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INDUSTRIAL RELATIONS ON THE WATERFRONT

by

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INDUSTRIAL RELATIONS ON THE WATERFRONT

In making comments on this subject it should be understood that these are the views only of myself as a Lawyer with something of a shipping background, and one who has had the opportunity to confront industrial relations in the maritime area over the last few years.

I shall make some observations on what I found and understood to be the position in at least one area of this general maritime scene and some comments regarding the position of the foreign shipowner.

At least part of what I have to say may well have been known to many of you for a long time, and to others, perhaps much more in recent times, as a hot and live issue. To others I suspect some of the basic concepts of this area are unknown, and I shall therefore trust that those of you who consider this to be old hat will bear with me.

I propose to address myself to the Australian maritime scene not so much on the waterfront, but as it faces shipowners, local and foreign, operating in this country.

Firstly - a general idea of the bodies and organisations involved.

On most Australian ships we have the following employees and Unions represented -

Deck Officers - by The Merchant Service Guild of Australia.
Engineers - by The Australian Institute of Marine and Powers Engineers.
The Radio Officer - by a separate body - The Professional Radio and Electronics Institute
The Stewards - by The Federated Marine Stewards and Pantrymens' Association
And the Seamen and Cooks - by The Seamens' Union of Australia.

Unit last year the cooks were a separate Union, but they have now combined with the S.U.A.

Each body is registered under the C. & A. Act.

On the employers' side, employers are represented in the industrial relations arena and before the Conciliation and Arbitration Commission usually by one of 3 bodies -

The Commonwealth Steamship Owners' Association (C.S.O.A.) a body registered in 1905 as one of the first organisations to register under the C. & A. Act of 1904.

This body represents the majority of cargo shipowners, whilst the unregistered Australian Maritime Employers' Association formed in 1976 represents principally Australian National Line, B.H.P., C.S.R. and Western Australian State Ships.

The offshore industry employers are represented by the employers' registered body, Australian Mines and Metals Association.

These bodies deal with disputes between employers and employees on a wide range of issues.

There is a long and well known history of industrial disputation in the maritime industry. In fact some of the earliest cases of significance before the Arbitration Court, as it then was, were between shipowners and seamen. On page 1 of Volume 1 of the Commonwealth Arbitration Reports of 1906 is the case of the Merchant Service Guild of Australia versus the Commonwealth Steamship Owners Association, a dispute which gave rise to judgments setting out the extent of the jurisdiction of the Conciliation and Arbitration Court to ships on international voyages. Interestingly enough, that case sets out in full the log of claims being made upon the shipowners of the time by the then deck officers, and it is interesting to reflect that claims were being made for 35 pounds per month for class "A" Masters, 20 pounds per month for class "A" Chief Officers, 16, 14 and 11 pounds per month for 2nd, 3rd and 4th Officers. As to leave, Provision 15 of the Award stated that every Master and navigating officer shall be entitled "in each year to continuous 10 days leave of absence on full sea pay at such time as the shipowner shall determine."

It may be worth mentioning at this stage that at present the most highly paid Master receives $52,700.00 per year with the average of approximately $42,000.00. The chief engineer slightly less. First Mates, $37,-$40,000.00. Chief Steward, $30 - $33,000.00. Assistant Steward, $24,000.00. Bosun, $25 - $31,000.00. Deck boys, $13,000.00. Chief Cook, $30 - $33,000.00. Assistant Cook, $22 - $28,000.00.

The table of salaries varies from vessel to vessel and category to category, and there is a wide range, but the ones quoted are indicative. The 2-crew system or something close to it is in existence on most Australian ships and this involves approximately 26 weeks leave.

The industry is regulated by a series of Awards of the Conciliation and Arbitration Commission. Most cargo vessels are governed by the Maritime Industry Seagoing Award 1981, whilst there is a separate tug Award, Port services and various Offshore Industry Awards. These Awards are binding on the parties or respondents to them, and employers can be prosecuted and fined for breaches.

The Maritime Industry Seagoing Award is an Award negotiated between employees and ship operators every 2 years with one presently being negotiated. The current award is due to expire at the end of June 1983.

In those negotiations (being conducted in the light of the wage freeze and the history of economic uncertainty), claims have been received from Unions for such items as a 100% increase in salary, indexation and catch up based on C.P.I. increases since June, 1982, 4 weeks annual leave in addition to the 26 weeks otherwise applying and by some, the addition of public holidays as well as 4 weeks annual leave. Maternity and paternity leave are sought as well as sick leave in addition to the provision of the Navigation Act which permits sea farers up to 3 months' sick leave in respect of illnesses or injuries occurring in the service of the ship or the owner.

Claims are made for study leave and various allowances etc., as well as for the introduction of first class air travel for all local and overseas travel. These claims must of course be viewed in the light of the system of logs of claims and negotiation.

The tug award involves substantially the same Unions and is negotiated every alternate year and expires in 1984.

The Award covers, in addition to wages, matters such as the following :-

leave;
sickness and accident premiums provisions;
travelling and travelling expenses;
compensation;
performance of work;
termination of employment;
allowances;
protective clothing;
severance pay and redundancy;
supernumeraries etc. etc.

There is, in addition, a Clause headed "Settlement of Disputes"

That clause sets out that where a matter arises which could lead to dispute, the matter can be raised on three levels - a Delegate or representative of the Union on the vessel can raise it with the Master who may then, if he is unable to settle it, refer it to the local office of the employer to be discussed with the local branch of the Union.

In cases where local branches themselves become aware of a dispute, they are obliged to refer it to the Federal Secretary of the Union if it cannot be resolved, and the employer must refer it to his Chief Industrial Representative. Disputes arising at a federal level may, where they cannot be settled, be discussed between the Chief Industrial Officer of the employer and the Federal Secretary of the Union, following which such disputes "shall be referred to the Commission for determination."

The Clause goes on to say that it is "the intention of the parties that work shall continue pending determination of any matter or dispute in accordance with the above procedure."

So, there appears a fairly well regulated system for the resolution of disputes with the final Arbiter being the Commission. This being so, one wonders why so many disputes take place and why so many delays to vessels occur. What is clear is that the disputes procedure is not always followed, and in many cases, is not regarded at all.

The problem of disputation and delay in the Maritime Industry has become notorious, and in 1981 and '82 was dealt with by Sir John Crawford as part of his consideration of the re-vitalisation of Australian shipping.

As most of you know, this long awaited and much heralded report contained an examination and recommendation of a number of issues including financial incentives, manning, the Government role, access to cargo etc., and was published last year.

Following the original report, a task force was set up with employer, A.C.T.U. and Union representation. That task force addressed itself to whether the Crawford recommendations concerning various matters including manning could be implemented, and it was concluded that they could.

In a section on industrial relations, the parties concluded that a package of measures would result in benefit to the industry in general through a reduction of disputes and fewer stoppages pending settlement of disputes. Those measures included -

> establishment of a shipowner/Union consultative committee to meet on a regular basis to review matters affecting operations, industrial relations and employment, and development of the Australian fleet. Further, that there should be a revision of procedures as set out in the Settlement of Disputes Clause in the Award which in summary provided that when an industrial matter arose, an attempt should first be made to settle it on a shipboard level, that if this failed, the appropriate company representative should be notified as should be the nearest branch of the Union where attempts would be made to effect settlement, and if this failed, the matter should be referred to the Federal Secretary of the Union and by the employer to his Chief Industrial Representative. Following discussions, once again the matter should be referred to the Conciliation and Arbitration Commission for determination.

Once again, it was expressed and agreed to that it was the intention of the parties that work should continue and that vessels should continue to trade pending determination.

The task force, which comprised representatives of both the seagoing Unions and employers, obviously saw the role of the Arbitration Commission as fundamental in the settlement of disputes on ships and sought the provision of a member of the Arbitration Commission dedicated to the maritime industry to ensure the ready availability of the Commission in view of the increasing national importance of the maritime industry.

Thus, a position in 1982 existed whereby the parties reinforced the general scheme of the settlement of disputes procedure and, in particular, it was important that as a final place for determination, there should be reference to the Conciliation and Arbitration Commission.

I would submit that there has been only a selective reliance upon the task force recommendations by maritime Unions since their agreement to that package in July 1982.

Well then, in a dispute how does the employer enforce the Award?

In the event of a significant dispute which threatens to or holds up a vessel, it is not long before the problem reaches the Federal level of the Union and the Chief Industrial Representative level on the employers' side. The options then open to the employer are as follows :-

1. To enter into negotiations directly with the Union officials concerned. If this fails-
2. then a dipute may be notified to the Conciliation and Arbitration Commission seeking its intervention and assistance.

3. In the event that no solution can be achieved by conciliation, then the Commission can be asked to arbitrate and reach a decision as to how a particular dispute should be resolved. In the meantime, in the event that the vessel has not sailed, the Commission's assistance in directing compliance with the Award is frequently sought.

There is a long standing view of employers that Arbitration should not take place whilst the vessel remains subject to a ban or limitation. In order to be able to arbitrate a matter, it is necessary to have representation of both parties and a case put by both parties. There is a developing trend on the part of certain Unions to refuse to take part in Arbitration and merely to press for demands by the use of some form of industrial sanction or other.

In the event that Arbitration cannot take place and the matter cannot be resolved in that way, the employer whose vessel is held up may apply to insert what is known as a Bans Clause in the Award. This involves applying to the Commission for a variation of the Award by inserting a provision prohibiting conduct which hinders, prevents or discourages observance of the Award, or the performance of work in accordance with the Award. If such a Clause is inserted and breached, then following enquiry by a presidential member of the Commission, a certificate referable to the Federal Court can be issued where a fine of up to $1,000.00 may be imposed on organisations or individuals, or in some circumstances, a fine of $500.00 per day in the event of a continuing breach of the particular terms of a Clause. The application for the Bans Clause, the enquiry by the presidential member, the issue of the certificate

and the reference to the Federal Court obviously takes time and involves substantial costs and delays to vessels.

An employer may seek to stand down certain employees on a vessel although as an option which might readily spring to mind in a factory, in the case of a loaded tanker or container ship, problems of standing down more than a handful of men are almost insurmountable because of safety and other requirements.

If a direction is obtained from the Commission, for example that a vessel be manned or that normal duties be performed, and there is no compliance with this direction or order of the Commission, then employers can consider the question of de-registration.

As previously indicated, the various employee Unions are all registered under, and receive the protection of, the Conciliation and Arbitration Act. It is open to an employer to apply for the de-registration or partial de-registration of a Union on a variety of grounds which appear in Section 143 of the Act which, for example, provide that the Federal Court may direct cancellation of an organisation where the conduct of that organisation either, in respect of its continued breach or non-observance of an Award or its continued failure to ensure that members comply with and observe an Award, have prevented or hindered the achievement of "an object" of the Act. "An object" of the Act is "the observance and enforcement of agreements and Awards made for the prevention of settlement of industrial disputes".

This option has been considered and some steps taken in respect of it by employers. However, it is not a speedy and certain process and may well involve a most unsatisfactory ultimate result.

Ultimately, the employer may have to go outside the provisions of the Conciliation and Arbitration Act, and look at other alternatives and it is here that he finds that the courses open to him are the same as those open to the foreign shipowner. He must consider options such as the following; actions for damages and injunctions for breaches of the Trade Practices Act, in particular Section 45D which in broad terms provides that a person shall not, with another person, engage in conduct that hinders and prevents the supply of services by a third person to a corporation when the conduct is engaged in for the purpose of and would have, or be likely to have, the effect of causing substantial loss or damage to the business of the corporation.

The elements of the provision are thus that there must be concert between Union members which prevents the supply of services by an organisation to, for example, a shipowner.

Section 45(d) 1(a) provides that a person shall not in concert with another person, engage in conduct having or likely to have the effect of preventing or substantially hindering a third person who is not the employer of the first person from engaging in trade or commerce between Australia and places outside Australia, among the States or within a Territory etc. The elements of this provision are that there must be concert between members of a Union having the effect of preventing a person, in this case a shipowner, for example, from engaging in trade and commerce etc.

There are defences in Section 45(D) (3) which, in substance, provide that there is no contravention of these earlier Sections if it can be shown that the employees who may combine had, as their dominant purpose, conduct related to "their conditions of employment etc.". The Courts have taken a restricted view on what should be considered the legitimate interests of the employees who are taking the action. For example, tug men who may withdraw their services, thus preventing their employers from providing a service, could not, in many cases, show that their own legitimate interests were involved when the conduct they were engaged in was related, for example, to the wage claims of miners or oil industry workers or a foreign seaman.

It is also possible for employers to seek injunctions by way of common law proceedings in the State or Federal Courts alleging that a civil wrong is committed by an employee if, with the intention of causing loss to a shipowner, the employee does something primarily unlawful in relation to some third party. Purely by way of an example, an employee on a tug would commit a tort against a shipowner if, with the intention of causing loss to him, he does something primarily unlawful, that is, breaches his contract of employment with the tug owner. This could give rise, in certain circumstances, to an injunction directed to particular individuals and/or organisations and also damages.

There is in addition the Tort of conspiracy. Where it can be shown that action is taken by a number of persons in concert for the purpose of injuring the trade, custom and financial interests of another, a claim for damages or injunctive relief can be brought unless it is shown that this conduct was prompted by a desire to

advance some legitimate trade or group industrial interest of the actors.

Employers, in addition, may give consideration to the provisions of Section 30K of the Crimes Act (Commonwealth) which makes it unlawful for a person, without reasonable cause or excuse, by boycott or threat of boycott of a person or property, to obstruct or hinder the transport of goods in trade or commerce with other countries or among the States, and a term of imprisonment for such activity is provided. The linking of an unlawful act under the tortious remedy mentioned above with Section 30K, is also possible.

An employer who finds that he is involved in a lengthy dispute which warrants consideration of any of the serious and complex steps taken above, should of course be acting in areas outside the actual arena and forum of the dispute whether in the Conciliation and Arbitration Commission or in the Court or elsewhere. An employer should be seeking the assistance of Governments and Government departments, the A.C.T.U., fellow shipowners through a body such as A.L.O.S., shippers, the media and the community in general. Obviously, the degree of difficulty in involving the community depends upon the likely effect on it of extensive delays, and if, for example, a fuel shortage is likely to result from bans and limitations, then community and government interest is more readily generated, and occasionally useful pressure applied at the appropriate place.

To enforce Awards, employees, on the other hand, have access not only to the provisions of the Act under which employers could be fined for non-compliance, but also to the strike option, one frequently resorted to all too readily and too early.

The position of a foreign shipowner is different. He is not a respondent in most cases to the Awards and is therefore not entitled to notify a dispute under the Conciliation and Arbitration Act and seek to have the matter dealt with in the normal and ordinary forum in which disputes are handled in this country.

If his vessel is held up as a result of the failure on the part of a contractor such as a tug operator to provide services, then he can request the tug operators to bring the matter before the Commission in an endeavour to effect a settlement and to put pressure on them, although this of course creates difficulties.

It may be the desire of a foreign shipowner whose vessel is held up by a ban on tugs, to force the hand of a tug operator to take extreme action against employees under some of the procedures outlined above. Of course, the tug operator has services to provide to a large number of vessel owners, and perhaps he is operating in more than one place so that he has to be cautious about the steps he might take to protect one customer in one place. Therefore, on such occasions, the tug operators may express a reasonable reluctance to become involved in disputes which really are between Unions and foreign shipowners for whatever reason, whether they be I.T.F. rates of pay, flags of convenience, the destination of cargoes or a programme on the part of the Unions to obtain berths for Australian crews on overseas trading vessels.

Accordingly, the foreign shipowner who is facing huge losses and disruption, becomes a very anxious and agitated client whose desire it is for some immediate action to be taken whether or not it will necessarily bring about an early end to a dispute.

One finds that some of the most aggravated clients are those who do not understand the Australian system and who cannot permit a situation to continue whilst they appear to stand idly by (even though they may be endeavouring to have talks with the Union Officials) when it seems clear that a strike of a certain duration is likely to take place no matter what steps are taken by the shipowner, so that, for example, a fourteen day ban will be a fourteen day ban whether the matter is notified to the Commission, whether outside action is taken or not, and the ban will run the course which the Unions are determined it should.

However, this quite rightly does not satisfy the shipowner who requires that some action in the form of proceedings outside the Conciliation and Arbitration system should be commenced to obtain injunctions at the earliest possible opportunity and possibly damages at a later stage (although I am not aware of any case in which the actual claim for damages has been pursued once an injunction has been obtained and complied with).

There are substantial difficulties involved in the path of satisfactorily bringing a matter before the Courts and obtaining injunctions. The major difficulty relates to evidence. Although I shall not go into this in detail, you should be conscious if acting as shipowners yourselves or as agents for foreign shipowners, that if, in the event of a prolonged dispute there needs to be some sort of proceedings outside the Arbitration system, very direct and accurate evidence of events will be required. This means the notation of all events, conversations and details in the most detailed and minute way and the ready availability of documents to

prove matters such as ownership, agency, constitution of Unions etc., must be available.

There have been successes in recent times in the obtaining of injunctions to prevent conduct aimed at holding up foreign vessels and the unfortunate likelihood is that similar applications will have to be made at some time in the future.

There are greater difficulties facing the applicant for such relief both in a practical sense of obtaining evidence and documents etc., and in obtaining the appropriate injunction which can have the effect of bringing about a conclusion of a dispute if the Unions as a combined force are opposed to it.

Injunctions obtained against certain individuals do not apply to other individuals. Injunctions obtained against some Unions cannot prevent conduct equally damaging being carried out by other Unions who are not affected by them and who would await their turn for the obtaining of an injunction against them only to find that some other Union becomes involved, say in letting go a line or something like that. So, care must be taken to cover the field as much as possible in this type of action, and this of course gives rise to great practical difficulties when at the date of the obtaining of the injunction against certain Unions, other Unions have not acted in any way suggesting that they would not perform their duties.

It is clear, in the general view, that one of the ills facing the industry is that there are too many Unions on board each vessel, and it would surely be in the interests of the industry for there to be a reduction in independent Unions.

Although most occasions present, at least outwardly, a united front, there are many occasions in which the real dispute exists between the Unions themselves - take for example the "River Boyne" case.

The natural rivalry between the Unions when it comes to manning of vessels in a climate where the reduction of manning is absolutely imperative, makes it clear that the industry has a long way to go before a situation is in place where employers and employees can negotiate readily and confidently expecting that solutions to problems will be obtained and adhered to.

The employers themselves can be a diverse body.

It is obvious that the interests of certain shipowners operating in certain trades, perhaps with a large fleet, will be different from the single vessel operator who might have one ship operating on an interstate basis carrying goods which are the life blood to his very survival on almost a week by week basis. A disruption of any length in an industrial dispute, even over a matter of principle, to that shipowner could prove fatal whereas the interests of the large shipowners would clearly be to withstand a demand in certain circumstances irrespective of immediate loss with a view to the saving of costs in the future.

This position, which can lead to a lack of unanimity on the part of the employers, in some cases, of course, assists Unions who may be engaged in the "leap frogging" tactics of obtaining gains from one shipowner and then insisting that they be passed on to another.

The differences, of course, go beyond merely operators of cargo vessels under the same Award. An inter Award reaction frequently arises, say as between the offshore industry whose interests in preserving industrial harmony may be totally different from the interests of the cargo ship operators who have to face the same Unions seeking to impose conditions which have been granted say in the offshore industry or tug industry, into the seagoing area.

The role of employers' organisations and the new peak Council as suggested by Sir John Crawford, is and will be to see that, as much as possible, these differences are ironed out.

To conclude a comment on the role of the Lawyer in this area, there are difficulties in the path of the Lawyers becoming involved in the Arbitration system because the Act itself gives no right of audience to legal representation without leave of the Commission. But like V.F.L. football, where the huge inflation of cost whether by way of player payments, fines etc., means large amounts of money are at stake and the Lawyers become involved, so with the industrial relations aspect of ship operation.

By far the vast majority of situations and disputes between employers and employees are dealt with without the need for either party to seek professional assistance, but the cost of loss of time due to industrial issues is so enormous that it does not take a long delay before the ship operator has to seek some remedy through the system whether within or outside the Conciliation and Arbitration forum.

The cost of holding a tanker or bulk carrier for example at $15,000.00 - $20,000.00 per day is so great that Union determination to hold up a vessel for the making of a point, for example when the "Mobil Australis" was held up for 16 days prior to and during Easter over an issue involving the changing of a crew on another vessel, or a "River Boyne" where an inter-Union dispute held up a new and exciting coal fired vessel for 7 weeks, has a very dire and significant effect on the overall profitability and ability to economically survive of even the biggest corporations. Under such threats and in such circumstances it is only to be expected that people must take steps to protect their position albeit with the limited means available to them.

What can be done for the future? Sir John Crawford concluded with confidence in the future given a positive programme involving Government, employers, and Unions. He referred to the need for effective communication, and this must be something at the real peak of importance. There needs to be communication between employers, amongst employees and between the two groups. Some steps are in train for the establishment of peak bodies. The making of ships more efficient and the reduction of manning as well as financial assistance have been stressed both within the Crawford report and subsequently by those engaged at top level.

I am reluctant to offer additional comments to those of the experts who are involved on a day to day basis, but can perhaps add that there is, in my view, a good case for saying that amongst some Union leaders there has been at times a marked degree of irresponsible conduct or maverick behaviour with which no industry can cope and prosper at the same time.

Until the rank and file take more of the responsibility for decision making as to their own futures and refuse to allow those futures to be jeopardized by this type of action, there will be a great deal of uncertainty about the ability of certain aspects of ship operation in this country to survive.