

THE LABOUR RELATIONS REFORM ACT 2002 (WA)

- THE FIRST NINE MONTHS

INFORMAL ADDRESS TO THE AUSTRALIAN LABOUR LAW ASSOCIATION –
WA BRANCH

HELD AT CORRS CHAMBERS WESTGARTH

29 MAY 2003

Senior Commissioner Anthony Beech¹

The topic upon which I have been requested to speak covers the amendments to the *Industrial Relations Act 1979* which were effected by the *Labour Relations Reform Act 2002*. For the record, that Act was proclaimed on 1 August 2002 other than for the parts relating to employer-employee agreements and the repeal of the *Workplace Agreements Act 1993* and consequential amendments which were proclaimed on 15 September 2002 (*GG* 26 July 2002 p. 3459; 6 September 2002 p. 4487).

Any review of the operation of the legislation since that time will necessarily have a different outcome depending upon the timing of the review. A review after three months' operation will produce a different analysis than one which occurs two years after its operation. The analysis which follows is a period approximately nine months after the operation of the amendments.

Some of the amendments allowed matters to occur which do not necessarily involve the Commission itself. For example, apart from establishing a no disadvantage test, which the Commission did at CICS (2003) 82 WAIG 2339, applications for employer-employee agreements are a function of the Department of the Registrar.

¹ B.Ec, LLB. (*W Aust*), Senior Commissioner WA Industrial Relations Commission; I wish to acknowledge the work of Mr Alex Watt in extracting some of the figures used in this paper and the analysis of the unfair dismissal figures done by my Chambers Liaison Officer June Stack in the preparation of this address.

As to those EEA's there have been 2 reported appeals under 97VM to the Commission against the refusal of the Registrar to register EEA's. The first was Goldeagles Nominees Pty Ltd and Minreef Pty Ltd t/a Wilmot Engineering involving a number of EEA's. The decision was that the Registrar was correct to refuse registration and the matter was adjourned to enable the appellants to lodge revised EEA's to overcome the deficiencies. The appeals were subsequently withdrawn: *Goldeagle Nominees Pty Ltd & Minreef Pty Ltd t/a Wilmot Engineering v. Registrar, Department of the Registrar, Western Australian Industrial Relations Commission* (2003) 83 WAIG 1178.

Appeals which came before Kenner C [2003] WAIRC 08023, 83 WAIG 1018 involved the *City of Melville v The Registrar*. The record shows that it involved 6 appeals by the City of Melville concerning 6 EEA's but the appeals were heard and dealt with as one. The appellant was represented by counsel. The respondent to the appeals was the Registrar. The registrar did not appear in the proceedings. An issue arose concerning the standing of a duly authorised bargaining agent appointed by the employees party to the EEA pursuant to s.97UJ to appear in the appeals. The Commission held that the appointment of a bargaining agent in connection with the registration of an EEA includes the refusal of registration of the EEA and incidentally to any appeal from such refusal. The decision of the Commission was that the Deputy Registrar erred in concluding that the absence of a date of execution on the EEA precluded the acceptance by the Registrar of the lodgement of the EEA's for registration. The Commission upheld the appeals, remitted them to the Registrar and directed the Registrar to confer with the parties pursuant to s.97VC of the Act.

Appeals lodged by Primepower Engineering Pty Ltd were discontinued: *Primepower Engineering Pty Ltd v. Registrar, Department of the Registrar, Western Australian Industrial Relations Commission* (2003) 83 WAIG 1179.

It is perhaps too early to discern any lesson from the appeals. As the matter before Kenner C demonstrated, and as I can advise from the Goldeagles Nominees appeal, the

issues have been of a technical nature rather than of law. I assume any issues arising from the legislation are still to be discovered. The most that can be said thus far is that although the parties to the appeals are the employer and the Registrar, the employees are also directly affected and it is important that they be served with the notices of appeal. They, or their bargaining agent, have standing to appear in the proceedings.

Right of Entry

I am advised there have been 310 authorities issued by the Registrar pursuant to s.49J of the Act concerning right of entry. There have been 5 authorities revoked pursuant to S.49J(6) on the application by the secretary of the union on whose behalf the authority was issued. A list of the authorities issued appears on the Commission's web site.

There have been 12 applications pursuant to s.49J(5) for the Commission to revoke an authority. Only two have so far been heard and determined, they being applications by Silent Vector Pty Ltd t/a Sizer Constructions against the CFMEU in relation to Joe McDonald. The applications were dealt with together and both dismissed (*Silent Vector Pty Ltd t/a Sizer Builders v. CFMEU* (2003) 83 WAIG 565) and there was no appeal against those decisions. In the applications the employer conceded that the employer had an onus to prove its case on the balance of probabilities to the degree of satisfaction prescribed in *Briginshaw and Briginshaw* because the revocation of a right of entry permit is sufficiently similar to imposition of a penalty.

The decision required an analysis of s.49J(5)(a) and (b) in relation to a number of allegations concerning two particular dates. The decision speaks for itself, I merely observe from that decision that s.49J(5)(a) speaks of entering premises for the purpose of holding discussions, and it was held that the words include holding a meeting. If the holding of the meeting was to secure industrial action, that would be to act in an improper manner. The evidence did not prove that to be the case. As to a second allegation that Mr McDonald sent employees home, that was not made out on the evidence of both Mr McDonald himself, who actually was called by the employer to give evidence, and his evidence was consistent with the evidence of other witnesses called by the employer.

That is the only case thus far to look at that controversial section of the Act. Four other applications involving the same parties have been adjourned partly, although not wholly, by consent (*Silent Vector Pty Ltd t/a Sizer Builders v. CFMEU* (2003) 83 WAIG 563). One application by Burswood Resort Management Limited was not proceeded with and was dismissed (*Burswood Resort (Management) Limited v. ALHMWU* (2003) 83 WAIG 1017). Another by *Personnel Services and Labour Hire Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union* discontinued at the request of the applicant (*Personnel Services and Labour Hire Pty Ltd v. ALHMWU* (2003) 83 WAIG 387). One by Wesfarmers Coal has been discontinued.

The Commission has been obliged to consider s.49J in another context however. The Commission was required to deal with a dispute concerning the notification by BHP Direct Reduced Iron Pty Ltd to an official of the AFMEPKIU that he would not be allowed access to the Boodarie Iron Operations unless he submitted a negative blood alcohol test result prior to entry and agreed to submit to future intermittent and random tests in future workplace visits. The Commission held that the right of entry provisions in the Act constitute a code and the Commission cannot impose a limitation or a proscription upon the right of entry not authorised by the statutory scheme contrary to the apparent will of the Parliament (*AFMEPKIU v. Transfield Services (Australia) Pty Ltd and Another* (2002) 83 WAIG 376). The Commission issued a declaration that it did not have the jurisdiction or power to make an order requiring the official to submit to a random drug and alcohol test as a condition of the exercise of those rights and that the companies concerned did not have the right to require it either.

Section 49I(7) permits an application to be made to the Commission to waive the requirement to give the employer concerned notice of an intended exercise of a power to produce employment records or other documents under s.49I(6). I am informed that no applications have been made under that subsection of the Act.

Interim Awards

Section 36A(2) gives power to the Commission to make an interim award that extends to employees pending the making of a new award under s.36A. I am informed that three applications have been made pursuant to that section. One decision has been issued in relation to Dampier Salt by a CICS (*AWU v. Dampier Salt Pty Ltd* (2002) 82 WAIG 2878; *Dampier Salt Pty Ltd v. AWU* (2002) 82 WAIG 3224). The record there shows that the interim award was to preserve the status quo while the parties conferred regarding the specific needs of the enterprise. On 12 May the Aerospace Engineering Services Pty Ltd Interim Award A6 of 2002 issued (2003 WAIRC 08390).

Enterprise Bargaining

Sections 42, 42A, 42G, 42H, 42I provide that applications may be made to the Commission about in relation to enterprise bargaining. The record of the WAIG shows that an application pursuant to s.42 E came before Gregor C and the parties consented to a declaration under s.42H that bargaining has ended: *ALHMWU v. Burswood Resort (Management) Ltd* (2002) 83 WAIG 56. There has been one other application pursuant to s.42H for the Commission to make a declaration that bargaining has ended and the declaration is reported at *CFMEU v. Hanssen Pty Ltd Project Management* (2003) 83 WAIG 956.

Enterprise Orders

There have been 13 applications pursuant to s.42I for enterprise orders. The vast majority have been from one union. At least 4 are recorded as discontinued: *CEPU and Another v. ABB Australia Pty Ltd* (2002) 83 WAIG 181; *AFMEPKIU and Another v. Coromal Caravans* (2003) 83 WAIG 1277 and that appears to have been the fate of most of them. I have been unable to find an enterprise order which has issued however there are presently applications proceeding through the Commission.

An application was made by the CFMEU for joinder as a party to an application by the AFMEPKIU for an enterprise order pursuant to s.42(I) of the Act. A number of issues of law were raised. The power of the Commission to order that a person be joined is to be found in s.27. Are the powers in s.27 available to the Commission when it is dealing

with bargaining between parties pursuant to s.42 of the Act, in this case bargaining formally initiated by one union? Has the Commission the power to join another union to that bargaining? The Commission decided that the powers are available and it exercised those powers by joining the applicant. Its decision is reported at *CFMEU v. AFMEPKIU and Coromal Caravans* (2003) 83 WAIG 389 and an appeal against that decision was dismissed by consent (*Coromal Caravans v. AFMEPKIU and Another* (2003) 83 WAIG 1143).

It is a matter for judgment whether the utilization of those sections of the Act is as anticipated.

There can be little doubt, however, regarding the utilization of at least one of the amendments of the Act and that is s.29(3) of the Act which permits the Commission to accept a referral of unfair dismissal that is out of time if it would be unfair not to accept it.

Unfair dismissals

I might preface my comments by speaking of claims of unfair dismissal generally. As I am sure you are all aware, claims lodged pursuant to s.29(1)(b)(i) of the Act, constitute the most numerous of the applications referred to the Commission. Last calendar year there were 949 applications claiming unfair dismissal lodged in the Commission pursuant to that section of the Act. That is on average 18 per week for the 52 weeks of the year. The Regulations gazetted by the Governor and effective from 1 August 2002 increased the fee for filing a claim of unfair dismissal from \$5.00 to \$50.00. A comparison of the first 4 months of last year with the first 4 months of this year shows a decrease in the number of applications:

January '02	77	January '03	59
February '02	100	February '03	71
March '02	105	March '03	72
April '02	81	April '03	74
	363		276

Given the volume of unfair dismissal claims pursuant to s.29(1)(b)(i) of the Act, it may not be surprising that s.29(3) of the Act is numerically the section of the *Labour Relations Reform Act 2002* with which the Commission has had most frequently to deal. 66 such applications have been made since August 2002. Of the applications filed: 17 - Pending; 13 - Withdrawn; 36 - Decisions issued: 14 Granted; 22 Dismissed.

A review of the decisions of the various Commissioners who dealt with this section revealed that two decisions, they being *Andrew v. Metway Property Consultants* (2002) 82 WAIG 3460 and *Azzalini v. Perth Inflight Catering* (2002) 82 WAIG 2992 reveal the present authorities to which advocates may wish to turn when preparing a case in relation to this section. Those tests are not dissimilar to those applicable to an extension of time, the leading authority in the area being *Cousins v YMCA* (2001) 82 WAIG 5 at [38] citing *Gallo v. Dawson* (1990) 64 ALJR 458 and *Ryan v. Hazelby & Lester t/a Carnarvon Waste Disposals* (1993) 73 WAIG 1752. The tests involve a consideration whether there is an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he contested the termination, and prejudice to the respondent.

The first appeal against a decision of a Commissioner under s.29(3) was heard last Friday in *Rodriguez v. Parks Industries* (FBA 6 of 2003). The reasons for the decision of the Full Bench have yet to issue. I am not sure whether the appeal went to the tests to be applied. Time will tell.

It is apparent however that in order for the Commission to decide whether it would be unfair not to accept a referral of a claim of unfair dismissal that is out of time that the referral is to be listed formally. The Commission may be presented with disputed facts on any of the four tests to which I have referred and will need to make findings of fact. In most cases that will require an opportunity to be given to call evidence. Further, there needs to be formal proceedings given the decision of the Commission goes to the rights of the parties and should be and is appealable. It is a formal decision.

In other words, it is a separate formal process which necessarily canvasses the merits of the substantive claim, even if it does not decide the substantive claim, in addition to the processes of conciliation and arbitration which would occur anyway if there was a right to lodge a claim out of time. It is developing into a hearing before you have a hearing. It introduces another layer of costs to the parties as well as the additional time involved. The way the legislation is worded, the Commission has to decide whether the referral is accepted before it is, in fact, accepted. And it is only when the referral is accepted that the Commission can initiate even the first step of conciliation.

The concern I express is that an application under s.29(3) may be appealed through to the Industrial Appeal Court before the merit of the application is even considered by the Commission. There is an uncomfortable parallel here with *STW Channel 9 v Satie* (1999) 79 WAIG 1863 where Scott J observed that it was unsatisfactory and contrary to the legislative spirit of the IR Act” to be taken through the entire industrial [appeal] process in relation to a preliminary point.

It provides no real answer to suggest to the parties that with their agreement a meeting of the parties could occur upon the lodging of the referral and prior to the formal determination of the 29(3) matter but such a course at least gives some initiative to the parties and an opportunity for them to deal with the matter on their own terms. Indeed, it is not dissimilar to what I understand has recently been introduced in the South Australian Magistrate’s jurisdiction. In that jurisdiction there is a pre-lodgement system available from a web-site to assist the parties to resolve a dispute with the court’s informal assistance before the notices of claim are formally lodged. It is reportedly successful.

A far less controversial amendment to the legislation occurred in s.96 where in relation to s.29(1)(b) claims, regulations may provide for some of the functions of the Commission to be delegated to the Registrar. Regulation 111 has been made which delegates to the Registrar the resolution by conciliation under s.32 of the Act a claim under s.29(1)(b). The Commission has always had the power under s.93(8) to direct a Registrar to

investigate and report in relation to a matter within the jurisdiction of the Commission. That is not conciliation as such although the Registrar and the Deputy Registrars do hold meetings of the parties at which agreements are reached. It is a system which has reportedly worked well.

With s.96 the powers given to the Registrar are those which s.32 permit including doing all such things as appear to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter. It includes calling of conferences and also making directions, orders or declarations. The Commission has recently employed 3 Deputy Registrars dedicated to this role. They should commence employment shortly and together with the present Deputy Registrars you may anticipate from them that in s.29(1)(b) claims the present “conciliation” role with which you are familiar will increase in frequency and depth.

The amendments to s.23A require an emphasis on reinstatement and re-employment as an alternative to compensation. However, the amendments were only applicable to applications made after 1 August 2002. It may be early days indeed therefore to consider the significance of those amendments. Similarly, the State Wage bench is presently considering whether there should be any changes to the State Wage Fixing Principles as a result of some of the changes to the legislation, for example those sections relating to interim awards.

While there have been, to my knowledge, two applications which were served upon 3rd parties in accordance with s.23B(1) of the Act, that being a section relating to the external interference by a third person with employment issues, neither of those applications made it to the decision stage.

S.23A also elevated to the statute the requirement on the Commission to have regard for a period of probation which was agreed between the parties and where the service was less than 3 months. Whilst that section has been referred to in the course of a few decisions, the reference has been only in passing and full argument regarding the scope of that

requirement still awaits us all. As it does in relation to other changes made to the definition of “employee” and the inclusion of labour hire agencies.

The scope of this address has been the amendments to the *Industrial Relations Act 1979* which were effected by the *Labour Relations Reform Act 2002*. In relation to those amendments, perhaps other than s.29(3) it is still early days.
