in relation to Union membership of the appellant's employees. The point and purpose of the respondents' imposing and procuring observance of the black ban was that it would cause substantial loss or damage to the appellant's business while it remained operative. ... No doubt, the respondents hoped that the appellant, in order to avoid the loss or damage to its business that could be

70 *McKernan*, note 37 above, at 403.

71 *Tillmanns* note 67 above at 374 per Bowen CJ.

72 Id at 382, 383.

73 Id at 382, 383. His Honour notes that the Union's purpose is determined by reference to the purpose of those through whom it acted.

74 Id at 384, 385.

> expected to flow from the black ban, would accede to the Union's demands. Avoidance of loss or damage in that event would not, however, be because the relevant conduct ceased to achieve the purpose of causing substantial loss or damage. It would be because the respondents desired from engaging in the conduct.

His Honour concluded that as s45D(2) meant that conduct offended the section so long as substantial loss was a purpose of the unionists, and as the evidence demonstrated that was the case, on the facts, then the section was breached. There was no suggestion that there was a purpose of the type referred to in s45D(3).

Tillmanns[75] is a significant case. Commentary on the decision in *Halsbury's Laws of Australia* notes that it acknowledges that there may be multiple purposes behind the actions in which people are involved. The purpose proscribed by s45D(1) need not be the dominant, nor even the substantial purpose, for which the conduct is engaged in, so long as it is a real purpose. The question of whether or not a purpose is real is not to be answered by reference to the natural and probable outcome of the conduct, or by whether it was appreciated that the proscribed effect would follow from the conduct. Rather, conduct (even where the ultimate purpose is a union purpose) will offend the prohibition if the immediate purpose is to bring pressure to bear on the target employer by causing substantial loss or damage to that target's business. In contrast, where conduct does not have a proscribed purpose, participants will not be said to offend the prohibition simply because a reasonable man would have foreseen that the conduct would also cause substantial loss or damage to the business of the fourth person.[76]

Leon Laidley

While *Tillmanns*[77] is the starting point for a consideration of the meaning of the word 'purpose', subsequent cases, such as *Transport Workers Union of Australia and Others v Leon Laidley*;[78] *Devenish v Jewel Food Stores*;[79] *Building Workers' Industrial Union of Australia and Others v ODCO Pty Ltd*;[80] and *Wribass Pty Ltd v Swallow and Australasian Meat Industry Employees' Union*[81], introduce concepts such as mo-

75 Note 67 above.

76 'Secondary Boycotts' in *Halsbury's Laws of Australia*, pp14-15.

77 Note 67 above.

78 (1980) 28 ALR 589.

79 (1990-1991) 72 CLR 32.

80 (1990-1991) 99 ALR 735.

81 (1979) 38 FLR 92.

tive, immediate as opposed to ultimate purpose, and dominant purpose into the debate,[82] as well as the question of whether the means to an end is an immediate purpose or whether it is to be considered something separate and distinct.[83] The introduction of such subtleties, as well as the existence of dissenting judgments in the cases as to the issue of whether the proscribed purpose did, in fact, exist, are critical. It shows that there is uncertainty in the area. Since the concept of purpose is relevant to all subsequent pieces of legislation in the field, particularly the legislation currently in force, the uncertainty could see the meaning, and therefore the scope, of the provision change over time. The debate is of further importance as the notion of purpose is relevant, not only to the prohibition on secondary boycotts, but also to the defence (namely, that the dominant purpose of the conduct relates to the employment conditions of those concerned).

In *TWU v Leon Laidley*,[84] the respondent was a distributor of bulk fuel, which it had purchased from Amoco Australia Ltd since 1968. The drivers at Amoco were members of the TWU. When the respondent used its own drivers to make deliveries of fuel, the Amoco drivers called a stop-work meeting to consider whether Amoco should cease loading the trucks of the respondent. The result of these discussions was that a letter was drafted in these terms: 'Due to legal problems under the *Trade Practices Act* and the secondary boycott clause, neither the company nor you may impose bans of this nature. However, the company will attempt to contact [the respondent] to discuss the situation'. Subsequently, the TWU informed Amoco that its drivers [all TWU members] were now in dispute with Amoco. There was concern over continuity of employment because it was feared that if the respondent could deliver to one service station, then he could deliver to others, hence encroaching on the work of the Amoco drivers. Amoco then announced that it was 'unable to supply [the respondent] ... [due to] union action beyond our control'. The respondent estimated its losses at about $1155 for each day on which it was unable to obtain supplies from Amoco.

82 *Leon Laidley*, note 78 above.

83 See, for instance, the difference between the reasoning of Bowen CJ in ibid, and the judgment of Spender J in *Jewel*, note 79 above.

84 *Leon Laidey*, note 78 above.

The respondent was granted an interlocutory injunction at first instance.[85] An appeal to the Full Court was dismissed,[86] despite the arguments of the appellants that they were engaged in the relevant conduct for the sole purpose of protecting the jobs of Amoco drivers, alternatively that if this was not the sole purpose, it was the dominant purpose and was substantially related to the conditions of employment or working conditions of the Amoco drivers by virtue of s45D(3). The majority judges, Bowen CJ and Deane J, in separate judgments, confirmed the views they had expressed in the earlier *Tillmanns* decision as to the meaning of the term 'purpose'.

Bowen CJ re-iterated that the purpose to which s45D(1) referred was the immediate purpose or the means to the (possibly union) end. His Honour stated that although:[87]

> the ultimate purpose of the respondents, in taking the action which they did, was to protect the employment, the other evidence would support an inference that their means of achieving that objective and, therefore, their immediate purpose, was to cause Amoco to cease supply to Leon Laidley. When Amoco did cease supply, the men returned to work.

Deane J, in considering purpose, stated that the evidence was incomplete. For example, there was no evidence as to what was said at the meeting at which the drivers decided to strike (held after Amoco had originally refused their request to cease loading the respondent's vehicles). Further, three out of four of the personal appellants swore affidavits in which they denied that they had engaged in conduct for the purpose of causing loss or damage to the business of any corporation and asserted that the sole purpose of the conduct was to protect the employment of the employees of Amoco who were members of the TWU. Deane J stated that this was evidence as to motive, and not immediate purpose and that it raised 'difficult questions as to the precise meaning to be given to 'purpose' in s45D'.[88] His Honour did, however, hold that there was sufficient evidence to sustain the interlocutory injunctions.[89]

Significantly, Sweeney J, in his dissenting judgment, held that the purpose of the conduct was not to cause substantial loss or damage,

85 Per Lockhart J in *Leon Laidley Pty Ltd v Transport Workers' Union of Australia and Others* [1980] 42 FLR 352.

86 *Leon Laidley*, note 78 above.

87 Id at 594 per Bowen CJ.

88 Id at 601, 602 per Deane J.

89 Neither Bowen CJ nor Deane J attempted to make any conclusive findings as to the dominant purpose issue raised in the defence in s45D (3).

but rather to protect the employment of the tanker drivers. Unlike Bowen CJ and Deane J, Sweeney J went on to consider s45D(3). His Honour suggested that the dispute related to the broad issue of the company's entitlement to use contract labour:[90]

> The question arises whether the protection of the working conditions in reserving an area of work was substantially related to their working conditions. I think when the effect was to reduce the quantum of work available to a given group of employees, that is substantially related to hours of work.

Wribass Pty Ltd v Swallow and Australasian Meat Industry Employees' Union[91]

The defendant union had a policy of opposing weekend trading. The plaintiff supermarket sold packaged meat on Saturday mornings, although it did not require its employees who were members of the union to work on a Saturday. In pursuance of union policy, members of the union who were employed at the supermarket's wholesale supplier of meat imposed a black ban on supplying the plaintiff's business. The ban extended to members in any wholesaling meat establishment in Tasmania.

The plaintiff contended that these members acted in contravention of s45D(1). An interlocutory injunction was granted by Smithers J, who paid particular attention to the meaning of the word 'purpose'.

Counsel for the union submitted that the evidence inferred that the real purpose of the ban was 'to protect the work-free Saturday morning'.[92] It was contended that an approach similar to that adopted in the conspiracy case, *McKernan v Fraser*[93] was appropriate. Although the result of the defendant in his actions was to exclude the plaintiffs from engagement by the employer unless they ceased to support a rival union, it was held that, in view of the existence of that real purpose, the conduct of the defendant, which might have otherwise supported the cause of action alleged, was not unlawful.[94] In other words, the desire to harm the plaintiff must be the 'sole, the true, or the dominating, or main purpose of their conspiracy'.[95]

90 *Leon Laidley*, note 78 above at 598 per Sweeney J.

91 Note 81 above.

92 Id at 100.

93 *McKernan*, note 37 above, cited in the judgment of Smithers J, Id at 101.

94 *Wribass Pty Ltd v Swallow*, note 81 above, at 101.

95 Id at 101 quoting Dixon J (as he then was) in *McKernan*, note 37 above.

Further, and 'slightly differently',[96] the union argued that the infliction of loss and damage upon the plaintiff's business was not a purpose of the participants in the relevant conduct at all because their whole concern was with their hours of work.[97] Counsel urged that 'there is a distinction to be drawn between purpose and consequence and that any loss and damage suffered by the plaintiff was but incidental to and a mere consequence of the pursuit of the one and only purpose'.[98] In short, the union submitted that the protection of the participants' hours of work was at least the dominant purpose and that as such it performed two functions. It reduced the damage to the plaintiff which flowed incidentally from it to a mere consequence, and it provided a defence under s45D(3).[99]

In response to these submissions, Smithers J distinguished the conspiracy cases raised by the union from the situation under s45D. The question in the present case was said to differ from the situation which arose in *McKernan v Fraser*[100] in that under s45D(1) and s45D(3) the issue is not whether persons combined for a particular purpose, but whether particular *conduct* was engaged in for a specified purpose, namely that of causing loss or damage. His Honour then continued to define purpose narrowly, distinguishing between the motivation of the conduct and its purpose:[101]

> It appears to me that in the context of s45D the concept of the purpose for which the actual conduct was engaged in does not extend beyond the achievement of the goal which that conduct was capable of achieving. In relation to the conduct which prevented supplies of meat reaching the plaintiff that particular conduct could achieve nothing more than the cessation of Saturday morning trading in fresh meat by the plaintiff. That was the dominant purpose of the actual conduct. The wider and ultimate purpose of maintaining the work-free Saturday morning was the goal which it was hoped and intended could be promoted by achieving the purpose for which the actual conduct was engaged in.

In light of this view, Smithers J held that:[102]

> the submission that the causing of damage to the plaintiff in its business was not a purpose at all because of the presence of the overriding pur-

96 Id at 102 Per Smithers J.

97 Id at 102.

98 Ibid.

99 Ibid.

100 *McKernan*, note 37 above.

101 *Wribass Pty Ltd v Swallow* note 81 above, at 103.

102 Id at 104.

> pose of protecting the hours of work of the participants or their co-workers loses its force. If one is looking at the conduct that hinders or prevents, and not at the exercise in its totality, that last-mentioned purpose is not seen, and is not present. The conception of the purpose of the conduct that hinders or prevents is narrower than the concept of the purpose of the participants' exercise considered as a whole.

On the evidence, the defendants clearly refrained from handling meat ordered by the plaintiff for the purpose of causing loss or damage. The purpose of the ban was to cause sufficient loss and damage to the plaintiff's business to compel it to comply with the demands of the union. A ban which did not cause damage was unlikely to apply any pressure.[103] His Honour rejected the union's argument that it was not inevitable that the loss of supplies would cause loss to the plaintiff. The union was aware that their failure to supply meant that the plaintiff would have difficulty acquiring supplies elsewhere.[104]

Finally, Smithers J considered whether the conduct could be excused pursuant to s45D(3). While his Honour held that the dominant purpose of the conduct was to force the plaintiff to cease to trade in packaged meat on Saturday mornings, there was a further question to be considered, namely, whether that purpose substantially related to the hours of work and conditions of work of the participants in the relevant conduct.[105]. On the evidence it was held that was not the case. The real question was whether the continuance of trading in packaged meat on Saturdays was likely to have a material impact on the working hours of most meat workers. For a variety of geographical reasons, his Honour held that it would not.[106]

***Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc and Others*[107]**

The appellants retailed milk in New South Wales which came from both New South Wales and Victorian suppliers. The council of the Amalgamated Milk Vendors Association Inc (incorporated in New South Wales) felt that the supply of Victorian milk to the appellants posed a serious threat to their business and to the businesses of other New South Wales milk vendors. (The Victorian price was cheaper than that of the New South Wales vendor.) For this reason, the re-

[103] Id at 105.
[104] Id at 105.
[105] Id at 105.
[106] Id at 106-110.
[107] (1989) 91 ALR 397.

spondents refused to supply the appellant with New South Wales milk.

Despite a finding at first instance that the conduct was not in breach of s45D, the appeal (before Sheppard and Wilcox JJ, with Spender J dissenting) was allowed.

In considering purpose, Sheppard and Wilcox JJ emphasised that it was only necessary for the proscribed purpose to be one of the purposes that motivated the conduct in question.[108] It was held that there was no doubt that the purpose of causing loss was the purpose possessed by the respondents - although it was an immediate and not an ultimate purpose. In reaching this conclusion, their Honours relied on the previous decisions of *Tillmanns* (per Bowan CJ and Deane J),[109] *Leon Laidley* (per Bowan CJ);[110] and *Wribass Pty Ltd v Swallow*.[111]

Their Honours concluded that:[112]

> [c]onduct falling within the opening words of section 45D will rarely be adopted out of disinterested malice. Ordinarily, the purpose of inflicting damage upon the business of a person is to cause that person to modify its behaviour in some way for the advantage of the person occasioning the damage, or its members. In other words, the damage is a means to an end. Consequently, although a primary purpose of the milk vendors was to damage or injure the appellant's business, another purpose which they had was to damage or injure the appellant's business. That was the means by which they intended to achieve their primary purpose. Upon the view of s45D(1) long accepted in this court, that is enough.

In contrast, Spender J delivered a strong dissenting judgment. The crucial part of this dissent related to his Honour's rejection of the notion that a person intends the natural consequences of his actions. In the view of Spender J, that assumption was the basis on which most cases on this issue have been argued and decided, and it was wrong. It should not be argued that, because the natural consequence of non-delivery of milk was to damage the target, the milk vendors must have intended to cause substantial loss or damage such that the loss or damage may be said to be at least one of their purposes. Rather, there should be a distinction between foreknowledge and intention, and between intention and purpose.[113]

[108] Id at 403.

[109] *Tillmanns*, note 67 above.

[110] *Leon Laidley*, note 78 above.

[111] *Wribass Pty Ltd v Swallow*, note 81 above.

[112] *Jewel*, note 107 above at 405.

[113] Id at 410.

Spender J made a distinction between means and ends, and stated that it was wrong to characterise the means by which a purpose was sought to be achieved as a co-existing purpose. His Honour said:

> It is possible to envisage a special case in which one of the purposes for which conduct is engaged in is the purpose of causing substantial loss or damage. If in truth one of the *objects* of the activity is to cause damage, as could be the case where the person is actuated by malice, one might be entitled logically and fairly to characterise one of the purposes as a purpose of causing substantial loss or damage. In most cases, however, the causing of damage, while foreseeable and foreseen if the actor turned his or her mind to it, will be the means by which the purpose of the activity is sought to be achieved, and the causing of substantial loss or damage will not be the purpose or one of the purposes for which the conduct is engaged in.

In support of his view, Spender J distinguished many of the major cases both relating to s45D and also in relation to the related industrial tort of conspiracy.[114] He also contrasted the position of employers and employees under the legislation.[115]

In the first place, Spender J reviewed the decision of Northrop J in *Nauru Local Council (Trading as Nauru Pacific Line) v Australian Shipping Officers Association*[116] in which it was said:

> It may be said that a person intends the natural consequences of his acts and that accordingly if, as a necessary effect of conduct engaged in for a purpose, substantial loss or damage is caused, then, of necessity, that conduct is engaged in for purposes including a purpose of causing substantial loss or damage. In my opinion, such a conclusion does not follow. The plaintiff carries the onus of proof, albeit on the balance of probabilities and albeit to establish a prima facie case in the sense already described. There is no provision by which the onus is shifted to the defendants...

Spender J also referred to the question raised by Northrop J, namely, that a defendant may undertake an action which has the effect of injuring a plaintiff in his trade unless the latter accedes to demands. However, is their purpose to injure the plaintiff in his trade or is their purpose and object to forward or defend their own trade? If, for example, an employer plaintiff 'struck the first blow' against a union, why should the employer be able to seek the protection of the court

[114] Id at 410ff.

[115] Id at 411.

[116] (1978) 27 ALR 535 as cited by Spender J, Id at 412-413.

when the union simply counters with a second blow in self defence?[117]

Spender J then went on to consider the oft-cited analogy of Lushington J in relation to the soldier who shoots to kill in battle,[118] and suggested that the analogy used by Evatt J in *McKernan v Fraser*[119] was one in which there is an interchangeable use of 'intention' and 'purpose'.[120] Spender J concluded:

> If a person were to shoot another person who was attacking him, the intention of the first person would be to kill or disable the attacking person, but the purpose of the first person would be to protect himself. It is, in my respectful view, a misuse of language to say that the means by which an objective is pursued is a 'primary' purpose, and the objective being pursued a 'secondary' purpose.

The final case considered by his Honour was that *Tillmanns v AMIEU*.[121] Justice Spender seemed to distinguish between the tests laid down by Bowen CJ and Deane J. Referring to the conclusion of Bowen CJ, Spender J stated: 'If it purports to equate knowledge of consequences with purpose, I respectfully disagree'.[122]

His Honour then discussed the test laid down by Deane J, namely that of Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*[123], and Justice Deane's subsequent conclusion that on the facts in *Tillmanns' case* the 'point and purpose of the respondents' imposing and procuring observance of the black ban was that it would cause substantial loss or damage'.[124] In my view, Spender J seems to be suggesting that Deane J adopted the correct test but erred in its practical application. His Honour stated that the conclusion of Deane J does not follow as it was based on the view that attributes as a purpose that which is frequently not a purpose, but an end.[125] This approach, according to Spender J should be contrasted with the 'true position as indicated ... in *Crofter*...'.[126] Although the passage is long,

[117] *Jewel*, note 107 above at 412, 413.

[118] Id at 413ff.

[119] *McKernan*, note 37 above at 403ff.

[120] *Jewel*, note 107 above at 414.

[121] *Tillmanns*, note 67 above. discussed by Spender J, Id at 414ff.

[122] *Jewel*, note 107 above at 415.

[123] [1942] AC 435, 444-5 discussed by Spender J, Id at 415.

[124] *Tillmanns*, note 57 above at 382 per Deane J, *Jewel*, note 107 above per Spender J at 415.

[125] *Jewel*, note 107 above at 415 per Spender J.

[126] Id at 415.

it as instructive to quote in full what may be regarded as the crux of Justice Spender's judgment:[127]

> The question to be answered, in determining whether a combination to do an act which damages others is actionable, even though it would not be actionable if done by a single person, is not 'did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action', but 'what is the real reason why the combiners did it?' Or, as Lord Cave puts it, 'what is the real purpose of the combination?' The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realise or should realise will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose ... Next, it is to be borne in mind that there may be cases where the combination has more than one 'object' or 'purpose'. The combiners may feel that they are killing two birds with one stone, and even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. The analysis of human impulses soon leads us into the quagmire of mixed motives, and even if we avoid the word 'motive', there may be more than a single 'purpose' or 'object'.
>
> It is only where there is this further element, which may fairly be identified as 'independent malevolence' or 'disinterested malevolence', to use the expressions quoted by Evatt J in *McKernan*, that it might properly be said that one of the purposes was to cause substantial loss or damage.

His Honour concluded that the vendors in this case did what they did in order to stop the supplies of Victorian milk, not for the purpose of causing substantial loss or damage.

***Building Workers' Industrial Union of Australia and Others v ODCO Pty Ltd*[128]**

The final case to be considered in the context of this discussion of purpose is *ODCO*. Basically, the respondent ODCO ran a business under the name 'Troubleshooters Available' through which they would supply contractors (as opposed to employees) to various construction businesses. Persons provided with work through Troubleshooters basically agreed to work for an agreed hourly rate irrespective of awards which might otherwise have applied. In conducting business, Troubleshooters faced difficulties from trade un-

[127] Id at 415-6. The difference between the purpose of the combination and the purpose of the conduct is a real distinction.

[128] *ODCO*, note 80 above.

ionists, including certain declarations that workers provided through Troubleshooters were 'black'.

In upholding the decision of the trial judge (Woodward J) that there was a possible infringement of s45D, Wilcox, Burchett and Ryan JJ essentially followed the reasoning in *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc.*[129]

Section 45D(3) - defence of dominant purpose

In defending an action for alleged breach of s45D, the concept of purpose is again important. Pursuant to s45D(3), a person shall not be taken to have contravened the prohibition where the *dominant purpose* for which the conduct is substantially engaged in is substantially related to the remuneration, conditions of work or working conditions of that person.

The concept of purpose was considered in this context in the case of *Epitoma Pty Ltd v Australian Meat Industry Employees' Union and Others (No 1).*[130] In that case, a dispute arose between the applicant (the owner of an abattoir) and the respondents (a trade union and various officers thereof). The dispute related to the terms of the employment of the workers, especially the use of contracts as opposed to awards. The respondents banned the abattoir and established a picket line which members of other unions refused to cross. The applicants sought an interlocutory injunction for breach of the *Trade Practices Act* 1974. Such was refused by Gray J at first instance.[131]

In considering the matter, his Honour decided that there was a prima facie case against the respondents of conduct of the kind proscribed by s45D(1A). However, that was not the end of the matter. One had to look at s45D(3) to determine whether a defence was likely to succeed.[132] Was the dominant purpose for which the conduct was engaged in substantially related to one of the matters referred to in s45D(3)(iii) or (iv)?[133]

The submission put to his Honour was that the action of the unionists was not capricious, but rather was taken to prevent the abattoir from operating under a contract system and to require it to accept an

[129] *Jewel*, note 107 above.

[130] (1978) 54 ALR 713.

[131] It is significant to note that on appeal, the Full Court declined to express a view upon the subject: *Cf Halsbury's Laws of Australia*, note 76 above, at p 19.

[132] *Epitoma*, note 130 above, at 724.

[133] Id at 725.

award. These considerations were said to amount to a general or ultimate purpose and that the dominant purpose of implementing the ban was shutting down the applicant's business. His Honour identified this reasoning as being of the kind accepted by Smithers J in *Wribass Pty Ltd v Swallow*.[134] Of that reasoning, Gray J stated:[135]

> With the greatest respect, I feel compelled to differ from the reasoning of Smithers J in that case. The application of that reasoning would be such as to render sub-s (3) of s 45D nugatory in most, if not all, cases. In any case falling within sub-s (1) or sub-s (1A) of s 45D, there must be a purpose of a kind described in those sub-sections. If this purpose, because of its proximate relationship to the conduct prescribed, is always to be regarded as the dominant purpose, there is no room for the operation of the defence set up by sub-s (3)(b). In my view, the legislature has intended to exclude from the operation of s 45D conduct which is genuinely engaged in pursuit of improvements in the terms and conditions of employment. In a case such as this, where the employees engage in what amounts to a strike, at the instigation of their own union and its officers, who are pursuing specific concessions from the employer as to the terms and conditions of employment of the employees, the section is not intended to apply. The Parliament did not intend to create a provision which could be relied upon to support 'anti-strike injunctions'. The use of words 'substantially related to' supports this construction.

His Honour concluded that 'the avowed object' of the ban was to secure award conditions for the applicant's employees, and that this was the 'dominant purpose' of the respondents.[136] Finally, it was stated that in interlocutory applications such as this, the balance of convenience takes into account the considerable economic loss of the applicant and the role of trade unions in seeking to maintain standards of industrial conditions for their members throughout Australia. Such a balance was extremely difficult and one must look to the facts of particular cases.[137]

As regards the general operation of s45D(3), the boycott must basically coerce the target into doing something which will have a bearing on the remuneration of the persons taking the action.[138] On the issue of what would be a sufficient purpose, in *Leon Laidley*,[139] the union

[134] *Wribass Pty Ltd v Swallow*, note 81 above, at 102-105 as cited in Id at 725.

[135] *Epitoma*, note 130 above at 726. This passage is also cited in *Halsbury's Laws of Australia*, note 76 above, at 18.

[136] *Epitoma*, note 130 above at 726.

[137] Id at 727.

[138] Byrne, note 2 above, at p 13.

[139] *Leon Laidley*, note 78 above.

purpose was job protection. The dissenting judge, Sweeney J, regarded the dominant purpose of the action, which concerned reserving an area of work, as substantially related to the working conditions of the employees.[140] In contrast, Bowen CJ stated that the question was difficult but that matters such as this were strictly outside the employment relationship.[141] In the view of commentators such as Byrne, the approach of Bowan CJ was the correct one. The phrase 'conditions of employment' does not comprehend the existence of the employment relationship.[142]

The difficulty in defining 'purpose'

From the above discussion, it becomes clear that the concept of 'purpose' was pivotal to the question of liability under the original s45D. To fall within the prohibition in subs(1), conduct must be engaged in for the *purpose* of causing substantial loss or damage. Even if that purpose was found to exist, however, liability would not be incurred where the *dominant purpose* of the conduct was related to one of the matters (essentially employment conditions) listed in subs(3).[143] Playing such a significant role, the interpretation of the concept of 'purpose' determined the scope of the operation of the section and, consequently, the effect of the section on the actions of trade unions and employers. Of significance is the fact that there was disagreement in the cases (as demonstrated above) as to the very meaning of the concept. For example, Smithers J in *Wribass* refused to apply the test used in conspiracy cases, namely that of ultimate purpose, instead deciding that purpose was not a wider goal but rather related only to that which the conduct itself can achieve.[144] Whereas Sweeney J in *Leon Laidley* would follow the approach in the conspiracy cases and treat ultimate purpose as being the purpose in both subs(1) and (3).[145] In the view of commentators such as Byrne, this uncertainty begged a critical difficulty, namely:[146]

[140] Byrne, note 2 above, at p 13.

[141] Id at 13.

[142] Id at 13. Byrne also notes that this view is different from that taken in the United Kingdom as to similar issues. He contends that s45D(3) is *not* a defence and therefore the onus of proof should be on the target to show that prima facie the dominant purpose does not come within the section.

[143] For example, note that in *Leon Laidley*, note 78 above, there was disagreement between Sweeney J and the majority as to whether the dominant purpose was related to the factors listed in the section.

[144] As cited in Byrne, note 2 above, at p 11.

[145] Ibid.

[146] Id at 12.

> If 'purpose' means *immediate* purpose then virtually every secondary boycott taken for a 'union purpose' would be caught by sub-section (1) and the industrial defence would have limited scope. If, however, 'purpose' is to be equated with the *real reason* and 'dominant purpose' with ultimate purpose, few industrial boycotts would come within sub-section (1) and, of those that do, many would be exempted by sub-section (3).

It is a significant difficulty because, Byrne continued, the issue really makes the provision an 'all or nothing' section.[147] In the view of this author, the fact that some of the differences of opinion arise in minority judgments is not in itself determinative of the issue. Dissenting judgments have been robust and essentially suggest that the section is robbed of all effect if the majority view prevails. Significant also is the fact that the constitution of the courts change, and that sometimes sections which are meant to 'curb' trade union industrial action can be construed very narrowly.[148]

As a final but important note in this regard, attention should be drawn to s45D(2) which states that 'a person shall be deemed to engage in conduct for a (prohibited) purpose if he engages in that conduct for a purpose that includes that purpose'. Once again, the liability of trade unions for engaging in secondary boycotts depends on the interpretation the word purpose and whether the damage that the union's actions inflicts on business is construed as one of its *goals* or *simply as the means to its legitimate end.* Ultimately, that subsection probably had the effect that s45D was construed as prohibiting all secondary boycotts.

Remedies: Purpose re-visited

In terms of the remedies available once a breach of s45D has been established, most of the cases concern applications for interlocutory injunctions. As noted by Hall, once an interlocutory injunction has been granted, the matter has basically been decided in the favour of the employer and against the union, as the union only has a chance of attaining their goal while they can exert the industrial pressure of a strike.[149] The provision does not create a criminal offence: however,

[147] Id at 12. It is significant to note that Byrne's article was written prior to the decision in the Mudginberri dispute, which led to the first award of damages under s45D. That dispute is considered later in this article.

[148] Id at 12.

[149] Hall, note 1 above.

Hall further contends the liability it imposes is a pecuniary penalty which is far greater than any that attaches to a criminal offence.[150]

An example of the severity of secondary boycott sanctions arose in *Australasian Meat Industry Employees Union (AMIEU) v Mudginberri Station Pty Ltd*[151] - the first case in which damages were awarded under s45D. A consideration of this case is also a useful way to conclude an analysis of the former s45D. It also raises questions as to the meaning of the word 'purpose' and the ramifications of such an interpretation on the place and power of trade unions in Australian industrial law. These considerations are relevant to the present law, which is largely based on the former s45D.

The Mudginberri dispute began as a dispute between the AMIEU and the Mudginberri Station, an abattoir and export meat processing works, over the manner in which its employees were to be paid. In essence, the union wanted to extend the system of payment governed by the *Queensland Meatworkers Industrial Agreement Award* 1979 to the Northern Territory by private agreement with the employers.[152] The argument of the Union in pursuing the change was that the Award system would place less strain on older workers and would allow for the easy computation of tax through the adoption of the pay as you earn system. However, Mudginberri did not agree, instead seeking to retain a system of paying employees by results. The employers argued that the latter system was the one agreed upon with employees; it rewarded hard work and made the company more profitable.[153]

Before any meat could leave the abattoir for export, the approval of meat inspectors had to be given. The AMIEU formed a picket of the abattoir, which the meat inspectors refused to cross. Relief was sought against this picket on the ground that it was a secondary boycott. Such relief was granted, the picketing stopped and the Commission sought to resolve the dispute as to the method of payment of the meat workers. When the matter was ultimately decided against the submissions of the union, the picketing recommenced. The meat inspectors again refused to cross the picket line.[154] Mudginberri sought an injunction and damages in respect of what it alleged was a union

[150] Id at 298.

[151] (1987) 74 ALR 7.

[152] Pittard, note 5 above.

[153] Id at 27.

[154] Id at 26-30. Pittard notes that this was due in part to the rules of the Meat Inspectors Association on the crossing of pickets.

secondary boycott: that is the union picket (concerted conduct between the AMIEU and its members) prevented the inspectors from crossing the picket (and delivering their inspection services) and that in turn caused loss to Mudginberri Station - it could no longer export meat because there was no prior approval by the meat inspectors. The union conduct was held to have been engaged in for the purpose of causing the loss or at least had the likely effect of causing that loss - s45D(1)(b).[155]

Permanent injunctions were granted[156] and damages in the sum of $1,458,810 awarded.[157] As noted above, in addition to resulting in an award of damages, the decision is significant as to the meaning of s45D, itself.

The union had argued that the true purpose of their action was to ensure a certain payment method was adopted by the employer and hence the purpose of causing loss or damage as required under s45D did not exist. However, that argument was rejected by the Full Federal Court, which relied on s45D(2) to find that one of the purposes of the union was to cause loss or damage and that was enough to be in breach of the section. The union's argument that its conduct fell within the defence of s45D(3) also failed. It had been argued that some of the participants in the picket were employees of the abattoir and, therefore, the pursuit of the picket was one connected with wages and conditions of work. In determining that the defence was not made out, the Court construed the picket not as one connected with conditions of employment but rather the pursuit by the union of a policy that employees should be paid in a particular way. Any visits to picket lines were not borne out of real commitment to the cause, but rather took place on an ad hoc basis.[158] Further evidence relied on by the court included the fact that the employees of Mudginberri were largely content with the conditions offered by their employer and the fact that the union had only visited the employees at Mudginberri after the picket had been formed.

On the application of s45D to this dispute, the commentary of Pittard is instructive.[159] Pittard seems to echo the concerns of Byrne and Hall

[155] Id at 31, 32.

[156] (1985) 61 ALR 417.

[157] That is the final sum granted in the Full Federal Court. It was held that s82 of the *Trade Practice Act* 1974 should be the ultimate guide to the assessment of damages.

[158] See judgment at first instance by Morling J in *Mudginberri*, note 156 above, at 285 as cited in Pittard, note 5 above, at p 41.

[159] Pittard, note 5 above.

as to the construction of the word 'purpose' as it appears in the section and the effect that construction has on the availability to unions of the right to strike. On the court's willingness to rely on the notion that as long as one purpose of the activity is to cause damage then the union will be in breach of the section, Pittard commented that:[160]

> This provision makes it easier to attract liability under s45D(1) of the *Trade Practices Act* as compared with liability under common law in cases of combinations or conspiracies. At common law, in actions for conspiracy to injure, the dominating purpose of the combination must be shown to be the wish to injure or harm the plaintiff. Section 45D(2), by way of contrast, ensures that only one of the purposes must be the purpose of causing substantial loss or damage to the fourth's person's business. As DR Hall stated:
>
> > A person may be held to have engaged in conduct for the purpose of causing substantial loss or damage to the business of a fourth person though that was neither the sole purpose nor the dominant purpose nor even a substantial purpose of his conduct. It is sufficient that he has engaged in the conduct for purposes that include that purpose of causing substantial loss or damage to the business of the fourth person.
>
> Issues of the relevant purpose were raised in *Tillmanns*... where Deane J noted that the relevant purpose in s45D(2) was *a* purpose, whether that purpose be a dominant or subsidiary purpose, and Bowen CJ discussed problems of proof, noting that:
>
> > The proscribed purpose may be difficult to prove as an independent matter especially where the dominant purpose of the ban is to extend union membership or further union interests. Nevertheless, the fact that a union and its members acting together have a union purpose does not necessarily exclude the possibility that they had, also, the purpose of causing substantial loss or damage to the business of a corporation.
>
> However, there was no such problem of proof in the Mudginberri dispute. Even where the picket line was said to be related to the union's general policy (regarding the manner in which workers were to be paid) there was an immediate purpose being the intention to damage Mudginberri's business.

On the meaning of the word 'purpose' as appeared in the defence under s45D(3), Pittard further comments:[161]

[160] Id at 38-39.

[161] Id at 42-43. Pittard also notes that the defence has traditionally been construed narrowly. *Cf Ascot Cartage Contractors Pty Ltd v Transport Workers Union of Australia* (1978) 32 FLR 148.

> The court viewed the lack of employee support for the union action as a factor supporting the conclusion that the conduct was not engaged in for the purpose of protecting the remuneration or working conditions of those employees, but that it was rather engaged in for the purpose of securing a general union objective. However, it should be noted that the language of s45D(3)(b)(ii) requires only *one* employee to be acting in concert with the union in order to establish the relevant dominant purpose. Lack of involvement by employees generally in the industrial action therefore is arguably equivocal, since it is sufficient for the defence that one employee is involved.
>
> ... the motivation for the actual participation in the picket line was important to the court. Were the ... employees (who did attend) genuinely supporting the goals of the union, or were they simply participating for social reasons or to maintain cordial relations with the union? Clearly, the participation of employees in industrial action will frequently be for mixed reasons, and any enquiry as to the genuineness of the motives or the degree of commitment to the industrial action must reveal the sorts of problems shown in the Mudginberri dispute. This creates additional problems for the establishment of the defence pursuant to s45D(3). The subsection is drafted in such a way as to be substantially linked to the matters therein listed. But once employees are participating in the picket line, over and above the occasional social visits, it does not seem necessary to look behind that participation at its genuineness. If the approach favoured by Morling J is used too rigorously, that part of the defence may well become of extremely narrow application.

As to the meaning of the word purpose, the new s45D, like its predecessor in the *Trade Practices Act*, speaks merely of 'purpose' and adds that it is sufficient if the prohibited purpose is one of a number of purposes. The Explanatory Memorandum addresses the meaning of the word purpose. It states:

> Boycott action may be undertaken for more than one purpose. For example, boycott action may be intended to harm the target as a means of pressuring the target to adopt a policy of employing only union members. In this regard, new subsection 45D(2) provides that the prescribed purpose need not be the only purpose of the conduct, nor even a substantial purpose. As stated by Justice Wilcox, following the approach of the majority of the Full Federal Court in *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc.* (1990) ATPR 40-997 at 41 092:
>
> > There is often a perception that the most effective method of obtaining a particular industrial objective is to subject somebody to the pressure of actual or threatened loss or damage. In such a situation, the party applying the pressure may have the purpose proscribed by s45D(1) notwithstanding that this purpose is a means to a greater end.

The Explanatory Memorandum, therefore, seems to favour an interpretation through which all secondary boycotts are banned and the unions' greatest weapon is removed. However, it is significant to note the conflicting judicial dicta relating to the meaning of the word purpose as it appeared in the original s45D. My view is that potential for a variety of interpretations creates the best chance for a union to defend an action under s45D and that provides the best chance for reforming the law.

Enterprise Bargaining and Section 127 Injunctions

To complete the discussion of strike law, attention should be paid to the provisions relating to strikes in the context of enterprise bargaining and section 127 injunctions.[162] An outline of these matters is necessary as these provisions come into play in the 1998 waterfront dispute considered in Part Three of this article.

Enterprise Bargaining

As noted in Part One, there is no right to strike. However, there is a limited freedom from prosecution for the taking of strike action. Such freedom arises in the context of enterprise bargaining.

As discussed, terms and conditions of employment have traditionally been decided centrally through an Industrial Relations Commission making pronouncements on terms to apply to, for example, all members of a union. Due to the 1990s phenomenon of increased competition and globalisation, this traditional approach to the settlement of working conditions has been regarded as less than conducive to competitive business. Consequently, the practice of settling terms of employment at the level of the individual enterprise had become a predominant mode of settling business conditions. If employees were to directly bargain with employers for conditions of work acceptable to themselves, then they were to have a 'bargaining chip'. Such was provided through the enactment of a right to take strike action free from civil penalty where such action supports trade union enterprise bargaining demands (*Workplace Relations Act* 1996 Part VIB Division 8 especially ss170ML and MM). Ironically, the unions were able to utilise their greatest weapon (the strike) to support a system in which they were of less importance and the individual was central (that is enterprise bargaining). The capacity of unions to take industrial ac-

[162] For further reading see for example L W Floyd, 'Workplace Relations: Employment and Industrial Law' in *Australian Commercial Law* (LBC Information Services, 1999).

tion free from civil penalty can be 'cancelled', that is, for example, where that action threatens life or the national interest or is not taken in the genuine pursuit of a bargain.[163]

Injunctions

In addition to the enterprise bargaining provisions, there is a further curtailment of strike action contained in s127 *Workplace Relations Act* 1996 - a right to seek an injunction against pending industrial action.

Conclusion to Part Two

The combined effect of all these strike laws contained in the *Workplace Relations Act* 1996 is to provide employers with an 'arsenal' of legal sanctions against trade unions which initiate strike action. The effect such legal weaponry has on the power of trade unions in practice is considered below in the discussion of the two great strikes of the 1990s - those at Weipa (which took place during the life of the former *Industrial Relations Act* 1988) and on the Wharves (which took place after the enactment of the *Workplace Relations Act* 1996). That study is used to support the argument that reform of the law is necessary so that trade unions can be given a meaningful role in Australian industrial relations. That reform lies in an acknowledgment that unions, taking action for the purpose of protecting their existence and without causing undue detriment to the national economy, should be afforded a defence.

Part Three: How the Purpose Defence would Work: Weipa and the Wharves: The Two Great Strikes of the 1990s

> We can't be beaten; We won't be beaten...
>
> For us to be beaten is for the trade union movement to lose its heart, its soul and its purpose.[164]

These fighting words might seem reminiscent of the great battles of the 1890s, when unionists fought to gain recognition and ultimately a legitimate place in Australia's industrial relations system, but they are not. Rather, they are the words of the former Secretary of the Australian Council of Trade Unions (ACTU), Mr. Bill Kelty, in his address to the National Conference of the Maritime Union of Australia (MUA) in 1995. In that year, those century old issues of trade union

[163] *Workplace Relations Act* 1996 Part VIB Div 4.

[164] Bill Kelty as quoted in B Norrington, 'ACTU Vows to Cripple CRA Mines' *Sydney Morning Herald* (14 November 1995).

legitimacy and power were fought again in the Weipa dispute. Three years later, in 1998, the same issues arose once more, this time on wharves. Although the Weipa and wharves disputes related to trade union power and their continued existence, there was a vital difference between them. Weipa occurred in the life of the *Industrial Relations Act* 1988 - which effectively allowed secondary boycotts. The wharves battle was fought during the currency of the *Workplace Relations Act* 1996 - which effectively prohibits all such actions. The result was that the unions in Weipa used secondary boycott conduct not only legitimately, to protect their existence, but arguably to cause excessive damage to business and the economy in an excessive show of strength. In contrast, the wharf workers (wharfies) were deprived of their traditional weapon in their fight for their continued existence on the wharves. This part of the article examines both disputes to demonstrate the deficiencies in the current and former secondary boycott legislation and to demonstrate how the proposed new purpose defence would lead to a more reasonable outcome in the handling of industrial action.

Weipa 1995

The mining giant CRA had developed an industrial relations philosophy that emphasised the importance of individualism in the workplace.[165] Rather than accepting the centralised conciliation and arbitration practice (whereby unions obtained award conditions of employment for all their employee members), CRA sought to have workers negotiate for themselves. If workers settled employment conditions tailored for their own unique abilities and if they worked to their personal best, it was argued they would have fulfilling lives as individuals and that would benefit both the company and themselves.

At a practical level, this philosophy was realised through use of individual staff contracts, that is, in direct contrast to the collective conciliation and arbitration system. While CRA publicly accepted the role of unions in Australia,[166] it clearly rejected the idea that workers could not bargain effectively with their employers and required collective representations.[167]

[165] J Ludeke, *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books, 1996) p. 15.

[166] Id at 4.

[167] Id at 1, 2.

In November, 1995, the Full Bench of the Australian Industrial Relations Commission (AIRC) heard submissions by the ACTU (supported by the Federal Government as intervener) and CRA Ltd in relation to these individual staff contracts as they operated at the CRA Weipa Mine. Of particular importance were the specific terms and conditions of employment found therein.[168] The staff contracts in question were drawn up by the company and were largely not the subject of negotiation with individual employees at the time they were offered. The salary offered in the contracts was substantially above the award rate, for example, award employees received an allowance of $1,281 per annum compared to an allowance ranging from $7,920 - $9,200 for those on individual contracts. Although contracts contained a fair treatment system in the event that employment difficulties arose, recourse was not to the independent Industrial Relations Commission, but rather was internal, confined to the next level of company management.[169] Evidence was also accepted relating to individual cases. It was shown that some award employees, who had qualifications and experience superior to, for example, new staff on contracts, were paid at a lesser rate than those new contract employees.[170]

The unions contended they did not seek prohibition of staff contracts, but that:[171]

> the contracts in question discriminated against employees who chose to stay on awards and this was evidenced by the significant improvements in pay and conditions given to employees on staff contracts regardless of their skill. This policy was said to be inconsistent with the central role given to unions under the *Industrial Relations Act* 1988 in the prevention and settlement of industrial disputes. Unions have a right to bargain collectively without their members being discriminated against on the basis of their preferred form of bargaining and there should be equal pay for work of equal value.

In support of the union's claims, the Federal Labor Government argued that individual contracts should not be used as a means of inducing employees to give up the protection of the industrial relations system established under the *Industrial Relations Act* 1988. The Commonwealth submitted that the company seemed to be of the view that the Commission and the Unions should be excluded from having any

168 *The Weipa Decision* (1996) 39 AILR 2-253.

169 Id at 2,253.

170 Id at 2,253ff.

171 Id at 2,246.

meaningful role which was against the basic framework and principles of the Act.[172]

In response, CRA denied that the pay differential was based on trade union membership or collective representation. Instead, they argued, sustained and steady improvement in plant performance in the company's operations elsewhere, such as New Zealand, was attributable directly to the introduction of staff contracts and that the two party (direct employer-employee relationship) was more productive than a collective arrangement, bargained on behalf of employees, through the offices of a third party.[173]

In accepting the unions' argument, the Commission stated that their decision was not a restriction or prohibition on the use of staff contracts. They said intervention by the Commission is only warranted where there is 'identifiable unfairness in their operation and/or they are found to be inconsistent with the scheme of the Act'.[174] Although there was evidence, in this case, that the system of contracts was largely accepted and supported by those which it governed,[175] there was also evidence that award employees, both as a group and individually, were treated unfairly simply because they had not signed a staff employment contract. In this case, the Commission determined no matter how well an award employee performed their task, they would never receive the same amount as those on individual contracts, but performing their work at a lower level than the award employee. The practices of the company were, therefore, inconsistent with the Act.[176] The Commission ordered that 'where an award employee states that he or she is prepared to work in accordance with all the requirements of the staff contracts, the company shall extend to each such employee the same terms and conditions, subject to the same requirements, as apply to employees covered by awards who have signed staff contracts'.[177]

Although the decision of the AIRC ultimately led to an effective remedy for the Weipa union workers in the form of an upgrade of conditions of employment, the use of industrial action also played a crucial role in securing their continued presence at the mine free from dis-

[172] Id at 2,247.
[173] Id at 2,255.
[174] Id at 2,256.
[175] Id at 2,256ff.
[176] Ibid.
[177] Id at 2,261.

crimination.[178] The unions' justification for taking this action was that they had pursued an interim award incorporating the principle of equal pay for work of equal value at Weipa, but CRA had taken issue with *technicalities* such that the substantive issue could not be heard. The union regarded this as the adoption of 'stalling tactics' by the company which were the 'straw that broke the camel's back'[179] and strike action was now required to press their claims. It is in relation to this industrial action that the strengths and weaknesses of the *Industrial Relations Act* 1988 strike provisions can be analysed.

Problems with Industrial Relations Act 1988: the Need for the New Purpose Defence

The Weipa strike began locally with simply an indefinite stop work by the 75 Weipa workers directly affected by the use of contracts.[180] Significantly, although there were grass roots appeals, emphasising the unfairness of highly skilled award workers being paid less than the new contract employees whom they had trained,[181] the strikers were always aware that this 'struggle'[182] involved more than the immediate interests of striking workers - it [was] a 'fight for the future of trade unionism',[183] as evidenced by the words of those organising the action:

> A history of our long struggle in this commitment is for the future of our children and the future of the trade union movement. We pray that our children will never have to lower their standard of living to negotiate their wages.

In other words, it was felt that the contract system (with its high wages) was only a means of coaxing employees off awards and, consequently, removing unions from work sites. After that was done, wages would be reduced and workers would be left to bargain, without a safety net, with their larger, more powerful employers. The battles of the 1890s, as the unionists saw it, would have to be fought all over again.[184]

178 P O'Gorman, *Weipa: Where Australian Unions Drew Their Line in the Sand with CRA* (Weipa Industrial Site Committee, CFMEU, 1996).

179 Id at p 2.

180 Id at p 3.

181 Ibid.

182 Id at p 6.

183 Ibid.

184 Id at p 39.

It is perhaps not surprising, then, that what began as a localised work stoppage developed into an industrial dispute that involved many forms of industrial action and spread across Australia to involve workers in cities spanning the whole country. From 19 October 1995, Weipa workers, in addition to stopping work, were engaged in blockades of the mining area both on land and then at sea.[185] The result was to stop pilot and tug vessels meeting large bauxite vessels at sea so that these huge bulk carriers were literally banked up off the Weipa Coast, and could not be loaded with the bauxite prepared for export.[186] In November 1995, different unions, not directly involved at Weipa, and sometimes engaged in other industries, such as coal mining and the waterfront, also participated in industrial action in support of the Weipa workers.[187] Planned were a five day national maritime strike (to shut down Australian ports) and a seven day national coal strike (which would cause loss particularly to CRA). These planned strikes commenced at an estimated cost to the *national economy* of between $100 and $200 million in lost production and export.[188] The cost to CRA was estimated at $3 - $4 million per day (although their share price remained stable).[189] Confronted by a serious threat to the national economy, the President of the AIRC, Justice O'Connor, intervened and called for a compulsory conference on Saturday, 18 November, 1995, which led to the positive outcome of equal pay (referred to above).

It was clearly a strength of the former provisions that unions could use enough 'industrial muscle' to bring a reluctant CRA to the Commission hearing on such a crucial issue as equal pay for trade union members and consequently the right of workers to join trade unions and the right of trade unions to operate effectively. However, in addition to facilitating that legitimate end, the union action went much farther, for example the Commission lambasted the mining unions for bringing forward their national strike (against the wishes of the

185 Id at p 17.

186 Id at p 19.

187 Id at pp 30, 31.

188 Kate Lenthall, 'Blackouts unlikely but overseas markets at risk' *Australian Financial Review* (16 November 1995); T Boreham, 'Coal Industry Faces $180 million loss from CRA strife', *The Australian* (21 November 1995).

189 L Carvana, M Gilchrist and I Henderson, 'CRA vows to press ahead with contracts' *The Australian* (22 November 1995).

ACTU) stating that such action actually jeopardised the resolution of the matter:[190]

> We will not respond or be influenced by attempts to bring pressure to bear on the commission by use of industrial action of the type now being used by the coal industry ... Far from assisting the implementation of appropriate principles, the action of the CFMEU in fact impeded the application of the commission powers to settle this dispute.

It can be seen, then, that the unions' industrial action, although initially a legitimate means of bringing CRA to the bargaining table, was ultimately to escalate to a level that was unnecessarily damaging - both to CRA and to those doing business with CRA or the ports generally, for example, farmers exporting materials. Significantly, although what the unions were doing could be regarded as a secondary boycott, no secondary boycott action was taken under the *Industrial Relations Act* 1988. Commentators, such as Professor Judith Sloan, have stated this highlighted the need for reform of the secondary boycott legislation as it then stood.[191] In my view, Professor Sloan is correct. The *Industrial Relations Act* 1988 was deficient in that it afforded unions too much power. A new purpose defence would improve the law. While the trade union could argue the defence whilst it was using secondary boycott action to bring CRA to the bargaining table on the critical issue of trade union survival and anti-union discrimination (Limb One of the defence), its right to argue the defence would be lost once the action went beyond that legitimate trade union security measure to do damage, such as that which was criticised by both the ACTU and the AIRC (Limb Two of the defence). The result, it is submitted, would be a fair balance between the rights of trade unions and the rights of the innocent third parties in particular, such as farmers, who were affected by the trade union's actions. Various civil actions in torts were taken by CRA against both the unions and the unionists. However, these were later dropped. The Federal Labor government was highly critical of the attempt to sue individuals and other businesses affected by the strikes who did not take action, often due to fear of union reprisals.[192]

[190] S Marris, 'IRC lashes workers for earlier strike action' *The Australian* (21 November 1995).

[191] Sloan, note 66 above.

[192] Writ 2170 of 1995 Queensland Supreme Court; T Boreham, 'Industry guarded about anti-union action', *The Australian* (23 November 1995).

On the Waterfront - 1998

The 1998 wharves dispute involved the same critical issue regarding the role and survival of trade unions in Australian industrial law. The question raised before the civil court (rather than the AIRC) was whether the employer, Patrick Stevedoring ('Patrick'), had discriminated against its trade union employees by effectively dismissing them and replacing them with a non-union work force.

Essentially, Patrick had leased part of its wharf to the first non-union wharfies since 1890. These non-union wharfies were employed by the National Farmers Federation (NFF) trading as PCS Stevedores. The purpose of this move was said to be to improve efficiency on the wharves and cut handling costs. In support of this claim, Patrick pointed to, amongst other things, the previous attempts of both Labor and Liberal Governments to reform wharf work practices and make them more productive. The problem for the unionists was that this employment of non-union labour was, unbeknown to them, accompanied by a corporate restructure of the Patrick Group of companies. This re-organisation was not then known to the employees. Essentially, the Group's employer corporations, 1, 2, 3 and Tasman, sold their stevedoring businesses, which comprised their plant, equipment and most contractual interests, to another company within the group.[193] Once they ceased carrying on stevedoring, their business was reduced to that of a labour hire company, that is, they were confined to the provision of their employees' labour to the other companies within the group and their 'only significant asset' was their Labour Supply Agreements (LSAs).[194]

The key terms of the LSAs were found in clauses 2.3(h) and 13.1(b). Clause 2.3(h) provided: 'In the performance [of the Agreement] ... the Contractor will ... ensure that the performance of the services are not interfered with or delayed or hindered for any reason'. Clause 13.1(b) continued: 'In the event of a breach of clause 2.3(h) of this agreement [Patrick] may terminate this agreement immediately'.

In early 1998, there were interruptions in the supply of labour at Webb Dock in protest against the NFF's non-union stevedoring activities (such being viewed by unions as an attempt to de-unionise). These strikes 'enlivened' Patrick's power to terminate the LSAs. On 4 April 1998, the company exercised that power. This action left the

[193] *Maritime Union of Australia and Ors v Patrick Stevedores No 1 and Ors* (1998) 153 ALR 602 (Judgement of North J).

[194] Id at 608.

employer companies with no work for their union work force to perform. The employers, most of their capital having been consumed by buying back their own shares from other members of the group during the restructure, and their source of income having been taken away by the termination of the LSAs, were then put under voluntary administration pursuant to Part 5.3A of the *Corporations Law* on 7 April 1998. The Patrick Group of companies continued to function as stevedores, seeking to operate its stevedoring business from another source, that is PCS, the non-union company. The MUA sought an interim injunction to stop that termination and revive the employment arrangements prior to 7 April 1998 pending a full hearing of their matters in relation to a breach of s298K of the *Workplace Relations Act* 1996, concerning freedom of association and anti-union discrimination, and a conspiracy claim, ie, that the actions of Patrick were a conspiracy to destroy the union.[195]

Section 298K of the *Workplace Relations Act* 1996 provides that an employer must not, inter alia, alter the position of an employee to the employee's prejudice (element one) for a prohibited reason (element two), for example (s298L of the *Workplace Relations Act* 1996) because the employee is a member of an industrial association that is seeking industrial conditions and is dissatisfied with present conditions.

Before Justice North in the Federal Court, the interim injunction was granted - there being found a serious question to be tried on the legal issues raised. Regarding element one, his Honour found that it was satisfied given the nature and terms of the Labour Supply Agreements. The provisions of clause 13.1(b), leading to termination of the contracts in the event of industrial action, could, in his Honour's view, be triggered by even a minor work stoppage by some employees.[196] Because such an event was likely to occur (especially in light of developments at Webb Dock and the union's subsequent fears), then power to bring about circumstances in which the workforce of the employers could be dismissed was readily available.[197] His Honour stated that the concepts of injury and prejudicial alteration referred to in s 298K are concepts of wide operation, capable of referring to the

[195] This is also important because the restructure defeated the unfair dismissal laws, although the workers were effectively sacked because they lost their jobs. That happened not through Patrick, as employer, terminating their employment, but through Patrick, as the user of contract labour, starving the labour supply company of demand for their workers.

[196] *Maritime Union of Australia and Ors v Patrick Stevedores No 1 and Ors*, note 193 above, at 608.

[197] Ibid.

effect of a commercial transaction entered into by an employer which has, or may have, an unfavourable impact on employees.[198]

Regarding the second element, in his Honour's view there was also a serious question to be tried as to whether one reason why the employer's made the LSAs in the form they took, and the reason why they appointed the administrators, was because the employees were members of the MUA and the employers wanted to dismiss them to replace them with a non-union workforce.[199] In terms of the actual evidence upon which North J relied, his Honour was moved by a minute to the Commonwealth Minister for Workplace Relations and Small Business, Hon. Peter Reith, of 12 March 1997. The minute was prepared in relation to talks between the Minister and stevedoring corporations, including Patrick, on the issue of waterfront reform. The relevant parts of the minute, as set out by his Honour, included:[200]

> what would be needed for the MUA's influence on the waterfront to be significantly weakened would be for a range of affected service users and providers to take decisive action to protect or advance their interests.
>
> stevedores would need to act out well-prepared strategies to dismiss their workforce, and replace them with another, quickly, in a way that limited the prospect of for example, the Commission ordering reinstatement of the current workforce.
>
> service users would need to take action under the *Workplace Relations Act* 1996 or the *Trade Practices Act* to protect their interests and this could have the effect of changing the MUA's behaviour and/or inflicting some financial pain throughout the award of damages.

Patrick had argued that their restructure was for commercial reasons. They sought to avoid customer confusion over who owned which asset, to allow better performance monitoring and borrowing at better rates.[201] However, his Honour noted that:[202]

> there was no express denial that a reason for undertaking the restructure in this particular way was to facilitate the termination of the employee's employment. No explanation was given as to why s13(1)(b) of each LSA took its particular form and no evidence was inconsistent with the reasons alleged by the union.

198 *Kumpton v Minister for Education of Victoria* (1996) 65 IR 317.

199 *Maritime Union of Australia and Ors v Patrick Stevedores No 1 and Ors*, at note 193 above.

200 Id at 610ff.

201 Ibid.

202 Ibid.

Patrick's next contention was that the real cause of harm to the employees was not the employer's entry into the September 1997 transaction, but rather the threatened termination of their employment, the termination could now only be achieved by a decision of the administrators and that decision would not be made for a prohibited reason, but for the reason that the employers were insolvent. His Honour rejected that contention. It was arguable that the conduct alleged to be in breach of s298K(1) was undertaken so that the administrators would have no option but to dismiss the workforce - that the termination would be the probable outcome. The termination was the effect of the conduct in breach of s298K. In his Honour's view it did not matter that the final act was to be the act of the administrators if that act was intended and likely to occur as a result of the prior conduct of the employers. The court has under s298U(e) the power to make orders to remedy the 'effects' of conduct in breach of s298K(1). There was a serious question to be tried as to whether the threatened termination of employment of the employees was the effect of conduct of the employers in breach of s298K(1).

Regarding the alleged conspiracy by unlawful means (the breach of s298K being the unlawful means), there was, according to his Honour, a serious question to be tried as to whether the conduct of the Patrick Group (in, for example, entering into the LSAs) was part of a strategy involving the employers acting in breach of s298K and seeking de-unionisation of the workforce.[203] Despite the Patrick claims that the unionists were inefficient, his Honour noted, to the contrary, that there was also evidence the unionists could work efficiently. In a Director's report of 31 December 1996, Mr Corrigan wrote: 'The trading profit represents a significant improvement over the prior year as a result of improved efficiency of operation...'.[204]

For these reasons His Honour granted the Maritime Union of Australia orders including:[205]

> Until the hearing and determination of this proceeding Patrick is restrained from acquiring the stevedoring services from any person other than the Patrick 1, 2 and 3.
>
> Until the hearing and determination of this proceeding Patrick 1, 2, 3 or Tasman are restrained from:
>
> entering into any agreement, arrangement or other transaction; or

[203] Id at 612.
[204] Id at 613.
[205] Id at 623.

> taking any action or doing anything
>
> having the effect that the employment of the employees engaged in their stevedoring business is or will be terminated.

On appeal to the High Court of Australia,[206] the majority - Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ - upheld Order Four (that if the companies were to trade on, they were to select workers from their original union work force). However, their Honours overturned Order Five (that the companies were to continue the business). In their Honour's view, the Courts had no power to force a company to trade, especially in circumstances where that company had real financial difficulties. Further, it was held that such an order would fetter the discretion of the Voluntary Administrator in contravention of the Corporations Law. In the event, the matter did not go to a full trial. Rather it was settled. The MUA workers returned to work agreeing to productivity increases and some redundancies in return for the continuation of their employment on the wharves.

Why the Workplace Relations Act 1996 is too harsh on unions (too pro-business)

While the Patrick judgment provided some positive outcomes to both the employers and employees, the High Court judgment left the MUA vulnerable due to the emphasis placed on the voluntary administrator's discretion. Had the voluntary administrator decided that the business should not continue, the MUA workers would have lost their jobs and seen the destruction of their 100 year old organisation. In those circumstances, the conspiracy and anti-union discrimination cases most likely would have gone to a full trial. However, even if the MUA had won those cases, it would have most likely only have led to financial reparation. By the end of a lengthy court case, the MUA's practical domination, and even existence on the wharves, would have been destroyed. Given that the MUA is one of the oldest and most powerful unions in Australia, the repercussions for the rest of the union movement would have been enormously damaging. Those sorts of restructures could have been copied, and the business culture of challenging unions could have been enshrined. In such circumstances, when the courts *could not* guarantee even the union's existence on the wharves, the unions were probably most in need of their traditional weapon of secondary boycotts. However, the operation of the *Workplace Relations Act* 1996 almost destroyed that weapon. In-

206 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 643.

stead of commencing an overtly damaging national strike (as was the case in Weipa), the MUA in 1998 could only organise pickets outside Patrick terminals. Peaceful pickets have always been legal. However, there was a real question as to whether these MUA pickets were peaceful, or a deliberate attempt to prevent the non-union work force supplying material to Patrick customers. Had the new company done so, the destruction of the union's domination of the wharves would have been completed at a practical level. The pickets and the overall dispute spawned a number of actions in areas such as: competition law; corporate law; international law and industrial law. These cases are considered below and, it is submitted, demonstrate how unions are currently straight jacketed from preserving their legitimate interests and existence and why the introduction of a new purpose defence would lead to a more balanced system of industrial law.

Intervention by the ACCC

The Australian Competition and Consumer Commission (ACCC), the body charged with the function of enforcing the *Trade Practices Act* 1974 commenced proceedings against the MUA alleging, inter alia, breaches of the prohibitions on secondary boycotts. These alleged breaches related to, first, the pickets (organised by the MUA) of Patrick terminals while they were operated by the non-union stevedores. The allegation was that these pickets were not peaceful, but rather disruptive and destructive of business and essentially non-competitive such as to amount to a secondary boycott. Secondly, the ACCC targeted international black bans inflicted by the International Transport Federation and various overseas unions on unloading ships that were loaded by non-union stevedores.[207] In one case, a ship had to return from the USA for its cargo to be unloaded and reloaded.[208] Essentially, the ACCC relied on the arguments that the secondary boycott provisions of the *Trade Practices Act* have extra-territorial operation, or that the conduct of the MUA and associates breached s45DB of the *Trade Practices Act* 1974. The latter provision was described by Professor Allan Fels of the ACCC, in an article he wrote for *The Age Newspaper*, as 'the waterfront provision: Where the movement of goods into and out of Australia is concerned, the section prohibits any two persons from acting in concert to prevent or hinder the supply of goods and services by a third party (other than

[207] M Davis and K Murphy, 'New Threat to crush docks union' *Australian Financial Review Weekend* (23-24 May 1998).

[208] M Davis and K Murphy, 'Bans force ship to reload cargo in NZ' *Australian Financial Review* (28 May 1998).

their employer)'.[209] As alluded to in Part Two of this article, the financial penalties for breaching these provisions can reach millions.

Contempt of Court

As stated above, a large part of the MUA's strategy during the dispute away from the court room was to picket the non-union manned Patrick port facilities. There were real questions as to whether these pickets were peaceful, with picketers even wielding iron bars in front of main entries to the Patrick terminals, causing a total inability to move cargo in or out of Patrick ports. One of the more unusual orders made in relation to these pickets was the injunction of Justice Beech of the Victorian Supreme Court, which in its initial terms banned 'the world at large'[210] from blocking access to the Patrick terminals. The order was criticised by academics as being 'extraordinarily broad' and without precedent in Australian law (- it would have lead to the prosecution of even innocent bystanders!).[211] The injunction was amended on appeal to the Full Court so that it only applied to members of the MUA - the only defendants named in the original application.[212] On 14 May 1998, the MUA was found in contempt of court for defying an order relating to the injunctions.[213]

Counter Claim by Patrick

Patrick Stevedoring lodged a counterclaim against the MUA seeking damages and even the deregistration of the union.[214] Essentially, the company claimed that since 1995 the union has been conspiring to injure Patrick. It alleged that the MUA induced Patrick to breach contracts with the non-union PCS Stevedores. Claims also included breaches of the *Trade Practices Act* ss45-47 for, for example, misuse of

[209] Article (undated) supplied to me directly by the ACCC. The article is at pains to indicate that the ACCC perceives it role as intervening in the public interest to prevent non-competitive practices. It aims to act 'without fear or favour' and stated that it was investigating the actions of Patrick to determine whether its leasing of Webb Dock to PCS (on behalf of the farmers) was an anti-competitive practice.

[210] B Haslem, S Balough and M Schubert, 'Pubic Wins Access to Pickets' in *The Australian* (29 April 1998).

[211] Professor Ron McCallum as cited in S Long and T Boyd, 'Australia's top union leaders to defy shock injunction' *Australian Financial Review* (21 April 1998).

[212] *Maritime Union of Australia and Ors v Patrick Stevedores Operations Pty Ltd* (1998) 144 FLR 420.

[213] A Burrell and S Long, 'MUA faces big fines after court's contempt verdict' *Australian Financial Review* (15 May 1998).

[214] M Davis and K Murphy, note 207 above.

market power. There were also claims that the union breached awards and agreements through its industrial campaign.[215]

P & O Stevedores

Another significant application involved the obtaining by P & O of an injunction under s127 of the *Workplace Relations Act* 1996 to prohibit members of the MUA employed by P & O from engaging in any 'strike, ban or limitation on the performance of normal work' for a period of 6 months. The breadth of the application lies in the fact that it covers workers at many different locations and ports. In support of its claims, P & O stated that it had been damaged by 'numerous instances of unlawful and illegitimate industrial action' in the past 12 months causing delays to shipping.[216]

Union measures in the ILO[217]

On 7 May 1998, the International Confederation of Free Trade Unions lodged a complaint with the ILO alleging nine breaches by Australia of its international treaty obligations. These alleged breaches included failure to protect workers against discrimination based on trade union membership; failure to protect the MUA and its right to be associated with an international trade union organisation (namely, the International Transport Federation); failure to allow the MUA to engage in 'legitimate' secondary boycott actions; and other complaints pertaining to Patrick's corporate restructure; picketing; and discrimination against MUA members in the offering of individual contracts.

The ILO also called Australia to account to the Committee of Experts in relation to the restrictions on collective bargaining. Although most ILO sanctions are diplomatic, and therefore gave no immediate practical assistance to the wharfies, such international condemnation at least provides unions with a platform from which they can lobby for legislative reform. It can also tarnish Australia's reputation[218]

[215] Clearly there is overlap between the claims of the ACCC and the counterclaim of Patrick.

[216] S Long, 'P & O seeks sweeping court order' *Australian Financial Review* (13 May 1998).

[217] F Brenchley, 'Unions tell ILO of Nine breaches', *Australian Financial Review* (8 May 1998) p 10.

[218] *AM* ABC Radio 13 June 1998.

Possible Action by the ASC†

Administrators should report to the ASC any breaches of the Corporations Law of which they become aware during the course of their administration. The administrators of the labour supply companies 'cast serious doubt on labour supply agreements ... describing their terms as 'onerous' and 'uncommercial'. They foreshadowed possible legal action to void the transaction, recover monies and pursue directors for personal liability *if the companies are placed in liquidation*'.[219] In the view of the administrators, there were doubts as to whether the costs of entering into the contracts outweighed the benefits. It was suggested that the directors should have reasonably anticipated that industrial action might occur and that, therefore, entering into these contracts, which gave an immediate right to Patrick Stevedoring Holdings to terminate the contracts in the event of industrial stoppages, meant that the agreements were unduly onerous and that they possibly contributed to the insolvency of the companies.[220] However, one must note that by the time the companies were in liquidation, the union labour would have no chance of regaining employment and the MUA would still be removed from the wharves.

Other actions the MUA might have pursued in this regard concern possible breaches of directors' duties. The directors of the labour hire companies had a duty to take decisions in the best interests of the labour hire companies themselves, rather than the Patrick Group. Through signing the LSAs it is arguable that the directors breached that duty and could be brought to account.[221]

Why there is a need for the purpose defence

On hearing the verdict of the High Court in the MUA case, the President of the ACTU, Ms Jennie George, dubbed the decision an example of the 'rule of law protecting everyday working people against the might of corporations and government'. She said it was a victory of 'spirit, tenacity, principle and commitment' to the cause of a free choice of union membership. She continued that the decision

† Editor's Note: The Australian Securities Commission (ASC) has since been renamed the Australian Securities and Investment Commission (ASIC) pursuant to the *Australian Securities and Investment Commission Act* 1998.

219 Stephen Long and Mark Davis, 'MUA sinks dock reform' *Australian Financial Review* (19 May 1998).

220 Ibid. There was no evidence, however, that there was breach of the laws against share buy-backs.

221 I am indebted to Dr Keith Fletcher for his commentary on the corporate law aspects of the MUA dispute, especially his acknowledgment of the practical problems for the MUA of bringing actions of this type.

demonstrated that 'if one fights for a cause one believes in, however great the odds, however tough the opponent, justice would succeed'.[222]

Academic commentators, such as Professor Ron McCallum,[223] also construed the decision as a victory for human rights and the guarantees of freedom of association over the rights of companies in the Corporations Law and the rights of third parties (business associates). In support of that view, Professor McCallum stated that as a result of the High Court decision, although the administrators could restructure the labour hire companies for the purposes of efficiency, they could not 'set to naught' rights enshrined at law which allowed workers to retain union membership free from prejudice. The administrators could 'not use efficiency as a mask for a rights dagger' - their actions had to be legitimate in substance and not prejudicial to unionists. Professor McCallum said the High Court decision reaffirmed that Australia is a 'rights-based' society.

Mr John Buchanan, assistant director of the Australian Centre for Industrial Relations Research and Training, agreed with McCallum's view, adding that the High Court seemed to have construed the situation as an industrial rather than commercial law problem. Although the Court strengthened the position of the administrators to make commercial decisions in running the labour supply companies, the Court equally upheld the workers' rights, construing the original corporate restructure as an instance where commercial laws had possibly been manipulated in order to violate industrial law. That finding had ramifications for other companies seeking to embark on a Patrick-style restructure. These trends were found in the fact that, apart from modifying Justice North's order so as to strengthen the right of the administrators to use their discretion, the findings as to the arguable case of conspiracy were not changed.[224]

However, other commentators were not convinced that the decision delivered to unions a sweeping victory. They pointed to the amendments made to Justice North's orders by the High Court, namely those which gave primacy to the discretion of administrators in a voluntary administration. It was suggested that although the administrators could not discriminate against unionists, the administrators

[222] As quoted in a live speech to wharfies in Melbourne, televised on the Nine Network in a special broadcast (4 May 1998).

[223] Quoted on the '7:30 Report' ABC Television (4 May 1998).

[224] S Long, 'Decision frustrates Patrick's legal strategy' *Australian Financial Review* (5 May 1998).

must make commercial decisions. The options open to the administrators included winding up the companies, if they could not trade profitably, or substantially reducing the workforce so that the companies could trade profitably. In either of these cases, jobs of MUA members would be lost, the employment of union members ultimately being subject to the administrators' commercial discretion.[225]

So, at day's end, who is right?

Sadly, it is the view of this author that the future of unions is tenuous. The MUA case was not a sweeping victory for unions and the *Workplace Relations Act* 1996 has substantially decreased the powers of unions in Australia and leaves them vulnerable. Essentially, the union's fortunes rested on two planks. First, they had to *prove the anti-union conspiracy*. Secondly, they had to argue that their pickets, which included the use of iron bars, were peaceful. Only if the pickets were peaceful would they be legal, and only if the unionists effectively picketed could they stop the new non-union workers from working effectively and making the union workers a practical redundancy. The conspiracy case was prime facie established, but only due to what might be regarded as a freakish trail of evidence: the fact that some Patrick workers were dismissed despite having been congratulated by their employer by facsimile on their improved productivity; one Patrick manager who would not sack his workers because he viewed them as efficient was himself sacked; the Prime Minister (supporting Patrick), when informed of these matters on *A Current Affair*, told the interviewer, Ray Martin, that these people 'were all members of the one union'; the public servant who wrote down a step by step guide as to how the union might be destroyed; and the Office of the Industrial Relations Minister issued press releases on the mass sackings within hours of their execution and had prepared a Bill relating to the proposed redundancy fund for introduction to Parliament the next day.[226] Had these incidents been unspoken and unwritten, one wonders whether the union could have established the prima facie conspiracy. If the union had not been able to argue the prime facie conspiracy, they would not have been able to settle the secondary boycott and other cases against them. Hence they would have been financially destroyed for taking secondary boycott action. Had they not taken the (possible) secondary boycott action in the form of pick-

[225] Kerry O'Brien, '7:30 Report', note 223 above.

[226] '7:30 Report' ABC Television (8 April 1998) and 'A Current Affair' Nine Network (8 April 1998).

ets, the non-union labour would have flourished, destroying the union in a practical sense.

The MUA members are not martyrs. Like the CFMEU in the Weipa dispute they have been militant at times. As the Patrick CEO, Mr Corrigan stated: 'They had overplayed their hand'. However, my view is that their annihilation (which it is submitted came perilously close) would have been detrimental to Australia and its Industrial Relations System and freedom of association in this country, and highlights the need for secondary boycott reform. While I assert that the *Industrial Relations Act* 1988 provisions led to far too lenient a result on the CFMEU, it is equally the case that the *Workplace Relations Act* 1996 was too harsh on the MUA. A compromise should arise in the form of a new defence – that defence would have been available to the MUA because they were trying to stop the alleged de-unionisation of the workplace, which is a legitimate trade union goal (Limb One); and they were not unduly damaging other sectors of the economy (as was the case in Weipa). They did damage third parties, but that damage was not wanton (Limb Two).

Part Four: Conclusion: Case for the New Purpose Defence

Rather than persisting with the situation where unions either have too much power or not enough, it is submitted that a middle ground should be sought in Australian Industrial Law that balances the interests of trade unions and business. That middle ground should take the form of a new defence to the secondary boycott prohibition of the *Trade Practices Act* 1974. The defence would turn on the purpose of the action and should be couched in these terms:

> Unions are afforded a defence where their action is taken in furtherance of a legitimate union end (ie preserving their very existence) (Limb One) and where the action taken is not unduly detrimental to the public or national interest (Limb Two).

A defence of this type would have penalised the CFMEU's actions in the Weipa dispute because they took damaging action after they had effectively won the battle. The defence would likewise have protected the MUA's pickets in circumstances where they were clearly acting to preserve their very existence: where the damage caused to the economy was moderate and where they were prime facie victims of a conspiracy which breached the Freedom of Association provisions of the *Workplace Relations Act* 1996.

There is ample authority for the enacting of a new defence. It was alluded to over twenty years ago by such luminaries as Hall and Byrne and latterly by commentators including McCarry, Pittard, Otlowski

and Jolly. Whilst the latter two authors considered the notion of a purpose defence in the context of the industrial torts, the idea is still relevant to secondary boycotts and, if the 72 hour cooling off period was ever removed from the statute law on industrial torts, could easily be argued in that context. Further authority for the new defence is found in the robust dissenting judgments of the original s45D cases; in commentaries concerning such industrial torts cases as *McKernan v Fraser*[227]; and in the international treaties and conventions to which Australia is a party (which allow some restrictions on boycotts short of total prohibition). Further, the concept of reasonableness - taking into account of public interest - is not new. That is found in the 'no disadvantage test' relating to enterprise bargaining and in the provisions which concern the termination of the bargaining period.

Despite the onslaught of competition law, the introduction of the new defence is also in the interests of the Government. As discussed in Part One of this article, a strike is not a means in itself, it is usually a sign of an underlying discontent. If there is one thing that the wharfies demonstrated through their pickets night after night after night, and with their celebration when the High Court decision was eventually handed down, it is that no legislation can quell the will of the people, and that those who try will often thwart themselves. Possibly the best path for any Government is the taking of a middle ground between the two extremes of excessive union rights and excessive competition policy.

As John Steinbeck wrote in his classic novel about the struggle of mid-western workers in America during the Great Depression:[228]

> This you may say of man - when theories change and crash, when schools, philosophies, when narrow dark alleys of thought, national, religious, economic, grow and disintegrate, man reaches, stumbles forward, painfully, mistakenly sometimes. Having stepped forward, he may slip back, but only half a step, never the full step back...Fear the time when the strikes stop while the great owners live - for every little beaten strike is proof that the step is being taken. And this you can know - fear the time when Manself will not suffer and die for a concept, for this one quality is the foundation of Manself, and this one quality is man, distinctive in the universe...

[227] *McKernan*, note 37 above.

[228] *Grapes of Wrath* (Pan Books, 1978), p 160.