FEDERATED CLERKS UNION OF AUSTRALIA v VICTORIAN EMPLOYERS FEDERATION[1]

Industrial law — Victorian award relating to notification and consultation by employers in relation to proposed technological change — Applicability of principles under the Conciliation and Arbitration Act 1904 (Cth) — Current status of traditional dichotomy between industrial matters and managerial prerogative — Commercial Clerks Award Clause 39 — Industrial Relations Act 1979 (Vic) ss 3(1), 34(1) — Conciliation and Arbitration Act 1904 (Cth)

In a majority decision on 20 August 1984, the High Court upheld an appeal by the Federated Clerks Union, and ruled that a clause in a Victorian industrial award requiring employers to notify and consult with the Union on technological change was valid. While the case primarily turned on a construction of the *Industrial Relations Act* 1979 (Vic), the decision may well have significant implications for cases arising under the *Conciliation and Arbitration Act* 1904(Cth), on the extent of the Conciliation and Arbitration Commission's jurisdiction to settle industrial disputes by award. The broad approach adopted by the majority in this case, reflects that of the recent *Social Welfare Union* case, in which the High Court held that the expression "industrial dispute" in s 51(xxxv) of the Constitution should be given its broad and natural meaning.[2]

Two main themes emerge from the judgments:

(i) consultation with, and notification of unions by employers, about technological change in the workplace, is an "industrial matter" within the meaning of the *Industrial Relations Act* 1979 (Vic);

(ii) the conventional distinction between "managerial prerogatives" and "industrial matters" in relation to arbitration legislation has been questioned.

Background

In February 1981, the Victorian Commercial Clerks Conciliation and Arbitration Board, established under the *Industrial Relations Act* 1979(Vic) met to consider a clause proposed by the Federated Clerks Union, for insertion in the Commercial Clerks Award. The clause provided that employers

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[1] (1984) 54 ALR 489; (1984) 58 ALJR 475; 8 IR 157; High Court of Australia; Gibbs CJ, Mason, Murphy, Wilson and Deane JJ.

[2] *Re Coldham; Ex parte the Australian Social Welfare Union* (1983) 57 ALJR 574.

be required to notify the Union if technological change in the workplace was planned, and to consult with the Union about such changes.

The Award governs the conditions of employment of most clerical workers in private employment in Victoria. The Union's proposal emanated from a growing concern about the introduction of computerised equipment, such as word processors, into offices. These changes often lead to redundancies and other results disadvantaging workers, yet many employers fail to notify or consult with the Union before the changes are introduced.

The Board decided to reject the union's proposal. This decision was, however, overturned by the newly-created Victorian Industrial Relations Commission, which decided that the clause was within the jurisdiction conferred by the Victorian Act, and that there was a need for the protection it offered.[3] On appeal to the Victorian Supreme Court the decision of the Commission was quashed on jurisdictional grounds.[4] The Full Court held that the provision should be characterised as one requiring consultation and notification, which did not constitute an "industrial matter" within the meaning of the Victorian Act.

Section 34 of the *Industrial Relations Act* 1979 (Vic.) provides.[5]

> (1) Every Board shall have power to make an award relating to any industrial matter whatsoever in relation to the trade or branch of a trade or group of trades for which that Board is appointed and in particular, without affecting the generality of the foregoing, to make an award determining all matters relating to—
> (*a*) work and days and hours of work;
> (*b*) pay, wages and reward;
> (*c*) privileges, rights and duties of employers and employés;
> (*d*) the mode, terms and conditions of employment or non-employment;
> (*e*) the relations of employers and employés;
> (*f*) industrial disputes;
> (*g*) the employment or non-employment of persons of any particular age;
> (*h*) the demarcation of functions and of any employés or class of employés;
> *(j)* the issuing or giving out of any material whatsoever for the purpose of goods being wholly or partly manufactured outside a factory;
> *(k)* questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole.

The disputed clause provides that where an employer decides to investigate the feasibility of technological change, he or she must notify the Union, and any employees who may be materially affected.[6] During the course of the investigation, the employer is required to keep the Union, and affected employees, informed of the technological change being considered, and pos-

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[3] (1982) 24 AILR ¶338; (1982) 24 AILR ¶472.

[4] *Victorian Employers Federation* v *Registrar of Industrial Relations Commission of Victoria* [1983] 2 VR 395; (1983) 25 AILR ¶266.

[5] This section was amended by the Victorian Government following the Supreme Court decision, to include notification and consultation on technological change to be expressly an "industrial matter" (s 34(1)(l) and (m) inserted by s 6 *Industrial Relations (Further Amendment) Act* 1983 (Vic)).

[6] Clause 39(b) Commercial Clerks Award (No 1 of 1982) inserted by Commercial Clerks Award (No 3 of 1982); (1982) 24 AILR ¶472.

sible alternative proposals which might eliminate or lessen the effect of changes on employees.[7] Upon making a decision to implement new technology, the employer must notify the Union and employees, and consult with them "about the proposed change, the reasons for it and any alternative proposals which, if implemented might eliminate or lessen likely material effects."[8] The employer is also required to provide the Union with technical data to allow an evaluation of the likely material effects on employees.[9]

"Material effects" are defined in the clause as being:

> the termination of employment, the elimination or diminution of job opportunities, promotional opportunities, job tenure or the use of skills, the alteration of hours of work, and the need for retraining or transfer of employees to other work or locations.[10]

The High Court Decision

The High Court held (Mason, Murphy, Wilson and Deane JJ) that the clause was valid, as it related to an "industrial matter" within the meaning of s 34(1) of the Victorian Act. Gibbs CJ dissented with respect to those parts of the clause which required the employer to notify and consult with the Union prior to the decision being made to implement new technology.

The respondent employer organisations argued that the clause involved an intrusion into "managerial prerogatives" – those rights reserved to managers and owners of businesses – which are not amenable to arbitration and not subject to award provisions. They relied on a series of cases on the *Conciliation and Arbitration Act* 1904 (Cth), in which it was held that there are certain "management rights" or "managerial prerogatives" which are not "industrial matters" within that Act, and are therefore not subject to regulation by awards. This line of authority is best illustrated by the *One Man Bus* case[11], in which the High Court ruled that staffing levels on Melbourne's buses and trams did not directly involve the relationship of employer and employee and could not, therefore, give rise to an "industrial dispute" because it was a matter of management.

This point of view, which was largely accepted by Gibbs CJ in his dissenting judgment, has dominated the High Court's attitude to date about the appropriate role for those industrial tribunals which are limited to settling disputes about "industrial matters". For example, it has been held that disputes about staffing levels[12], whether the employer should make employees redundant[13], shop trading hours[14], and the deduction of union fees from

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[7] *Ibid* Clause 39(c).
[8] *Ibid* Clause 39(d)(ii).
[9] *Ibid* Clause 39(e).
[10] *Ibid* Clause 39(a).
[11] *R* v *Commonwealth Conciliation and Arbitration Commission; Ex parte the Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443.
[12] *Ibid* 451-452.
[13] *R* v *Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots* (1971) 127 CLR 11, 20, 31.
[14] *R* v *Kelly; Ex parte Victoria* (1950) 81 CLR 64.

employees' salaries[15] are disputes about "management rights" and are outside the jurisdiction of the Commonwealth Commission.

The managerial rights-industrial matter dichotomy has, however, not been without its critics.[16] Neither the Commonwealth nor the Victorian Act, specifically refers to, or protects, the "rights" claimed to inhere in management which are said not to be subject to arbitration. In fact, the legislation empowers the relevant tribunals to make awards with respect to certain, specified matters, which, if exercised, must always trammel employers' rights to make decisions about the way in which their enterprises are organised. Hence, the dichotomy has been read into the legislation, and not derived from its express terms. Its purpose appears to be to prevent industrial tribunals from interfering in certain decisions which are generally perceived as best remaining in the exclusive preserve of management.

However, ideas about what constitues "management rights" are controversial, and change over time. As Robinson J of the Conciliation and Arbitration Commission said:

> The phrases 'management rights' or 'management perogatives' [sic] have been used over the years to delineate those areas of business activity which are not 'industrial matters' and are therefore properly removed from union interference or influence. It must be said that the right of management to 'run its own business' is not as untrammelled or clear cut as it was twenty, or even ten years ago. I do not comment on the desirability or undesirability of this evolutionary process, it simply is a fact of current industrial relations.[17]

While the process may be "evolutionary", no clear definition of "management rights" has ever been expounded which might assist in determining exactly which types of disputes are outside the bounds of arbitration. This was reflected in argument in the principal case, when counsel for the employers was asked to define "management rights". He said that they included everything that was not an industrial matter.[18] As the content of an "industrial matter" was the point on which the case turned, this argument cannot have taken the Court very far.

Although this conceptual difficulty underlies the decision, and in some ways explains the divergence of views among the judges, the difficulty was not resolved in this case. Disappointingly, the High Court stopped short of either defining what a "management right" might be, or rejecting it altogether as a limitation on arbitration tribunals' jurisdiction. Instead, the majority decision was based on a narrower ground involving acceptance of the Union's argument that notification and consultation over technological change in a workplace, was an "industrial matter" within the meaning of the Victorian Act.

Indeed it appears that the Union itself shared the view that there were certain "managerial prerogatives" which should not be subject to award provisions. A point stressed in argument by the Union was that the clause in

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[15] *R* v *Portus; Ex parte Australia and New Zealand Banking Group Ltd* (1972) 127 CLR 353, 371.

[16] W B Creighton, W J Ford and R J Mitchell (eds) *Labour Law: Materials and Commentary* (1983) Ch 16 especially 280-311.

[17] *Cinematograph Exhibitors Association* v *Australian Theatrical and Amusement Employees Association* (1973) 152 CAR 66, 67.

[18] *Federated Clerks Union of Australia* v *Victorian Employers Federation*, High Court of Australia, Transcript No M79 of 1983, 71.

no way denied the ultimate right of the employer to decide to introduce new technology; it merely provided a mechanism by which the employer could notify the Union of impending change, and consult with the Union in order that the effects of the change could be minimised. Counsel for the Federated Clerks Union accepted that a clause giving the union a veto over changes proposed by the employer, rather than just the right to be notified and consulted, would intrude into managerial rights, and served to suggest such a clause could be beyond power.[19] Interestingly, the transcript indicates that some members of the Court may not have been of this view,[20] but this point was not traversed in the judgments themselves.

Mason, Murphy, Wilson and Deane JJ held that the clause was an "industrial matter" within various paragraphs of s 34(1) of the Victorian Act. In doing so, they relied on the "material effects" referred to in the clause, all of which were regarded as capable of leading to "industrial disputes" (which are defined in s 3(1)).

Mason J said that the words in the opening paragraph – "any industrial matter whatsoever" – should be given a broad interpretation, embracing any matter having an industrial character, provided it has a relevance to or connection with industrial relations, which is the topic of the statute.[21] He pointed out that many of the cases cited in argument related to the narrower definitions of "industrial dispute" and "industrial matter" found in the Commonwealth Act, and that much of this authority favoured a strict interpretation of those expressions, requiring a direct effect on the relationship between employer and employee. His Honour expressly rejected this reasoning in relation to the Victorian Act.[22] The "material effects" of the clause were, he said, a continuing and important cause of industrial disputes.[23] The entire clause was, therefore, within power.

With respect to the employers' arguments about managerial prerogatives, Mason J said that these were largely irrelevant to the question before the Court.[24] He was, however, prepared to question the relevance of the concept to industrial law, while not rejecting it completely:

> The problem with the concept of management or managerial decisions standing outside the area of industrial disputes and industrial matters is that it does not provide a clear distinction. There are many decisions made by management which are capable of giving rise to an industrial matter . . . Whether the concept of management or managerial decisions can be sustained as an absolute and independent criterion of jurisdiction, even in the context of the Conciliation and Arbitration Act, is an important question that may require future consideration.[25]

His Honour went on to acknowledge the policy considerations which might support the abandonment of the distinction between "managerial prerogatives" and "industrial matters".

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[19] *Ibid* 10.
[20] *Ibid* 12.
[21] *Federated Clerks Union of Australia* v *Victorian Employers Federation* (1984) 54 ALR 489, 500.
[22] *Ibid* 501.
[23] *Ibid* 503.
[24] *Ibid* 502-503.
[25] *Ibid* 502.

> The prospect of industrial tribunals regularly reviewing business policy decisions made by employers, and thereby controlling the economy to a substantial extent, is indeed a daunting one. On the other hand, the popular understanding of an industrial dispute extends to any dispute between employees and employers that may result in the dislocation of industrial relations, for example, by the withdrawal of labour or the introduction of work or other bans. What is more, reflection on the serious impact on the community of industrial dislocation suggests that the scope and purpose of statutes regulating conciliation and arbitration and industrial relations extend to the conferment of jurisdiction on industrial tribunals in relation to industrial disputes in their broadest conception[26].

Deane J also held the clause to be within power, saying that the construction of the Victorian Act should be approached in the light of modern realities.

> [I]t is a matter of common knowledge that the threatened or actual implementation of [technological change] . . . constitutes one of the main causes of contemporary disputation between employers and employees both in this country and overseas. Provisions aimed at providing an existing employee with some protection against the effect of the introduction of such changes upon his or her employment or ensuring, at the least, some notification and consultation . . . are not inappropriate to be included in the terms and conditions of employment of any employee who is concerned with the security, significance and content of his or her employment and whose existing employment is or may be thought to be vulnerable to the effects of such changes.[27]

His Honour expressly rejected the contention that the Victorian Act is framed on the basis of the dichotomy between the "prerogatives" of management and the interests of employees.[28]

Murphy J upheld the validity of the clause, saying that the expressions used in the Victorian Act should be given their broadest possible meaning. He also pointed to the shifting nature of the line between "management rights" and "industrial matters", and to the growing need for consultation between unions and employers.[29]

Wilson J also held that the clause was an "industrial matter" within the Victorian Act, although his reasoning appeared to differ from that of the other judges in the majority. His Honour did not directly address the "managerial prerogatives" issue in any detail, but appeared to accept that such rights did exist, and should not be interfered with by arbitral tribunals. He was clearly influenced by the fact that the clause did not interfere with the decision by management to introduce new technology, but merely required notification and consultation.[30]

Gibbs CJ in his dissenting judgment, relied on the line of authority which draws a distinction between "managerial prerogatives" and "industrial matters" – with the former being outside the jurisdiction of industrial tribunals. The Chief Justice did not opt for the narrowest interpretation of an "industrial matter"; it need not be confined to a dispute concerning the terms and conditions of employment, but must arise from, or relate to the employment

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[26] *Ibid.*
[27] *Ibid* 512.
[28] *Ibid* 513.
[29] *Ibid* 504-505.
[30] *Ibid* 510.

relationship.[31] A political dispute between an employer and his or her employees would not, therefore, be an "industrial matter" because it would not arise from the employment relationship.[32] He acknowledged that where the dispute concerned a matter of management, the line may be more difficult to draw:

> It is clear that a decision made by an employer as to the management of his business may have a great effect, beneficial or detrimental, on the prospects of his employees. A decision to close an existing branch of a business, or to open a new branch, is an obvious example. However, it is well-established that a dispute concerning the management of a business is not an industrial dispute as ordinarily understood . . . [it] is the employer's sole responsibility, and a dispute concerning management does not directly involve the relationship of employer and employee or arise out of that relationship.[33]

Consultation with, and notification of the Union, when the employer decides to investigate the feasibility of introducing technological change is, for the Chief Justice, clearly within the arena of "management rights". The clause was aimed at giving the Union an opportunity to influence management before the decision was made: "a dispute regarding whether employees should have the right to be informed and consulted before a management decision is taken is a dispute as to management, and not an industrial dispute".[34]

Conclusion

The case raises some extremely important issues and questions, but has failed to provide many satisfactory answers. The distinction conventionally drawn between "management prerogatives" and "industrial matters" has been subjected to some examination and criticism, although it still at least retains the support of Gibbs CJ and Wilson J. The majority judgments held that notification of, and consultation with unions over technological change falls within the broad concept of "industrial matter" in the Victorian Act. It was, therefore, unnecessary to decide if the distinction has any relevance to the Victorian, or indeed the Commonwealth Act. Notwithstanding this limited focus for the decision, there were some interesting observations made by Mason, Murphy and Deane JJ which foreshadow a possible re-evaluation of this distinction, which has in the past significantly limited the jurisdiction of the Commonwealth Commission. The increasing demand for "industrial democracy" and sharing of workplace decision-making must prompt unions, with State and Federal awards, to seek to include such provisions in their awards. Hence, the opportunities for a thorough re-examination of the concept, within the context of the Commonwealth Act could well be legion.

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[31] *Ibid* 494.
[32] *Ibid* 495 citing Stephen J in *R* v *Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353, 371.
[33] *Ibid.*
[34] *Ibid* 497.

* BA (ANU).