Novacoal also contended that Macquarie Generation was estopped from suspending deliveries for non-compliance because of its acceptance of coal with such characteristics in the past and that in reliance on that conduct Novacoal had organised its affairs in a particular way including in particular the very large expenditure on its coal preparation plant and equipment. The Court noted that Macquarie Generation had made it abundantly clear that it would require strict compliance with the contract in the interim agreement of 16 June 1999. The Court concluded that any estoppel that may have been extant as at June 1999 was jettisoned by the interim agreement of the parties on 16 June 1999 which contained that clear statement.

Damages adequate

The Court also added that damages would have been an adequate remedy for Novacoal and that, consequently even if a serious question to be tried could have been established, an injunction would still not have been issued. The main submission advanced on damages not being adequate was that Novacoal could not pursue other contracts because it had to effectively stand at the ready to deliver to Macquarie Generation when the suspension was lifted and in those circumstances it was not possible to quantify what Novacoal had lost in that period of standing at the ready. The Court indicated that while this submission looked attractive at first blush the commercial realities of the capacity of Novacoal tempered its attractiveness. Novacoal had the capacity to explore other ventures and sell coal to others notwithstanding its contractual obligations to Macquarie Generation. In those circumstances, it was concluded that damages was an adequate remedy.

Result

The application for an injunction was refused.

FREEDOM OF CHOICE OR FREEDOM FROM CHOICE? - COLLECTIVE BARGAINING AND INDIVIDUAL WORKPLACE AGREEMENTS IN THE PILBARA

Steven Amendola*

Australian Workers Union v BHP Iron Ore Pty Ltd [1]

A dispute arose out of a decision by BHP Iron Ore Pty Ltd ("BHP") to pursue individual agreements with its iron ore workers in the Pilbara region of Western Australia. There had been much publicity over this issue and the assertion of a right to collectively bargain.

The applicants sought interlocutory injunctive relief in the Federal Court, to stop BHP from continuing to offer individual agreements to its workforce in the Pilbara.

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* Dunhill Madden Butler, Melbourne. The assistance of Yi Foong Ng is acknowledged.

1 [2000] FCA 39, Gray J, 31 January 2000.

BACKGROUND

The first five applicants were unions with members employed by BHP. Five of those employees were also applicants. The operations carried on by BHP in the Pilbara region in Western Australia included mining, transporting, processing and shipping iron ore.

As at November 1999, BHP employed more than 1,000 "award employees", whose terms and conditions of employment were regulated by an award of the Western Australian Industrial Relations Commission and a series of collective agreements negotiated between BHP and five Western Australian state-registered trade unions, counterparts of the first five applicants. It also had many "staff employees" in managerial and supervisory positions, whose terms and conditions of employment were regulated by individual contracts of employment.

On 10 November 1999 BHP began:

- offering to each of its award employees an individual workplace agreement that, when registered pursuant to the *Workplace Agreements Act 1993* (WA) would override the statutory effect of the award and the collective agreements in respect of each employee who was a party to such an agreement; and

- refusing to negotiate collectively with respect to the terms and conditions of employment of its award employees.

In November 1999 each of the first five applicants served on BHP a notice of initiation of a bargaining period, pursuant to s 170MI of the *Workplace Relations Act 1996* (Cth) ("WRA"). In December 1999 each of the first five applicants gave notice to BHP of intention to take protected industrial action pursuant to s 170MO of the WRA. Industrial action had since been taken. BHP refused to bargain with any of the first five applicants.

Up to the date of the Court decision, 481 of BHP's award employees (ie, just under 50%) had accepted BHP's offers and entered into workplace agreements. The individual agreement offered contained a number of benefits. It offered an increase of approximately 7% on base salaries, an annual incentive program designed to pay an average of 7.5% of defined base salary based on company, department and individual performance, and an annual salary review based on individual performance. It included membership of the BHP Superannuation Fund with an increased employer contribution from 8% of an award employee's defined wage to 14% of a staff employee's defined salary. It also included payment out of all accrued sick leave; one additional shift added to annual leave, options for novated leasing of private vehicles, and education assistance.

Interestingly, the judge considered that there were disadvantages to those who accepted offers of individual workplace agreements in that they lost the benefits of any entitlements pursuant to the awards and collective agreements in place.

Although the applicants filed a wide ranging application, the arguments they prosecuted revolved around ss 298K, 298L and 298M of the WRA, and inducing breach of contract.

ONUS OF PROOF AND TEST FOR INTERLOCUTORY INJUNCTION

When an application is made alleging a breach of the freedom of association provisions (ie ss 298K, 298L and 298M) the onus is upon the party the subject of the allegations to disprove them: s 298V of the WRA.

In broad terms, the test for the grant of an interlocutory injunction is the demonstration:

- of a serious question to be tried; and
- that the balance of convenience is in favour of granting an interlocutory injunction.

The demonstration of a serious question to be tried is not a high threshold, but it is arguable that in the past two years in the industrial law jurisdiction the test has been applied in such a way as to significantly devalue it.

Much of the evidence filed, particularly by the applicants, was hearsay and conjecture although that is almost a natural corollary of the urgency of the application and the nature of the relief sought, ie an interlocutory injunction. The court relied upon it to the extent necessary. BHP put forward little or no evidence on the balance of convenience issue.

THE STATUTORY PROVISIONS

The following provisions of the WRA were relevant to the application for interlocutory relief:

> *298K(1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:*
> *(a)...*
> *(b) injure an employee in his or her employment;*
> *(c) alter the position of an employee to the employee's prejudice;*
> ....
> *298L(1) Conduct referred to in subsection 298K(1)...is for a prohibited reason if it is carried out because the employee...:*
> *(a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or*
> ...
> *(h) is entitled to the benefit of an industrial instrument or an order of an industrial body; or*
> ...
> *(l) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions - is dissatisfied with his or her conditions;*
> ....
> *298M An employer, or a person who has engaged an independent contractor, must not (whether by threats or promises or otherwise) induce an employee, or the independent contractor, (as the case requires) to stop being an officer or member of an industrial association.*

It was accepted by the court that protected industrial action to force collective bargaining was the only legitimate weapon available to compel BHP to bargain collectively, in the absence of any statutory provision compelling BHP to bargain with the unions. There was no such statutory provision.

THE APPLICANTS' CASE

The case put on behalf of the applicants relied on three separate grounds:

- BHP had embarked on a course of conduct by which it injured some of its award employees in their employment, or altered their positions to their prejudice, for prohibited reasons or reasons which included prohibited reasons, and proposed to continue that course of conduct. The course of conduct was said to include four elements:
  - entering into individual workplace agreements with some of BHP's award employees, and registering those agreements pursuant to the *Workplace Agreements Act 1993* (WA), thereby treating those employees as staff employees
  - BHP's refusal to engage in collective bargaining with respect to the terms and conditions of employment of award employees
  - the adoption of a scheme for voluntary redundancy of employees (something which the court disregarded in considering the application)
  - overt discrimination against some award employees who had not accepted the offers of workplace agreements.

Three prohibited reasons were alleged:

- award employees were members, or in some cases officers or delegates, of the state-registered trade unions or the first five applicants
- award employees were entitled to the benefit of industrial instruments in the form of the award and the EBAs
- the award employees, being members of industrial associations that were seeking better industrial conditions, were dissatisfied with their conditions. These were the ss 298K and 298L claims.

- By making individual workplace agreements with some award employees, which were then registered pursuant to the *Workplace Agreements Act 1993* (WA), BHP had induced those employees to stop being members of the state-registered trade unions or the first five applicants. This was the s 298M claim.
- By entering into individual workplace agreements with some award employees, and having those workplace agreements registered, BHP committed breaches of the contracts of employment of other award employees. This was the inducing breach of contract claim.

SECTIONS 298K AND 98L - CLAIM

The applicants contended that the fact that some award employees had entered into workplace agreements with BHP and had become entitled to the benefits of those agreements placed those who had not entered into such agreements, and thus remained on their terms and conditions, in a relatively disadvantageous position and that relative disadvantage amounted to injury in employment or alteration of the employees position to his or her prejudice.

Gray J relied upon a series of cases to support the proposition that relative or comparative disadvantage could amount to injury in employment or alteration of an employee's position to his or her prejudice, and concluded that he was obliged to take the same view in the present case.

Whilst it is possible that the issue of relative or comparative disadvantage could form a serious question to be tried, it was, with respect, doubtful that it followed in this case, given the particular facts, compared to the facts in the cases relied upon by His Honour.

Health Services Union of Australia and Ors v State of Tasmania [2] ("Health Services") case is obviously distinguishable from this case on the facts because:

(a) In *Health Services* all employees had actually been promised a 5.5% wage increase regardless of the outcome of the industrial dispute, and subsequently, only union members were denied this increase. It is arguable that the wage increase was in the nature of a present entitlement to future benefits, and the refusal to pay it was therefore an actual diminution of the terms of employment. (This was apparently the view taken by Marshall J.).

(b) Marshall J's comment that "singling out a member of the HSUA for denial of a wage increase is in the circumstances [a relevant] injury" must be read in this context. There was an actual denial, not a "relative change" (Gray J); it is not suggested that "singling out" on its own is an injury.

(c) There was no difference between the terms and conditions of employment nor the expected duties of HSUA and non-union members. In other words, the wage increase was not "offset" against, for example, productivity increases or changed working conditions. This point was emphasised by Marshall J, as it went to the issue of whether the union employees were being "treated differently to other employees and for reasons not associated in the manner in which (they are) performing (their) work": *Squires v Flight Stewards Association of Australia* [3] . At BHP, the wage increases and other benefits extended to WA employees could relate to conditions required of those employees that were different to the conditions of award employees who had not signed such agreements.

In *United Firefighters Union of Australia v Country Fire Authority*,[4] the union represented award employees who were doing the same job as colleagues on individual agreements. They were all performing the duties of Operations Officers, a classification not recognised by the award. The employees on individual agreements had officially been promoted to this rank and received higher wages and a salary package. The CFA apparently accepted that the award employees had "taken up appointment of the new managerial role of Operations Officer" but refused to provide them the higher rates and salary package, while at the same time denying them the benefit of wage increases due to them under an EBA in their nominal positions as Fire Officers. This was because they had refused to sign individual agreements.

North J considered that failure to remunerate at the Operations Officer rate for duties performed as if an Operations Officer is a relevant injury. However, His Honour's next point is a little obscure:

> "Further, the requirement to sign an individual ... agreement as a prerequisite to retaining an appointment by way of promotion is to alter the position of the employee to [his] detriment, or to

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2 (1996) 73 IR 140.
3 (1982) 2 IR 155 at 164.
4 IRC (Vic), North J, 24 December 1996.

> injure the employee in [his] employment. The alteration and injury probably flow from the fact that the requirement to sign an individual ... agreement was not previously a requirement for promotion" (emphasis added).

Perhaps North J meant that it might be an injury/prejudicial alteration to make promotion conditional on a requirement that had never been necessary before. Gray J interpreted the passage as relating to the "relative upgrading" of the individual agreement employees, which is erroneous: it relates to actual denial of recognition of the employees' rank and the remuneration due to them.

In *Independent Education Union of Australia v Canonical Administrators* [5] Ryan J said of s170MU (clearly obiter, as the case related to refusal to pay a striking teacher):

> "the subsection precludes an employer from discriminating against an employee ... by, for example, the allocation of less congenial shifts or rosters or affording fewer opportunities for overtime than are extended to other employees".

Again, Gray J interprets this to mean that there would be no actual change to the award employee's position of employees in such a situation, whereas it could clearly be argued that actual downgrading had taken place, especially given that in *Childs v Metropolitan Transport Trust* [6] Smithers J said that the *narrow* construction of "position" included "immediate incidents of day to day employment." Such incidents would include rostering arrangements and overtime.

The above cases suggest that there can rarely be an "upgrading" of certain employees without a corresponding "downgrading" of other employees. However, this obviously depends on the circumstances of the case.

In BHP there was no actual downgrading of award employees in any sense. Whilst it was possible to envisage a situation over time where award employees would be disadvantaged if they were "stuck" on the collective bargain rates whilst performing the same job that was not the current position.

Further, in reaching the conclusion that there was a serious question to be tried on this point, Gray J ignored the disadvantages to employees on individual agreements relative to award employees to which he had earlier referred in his reasons for decision when considering the issue of relative or comparative disadvantage. It is hard to see the argument on this being anything other than a barely serious question to be tried, if that.

PROHIBITED REASON

On the question of whether the "relative disadvantage" was for a prohibited reason, ie union membership, having the benefit of an industrial instrument, or employees being dissatisfied with their existing conditions, His Honour indicated that there was no more than a bare denial by BHP provided in affidavits by people who had not been responsible for making the decision to offer individual agreements.

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5 (1998) 157 ALR 531 at 548.

6 (1981) IAS Current Review 946.

A bare denial in such circumstances was not sufficient to discharge the onus of proof resting on BHP. Thus in such a situation there has to be positive evidence presented to demonstrate a negative, ie that something was not done for a particular purpose either entirely or in part.

Whilst the term injury to employment and, particularly, alteration of an employee's position to his or her prejudice are broad (see *AWU & Ors v Yallourn Energy Pty Ltd* [7] as stated above, it is hard to see the facts of this case giving rise to other than a conclusion that it was no more than a barely serious question to be tried, if at all.

SECTION 298M - INDUCEMENT TO STOP BEING MEMBERS

The applicants also relied upon BHP's entry into workplace agreements with 481 employees to found their allegation that BHP had induced employees to stop being members of unions in breach of s 298M.

As Gray J put it:

> "at its most basic, the argument is simple. It is that conduct having the effect of causing members of a union to stop being members of a union induces them to do so, even if this is not the intention of the employer concern".

Gray J relied upon a decision of Toohey J in *Trade Practices Commission v Mobil Oil Australia Ltd* [8] dealing with s 96(3)(b) of the *Trade Practices Act 1974* (Cth) as supporting an argument that the effect of an inducement need not be intended.

Whilst I am not aware if BHP relied upon any authorities in opposition to the *Mobil Oil* case on that point there is judicial opinion to the contrary as to the question of intention, where inducement is concerned.

Yorke v Lucas [9] was a decision by the High Court about the interpretation of what is now section 75B(1) of the *Trade Practices Act* 1974, a provision deeming certain persons to be involved in a contravention of the Act. The subparagraphs in question are now sub-ss 75B(1)(a) and (c). However, the High Court also considered what is now s 75B(1)(b) in *obiter*. The relevant legislation said:

> *"(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB or V, or of section 75AU, shall be read as a reference to a person who:*
>
> ...
>
> *(b) has induced, whether by threats or promises or otherwise, the contravention;*
>
> ..."

A majority of the Court (Mason ACJ, Wilson, Deane and Dawson JJ jointly) said:

> "[Sub]paragraph (b), which speaks of inducing a contravention by threats, promise or otherwise... clearly require intent based upon knowledge (at 312-313)".

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7 [2000] FCA 65.
8 (1984) 3 FCR 168.
9 (1985) 61 ALR 307.

In that case counsel for the unsuccessful appellant had relied upon *Mobil Oil* in support of the proposition that intent was unnecessary (see *Trade Practices Commission v Service Station Association* [10] However, even if *Mobil Oil* still applies to s 96(3)(b) of the *Trade Practices Act*, which refers to "inducing, or attempting to induce", a much stronger argument can be made that the requirements of s 298M of the *Workplace Relations Act* in relation to inducement are identical to those of s 75B(1)(b) *Trade Practices Act*, and therefore *Yorke* applies and thus intention as to a particular outcome is required.

In *Trade Practices Commission v Service Station Association*[11], Heerey J relied on the High Court's obiter about section 75B(1)(b) in *Yorke's* case to interpret the identical proviso in s 76B(1)(d) as requiring intention. His Honour said:

> "I do not think it is sufficient to show that the 'natural, probable, and inevitable" consequence of the respondents' conduct was the making [of] or arriving at the impugned arrangement..."[12]

The decision was upheld by the Full Federal Court.[13] Although the appeal was not on this point, the Full Court reproduced the passage from Heerey J's judgment cited above, with no suggestion that it was wrong. This, together with the High Court's *obiter* in *Yorke* reproduced above, in the writer's view, throws considerable doubt on the conclusion arrived at by Gray J in the BHP case.

Quite apart from those authorities it makes sense for there to be a requirement of intention in s 298M. If the above contentions be correct, then the argument put forward by the applicants falls more into the category of something like the "you can hardly be serious" question to be tried.

BREACH OF CONTRACT

One of the terms of the award which applied to award employees was that:

> "No contract of employment shall be made between the employer and any employee which contains any term or condition which is inconsistent with or contrary to the provisions of this award; ..."

If the terms of the award were terms of the employee's contract of employment, the argument was that on its face the above term would give each award employee a contractual entitlement against BHP to stop BHP entering into a contract of employment inconsistent with the award with any other award employee.

On the basis of the following passage His Honour considered that it was seriously arguable that all terms of the award became part of an employee's contract of employment.

> *"CONDITIONS OF EMPLOYMENT:*
>
> *The terms and conditions of employment which [sic] include, but are not limited to those set out herein. In general, the terms and conditions of employment are as prescribed in the Iron Ore Production and Processing (BHP Iron Ore Ltd) Award No. A29 of 1984 and the BHP Iron Ore Enterprise Bargaining Agreement 1993 (EBA) and the Stage I & II Award Restructuring Agreements.*

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10 (1993) 116 ALR 643).
11 (1992) 14 ATPR 41-179 at 85-94.
12 Ibid 97.
13 (1993) 116 ALR 643.

Where any inconsistencies exist, the conditions as set out in the EBA shall prevail. Employment with BHP Iron Ore Pty Ltd is dependent on acceptance of all the terms and conditions of employment."

Noting that it was only said that "in general" the terms and conditions of employment were as prescribed by the award, the provision in question did not easily sit in an individual contract of employment. Given recent High Court authority in *Byrne & Frew v Australian Airlines* [14] which suggests it is very difficult to import award provisions into a contract of employment, in the writer's view it was at best barely a serious question to be tried, but more likely it was not sufficiently arguable to be a serious question to be tried.

It was suggested by BHP that such an award provision, to the extent it was incorporated into a contract of employment, had to be read down so as to leave BHP free to make a contract with any other employee that was inconsistent with the award. That argument was rejected by the Court. His Honour indicated that reading down the award term when it became a term of each contract would require considerable modification of the award term. With respect, one would have thought that this was a powerful argument as to why the award term could not be imported as a term of the contract of employment.

Gray J went on to say that in a real sense each employee has an interest in the terms and conditions upon which his or her employer engages other employees. Whilst that may be so in the sense that an employee may be interested in what conditions apply to other employees, it is submitted that in a legal sense this does not justify His Honour's conclusion that the award term was capable of operating sensibly as part of an individual contract of employment. When considering what the High Court said in *Byrne & Frew* it is hard to reach such a conclusion even on the basis that only a serious question to be tried is required.

If this submission is correct, then the argument about breach of contract would collapse.

BALANCE OF CONVENIENCE

BHP put forward little evidence on the issue of balance of convenience.

In such circumstances, and given His Honour's findings that there were serious questions to be tried on all issues raised by the applicants, His Honour unsurprisingly found that the balance of convenience favoured the grant of relief to prevent the offer of individual agreements until the serious questions were determined at trial.

DISCRETION

In considering the exercise of discretion Gray J considered a decision of North J in *Australian Paper Ltd v CEPU* [15] where North J expressed the reservations that a court should have in mind before granting an injunction in respect of an industrial dispute. Gray J then lamented the use of injunctions as a blunt instrument against unions in the past, but then proceeded to wield that blunt instrument against BHP, albeit with a statement that this was done with great caution.

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14 (1995) 131 ALR 422.
15 (1998) 81 IR 15.

CONCLUSION

It is respectfully submitted that greater caution ought to have been exercised in determining whether there was a serious question to be tried. It is well known that in industrial disputes the grant of an injunction often acts as a catalyst for further dispute no matter which party obtains it. Some vigour needs to be exercised when confronted with an argument that is little more than a hair trigger exercise on behalf of an applicant. Because such cases rarely go on to final hearing and determination, there is the danger that interlocutory decisions will give rise to potentially bad law.

In this case if the serious questions to be tried as found by the court were upheld at final hearing, this would amount to the freedom of choice provisions in the WRA being applied in a way that results in freedom from choice. *"I want a collective bargain"* would translate into *"there will be a collective bargain"*, although there is no express provision in the legislation which compels collective bargaining. It would be a way of indirectly forcing collective bargaining to be undertaken beyond the scheme of the WRA, which does not favour one bargaining stream over another. In those circumstances the result would be very strange indeed.