Notes

Freedom of Association and the Meaning of Membership

An analysis of the BHP cases[1]

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1. Introduction

On 31 January 2000, Justice Gray sitting in the Federal Court of Australia, issued interlocutory injunctions against BHP – one of Australia's largest corporations – preventing it from offering its Pilbara iron ore workers individual contracts of employment. This decision which was confirmed by the Full Federal Court on 7 April 2000, albeit on rather narrower grounds, has forced BHP to the bargaining table to once again endeavour to collectively bargain with the trade unions. Although these decisions are interlocutory in nature, and although the unions may be hard put to prove their allegations, these BHP interlocutory decisions have raised for the first time in Australia the issue of whether the right to belong to a trade union carries with it the right to have that trade union bargain for collective outcomes.

This note gives a brief outline of the circumstances leading to the two decisions of the Federal Court, before plunging into the freedom of association provisions in Part XA of the *Workplace Relations Act* 1996 (Cth), under which the unions claimed protection. The various interpretations given to freedom of association emphasise the need for a re-evaluation of the Australian provisions and the meaning of membership. This requires a discussion of the types of rights that the freedom of association is designed to protect, the relevance of indirect discrimination approaches and the nature of the legislation itself.

2. Tensions in the Pilbara: (the story so far)[2]

BHP Iron Ore Pty Ltd is a wholly owned subsidiary of BHP. It carries out iron ore production and processing in the Pilbara region with its mine located in Newman, Western Australia. Traditionally, there has been a distinction between 'staff' and 'award' employees. Staff employees were on individual contracts and were seen to be superior to award employees because of the positions they held as supervisors, superintendents and managers. Award employees, or the 'blue collar'

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1 *Australian Workers Union v BHP Iron Ore Pty Ltd* (2000) 96 IR 422. This was the decision of Gray J. *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 171 ALR 680. This is the Full Federal Court's decision (Black CJ, Beaumont and Ryan JJ).

2 Unless stated otherwise, these facts were taken from Gray J, above n1.

workers have had their terms and conditions governed by a series of awards and collective agreements. These collective agreements were negotiated by a single bargaining unit consisting of five state registered unions.[3]

In early 1999, BHP advised these unions of its desire to make changes to their current agreement. Negotiations were slow and in April 1999, the company gave notice of its intention to withdraw from the agreement by June of that year. In November, BHP offered to each of its award employees an individual workplace agreement under the *Workplace Agreements Act* 1993 (WA). It then refused to continue negotiations for a further enterprise agreement with the single bargaining unit.

There were a few important factors that contributed to this position. First, there had been a series of changes in the structure, strategy and leadership of BHP. There had been major divestments, the Newcastle steelworks had closed and a new American CEO Paul Anderson, had been appointed.[4] John Ralph, (ex-CRA executive and a major architect of the push to individual contracts at Hamersley Iron Pty Ltd) was also a new member of BHP's board.[5]

Secondly, BHP's relationship with the unions was coming under growing pressure from both external and internal sources.[6] While union relations with BHP had never been cosy, they had at least been built on a general acceptance of awards and unionism.[7] This was challenged on two fronts. The benefits of a non-unionised workplace seemed to be compounded by the fact that the Australian Workers' Union and the CFMEU were involved in a long and costly dispute amongst themselves over coverage.[8] This in-fighting may have been the last straw for management.[9]

In addition, due diligence examinations in failed merger negotiations with Hamersley Iron Pty Ltd ('Hamersley') had given BHP information about the savings the company had made by offering individual contracts to award employees in 1993. By the end of 1999, Hamersley's workforce was almost completely de-unionised and workers were paid lower rates than they would have received under the 1993 award. This approach was not unusual. In the Western

3 These unions were the WA branches of the Australian Workers' Union; the Construction, Forestry, Mining and Energy Union; the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia; and the Transport Workers' Union of Australia.

4 Bradon Ellem, 'Trade Unionism in 1999' (2000) 42 *Journal of Industrial Relations* at 73.

5 *Industrial Relations and Management Letter* (February 2000) at 2. For a discussion on what happened in the CRA matter see, Matt Moir, 'Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa* case.' (1996) 18 *Syd LR* at 350.

6 Robert Gottliebsen, 'Gottliebsen's Comment' *Business Review Weekly* (10 December 1999) at 12.

7 Above n4.

8 Above n5.

9 See Nicholas Way, 'Industrial Relations: Pilbara Unions Face Shock' *Business Weekly Review* (18 June 1999).

Australian mining industry, collective agreements were becoming the exception, rather than the norm.[10] Financial observers had seen BHP as being behind the competition because it had not offered individual contracts.[11]

The individual contracts offered in November 1999 contained many incentives. They included fly-in, fly-out arrangements with free flights, a seven per cent pay increase on base salaries, improved superannuation, incentive programs based on performance and payment of all accrued sick leave. Although it was not mentioned, part of the package was also the 'psychological promotion' from award employee to 'staff' – a term previously reserved for management.

In exchange for these benefits, the employees surrendered the protections of their state awards and agreements.[12] One of the standard terms in the new contracts stated that some terms and conditions would be set out in the staff handbook 'as amended from time to time'. This allows BHP to change the terms at will, without consultation. Overtime payments over 40 hours and the right to consultation over issues such as redundancy were also forfeited. The effect of the individual agreement was to overrule award conditions or conditions set out in other industrial agreements.

By 24 January 2000, 40 per cent of the employees had accepted the individual agreements. Giving this figure a push were the massive bonuses (up to $5000) for workers who signed up before 3 December.[13] The unions brought an application for an interim injunction, hoping that they would be able to stop the process before those remaining loyal to the unions were outnumbered. While the unions sought a range of orders, they confined their interlocutory application to an injunction restraining BHP from taking any further steps towards offering, making or registering more individual workplace agreements.

3. *Overview of the Decisions*

To grant an injunction, the Federal Court had to find that there was a serious question to be tried and that on the balance of convenience, an injunction restraining BHP was appropriate. While a variety of legal issues were raised, this paper will focus upon the use of the freedom of association provisions under Part XA of the *Workplace Relations Act* 1996 (Cth) (hereinafter *WRA*). The union argued BHP had breached the provisions twice. It was alleged that BHP had induced its employees to give up their union membership in breach of s298M which provides 'An employer ... must not (whether by threats or promises or

10 Robe River Iron Associates Pty Ltd had achieved similar labour cost reductions by the same means. See Nicholas Way, 'Industrial Relations: Divided Workforce BHP's New Challenge' *Business Review Weekly*, 18 February 2000.

11 This attitude in support of individual contracts can be seen in the fact that on the day of the offer, BHP's share price jumped significantly in value. See Nicholas Way, 'Strategy: BHP Mettle on Test in the Pilbara' *Business Review Weekly* (14 January 2000).

12 Section 7B of the *Industrial Relations Act* 1979 (WA) provides that parties to workplace agreements made under the *Workplace Agreements Act* 1993 (WA) do not come within the definitions of 'employer' and 'employee' for the purposes of the *Industrial Relations Act* 1979 (WA).

13 Above n5.

otherwise) induce an employee ... to stop being an officer or member of an industrial association.'

Secondly, the unions claimed that BHP had engaged in conduct (under s298K) for a prohibited reason (under s298L). Section 298K(1) of the *WRA* provides that 'An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do' any of the listed types of conduct. In particular to this case, it was alleged that BHP had engaged in conduct that 'injured' certain employees in their employment and 'altered' their position to their prejudice for prohibited reasons. The prohibited reasons on which s298K is predicated are to be found in s298L(1) which, so far as is relevant, provides:

> Conduct referred to in subsection 298K(1) or (2) is for a prohibited reason if it is carried out because the employee:
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> ... is, or has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
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> ... is entitled to the benefit of an industrial instrument or an order of an industrial body; or
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> ... 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 ...

The following sections of this note will examine the operation of these provisions in greater depth but it is important at this stage to note that ss298K and 298L operate together. Justice Gray found that there was a serious issue to be tried in relation to both breaches of the provisions.[14] However, the Full Court only found that there was a serious question to be tried in relation to whether BHP had induced the union members to give up their membership.[15]

On the balance of convenience, an interim injunction was granted at first instance and only slightly amended in the Full Court's decision. While Justice Gray was cautious to exercise his discretion and noted that an injunction can sometimes be a 'blunt instrument,'[16] he dismissed BHP's arguments as mere 'rhetoric about flexibility and competitiveness'[17] and was persuaded that if the offer was allowed to continue, the situation for the unions would be 'irretrievable.'[18] It was important that the orders were only interim orders and that the unions had given an undertaking as to damages. The Full Court agreed with Justice Gray's general approach but shortened the duration of the orders.

It is important to highlight that these decisions are not final. They only examine whether there was a serious question to be tried. As Justice Gray noted, the application was 'made as a matter of urgency,' arguments were 'prepared in a

14 Gray J, above n1 at 438 and 442.
15 Full Court, above n1 at 700.
16 Gray J, above n1 at 446.
17 Id at 445.
18 Ibid.

hurry' and the findings 'are not to be considered in the same light as findings of fact which might be made after a full trial of the issues.'[19] Although the decisions were only interlocutory, a comparison of the reasoning behind them is worthwhile due to the growing role of the Federal Court.[20] In reality, the effect of the decisions was to halt the signing of individual contracts and force BHP to the bargaining table.[21] This was a major achievement because it showed that the freedom of association provisions could be used to encourage (or force) collective bargaining. Just how the provisions were interpreted is the subject of discussion below.

A. Inducement & s298M

The reasoning behind the decisions of Justice Gray and the Full Court show how different interpretations of the freedom of association can affect the scope of the provisions. Although both judgments held that there was a serious question as to whether BHP had induced employees, 'by threats or promises or otherwise,' to stop being union members in breach of s298M, there was some disagreement on the weight to be given to BHP's intentions.

Justice Gray argued that that it was not necessary for the unions to show that BHP intended to induce the union members away from their membership, but that proof of inducing conduct leading to the proscribed result was sufficient.[22] It was strongly argued that without the ability to bargain collectively, membership was made less attractive to employees as it had no connection to the determination of their terms and conditions of employment. This assertion was supported by evidence of a decline in union membership at Robe River and Hamersley after the introduction of individual contracts. Wooden notes that the use of individual contracts has been widely recognised as being 'synonymous with declining union coverage and influence.'[23] Justice Gray held that the practical *effect* of the respondent's conduct was to induce a substantial number of its employees to stop being union members. To give his finding extra weight, Justice Gray addressed the issue of intention by arguing that if intention had to be proven, there was also evidence from various documents that suggested BHP had intended to get rid of the unions and BHP had not refuted this sufficiently.[24]

Black CJ, Beaumont and Ryan JJ upheld Justice Gray's decision but differed in their reasoning. While they did not discuss the particular factors contributing to their decision, they did emphasise that 'the existence of a particular intention may

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19 Gray J, above n1 at 425.

20 See Rodney Dalton, 'Industrial Relations – Are We Returning to the Law of the Jungle?' (*Australian Financial Review*, 31 March 2000); David Peetz, 'Nearly the Year of Living Dangerously: In the Emerging Worlds of Industrial Relations' (1999) 37 *Asia Pacific Journal of Human Resources* 3.

21 On 16 March 2000, the company began negotiations with the unions. See Brad Norrington, 'BHP's Union Workers Offered 15% Rise' (*Sydney Morning Herald*, 17 March 2000).

22 Gray J relied on a competition law case, *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168.

23 Mark Wooden, *The Transformation of Australian Industrial Relations* (2000) at 94.

24 Gray J, above n1 at 442.

be a significant consideration.'[25] There is some strength in this argument, particularly where evidence of the company's intention is overt. The evidence used against the company in the *Patricks* dispute is an example of this.[26] Weaknesses in this approach are revealed by the fact that many of the precedents referred to by the Full Court differed to s298M and the current case because they involved legislation that *explicitly* required proof of the party's purpose.[27] In addition, considering the defendant's intention in relation to a provision that does not explicitly require it may be importing elements that are unduly harsh on plaintiffs. Proving the intent of a corporation is often difficult for the plaintiff because key items of evidence such as internal documents and management testimony remain in the control of the employer.[28] Therefore, despite the fact that a company cannot claim privilege against self-incrimination, evidence may be 'locked up in the employer's breast' and beyond the reach of the employee.[29]

To overcome this, where intention is an element of the breach, s298V places the burden of proof on the party alleged to have engaged in the prohibited conduct stating: '...it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the ... [defendant] ... proves otherwise.' The Full Court did not discuss the operation of s298V in relation to s298M. While it was argued that BHP's intentions may only be a consideration, this still ignores the unfairness that s298V was designed to overcome. As the Full Court itself stated, '[s]ection 298M has to be construed in its own particular statutory context.'[30] Read in the context of Part XA, particularly s298V, it appears the intention of the defendant should not be a 'significant consideration' because it places an unfair burden on the plaintiff. It comes down to deciding whether the legislation's primary purpose is to protect union members from discrimination or to simply prohibit discriminatory conduct when it is overt. Justice Gray argued that proof of conduct inducing the employees to give up their membership should be enough. This approach is preferred as it acknowledges that the primary purpose of the legislation is to protect union members against discrimination.

B. Sections 298K & 298L: The Dance between Conduct and Reason

The differences between the reasoning of the Full Court and Gray J was more evident in relation to ss298K and 298L. As explained above, the two sections operate together. Section 298K(1) lists various modes of conduct that an employer must not engage in for any of the prohibited reasons outlined in s298L. The unions

25 Full Court, above n1 at 696.

26 See *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* (1998) 153 *ALR* 626 and *Maritime Union of Australia v Patrick Stevedores No. 1 Pty Ltd* (1998) 153 *ALR* 602.

27 Full Court, above n1. See the discussion of the interpretation of the *Trade Practices Act* 1974 (Cth) s45(2)(a) at 696 and the *Employment Protection (Consolidation) Act* 1978 (UK) s23(1) at 697.

28 Breen Creighton & Andrew Stewart, *Labour Law: An Introduction* (3rd ed, 2000) at 288.

29 *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 *ALR* 197 at 204. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 *CLR* 477.

30 Full Court, above n1 at 696.

argued that BHP had injured the employees and altered their position to their prejudice: s298K(1)(b) and (c). They argued that BHP had entered into the individual agreements with some employees, refused to negotiate with remaining award employees, overtly discriminated against the remaining award employees and adopted a voluntary scheme of redundancy.[31] As mentioned above, it was argued by the unions that BHP had engaged in this conduct for the following prohibited reasons: the employees were members of an industrial association (s298L(a)); the employees were entitled to the benefit of industrial agreements and awards (s298L(h)); they were members of an industrial association seeking better terms and conditions and they were dissatisfied with their conditions (s298L(l)).

Justice Gray found the general offer combined with a refusal to bargain collectively injured the remaining award employees and altered their position as they often had to work next to employees who were enjoying the benefits of the new agreements. Justice Gray held that it was sufficient for the union to allege that certain prohibited reasons applied. BHP failed to show sufficient evidence to rebut the presumption that this conduct was for a prohibited reason: s298V. To argue that BHP had engaged in such conduct, Justice Gray relied on a case where signing individual contracts had been a prerequisite for a promotion: *United Firefighters Union v Country Fire Authority*.[32] It was held that the case supported the proposition that 'a relative upgrading of other employees, without actual downgrading of the specified employee, [could] amount to an injury in the specific employee's employment or to alteration of his or her position to his or her prejudice.'[33] Therefore even though there was no actual diminution in the terms and conditions of employment, it was enough that BHP's actions altered the *relative position* of these employees.[34]

The Full Court disagreed and differentiated the *Firefighters Case* on the basis that it involved a new condition for specific employees. The Full Court held that there was no serious question in relation to a breach of s298K in the BHP case because the provisions required an intentional act. This narrow interpretation of 'conduct' meant that BHP's failure to negotiate collectively was not 'conduct' under s298K because it was an 'omission', not an 'act'. While types of conduct listed in s298K are expressed in active verbs, it is well recognised that it is possible to 'injure' someone without a positive action.[35] The Full Court also denied that there could be a breach because there was no intentional conduct 'singling out' certain employees on the basis of their union membership.[36]

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31 The focus of the decisions was on the first two of these actions.

32 *United Firefighters Union v Country Fire Authority* (Industrial Relations Court of Australia, North J, 24 December 1996) (hereinafter the '*Firefighters Case*').

33 Gray J, above n1 at 435.

34 Id at 434.

35 See *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, an example of a tortious case where an omission (failure to obtain independent legal advice for a minor) led to injury (the minor's claim was statute barred).

36 Full Court, above n1 at 693.

In terms which reflect modern discrimination jurisprudence, the Full Court's decision suggested that ss298K and 298L operate on direct discrimination but not on indirect discrimination or discrimination which is revealed by the disparate impact of the conduct in complaint. It seems the Full Court implicitly followed the House of Lords' narrow interpretation of the words 'individual' and 'action' used in the English legislation rather than the broader concepts of 'conduct' and 'position' used in Australia's s298K.[37] Furthermore, the fact that the offer was made to all employees should not be given weight when considering whether injury occurred or terms and conditions were altered to the detriment of certain employees.

Indirect discrimination can occur in the workplace through policies that do not explicitly mention the group affected. This type of discrimination occurs when neutral policies have a detrimental effect on members of the group because of the group's characteristics.[38] While the offer appeared neutral, combined with an unreasonable refusal to negotiate collectively, it had an indirect and discriminatory effect on union members because of their desire to participate in union activities. In *Health Services Union of Australia v Tasmania,*[39] where union members were denied wage increases explicitly on the basis of their membership, Marshall J stated that it was 'difficult to imagine a more blatant breach.'[40] This implies that there may be breaches that are not as blatant – breaches that may include omissions or indirect discrimination. While such breaches may appear subtle, their impact upon the employees can be just as devastating.

Another fundamental difference between the reasoning of the Full Court and Justice Gray was once again, the issue of BHP's intent.[41] The Full Court held that the fact that award employees did not get the same benefits as other employees was 'a consequence of an election between different contractual regimes for the regulation of the employment of the two groups of employees ... not ... the active, intentional, conduct of the employer which is struck at by s298K.'[42] This comment is rooted in ideas emphasising the freedom of contract where the fairness of the bargain is legitimised by the parties' consent. This position not only shifts the onus back onto the employees, but it also ignores that the results of their choice not to sign had been pre-determined by a framework set up by the employer with the intention of getting certain results. Denying this intention would be denying the ability of management to predict results. Just because the offer was not framed directly against union members does not mean there was no intention to discriminate against them.

It is ironic that the Full Court decided that BHP's conduct was not intentional considering that, for the purposes of argument that counsel for BHP accepted that

37 See the discussion of the *Employment Protection (Consolidation) Act* 1978 (UK) s23(1) and *Associated Newspapers Ltd v Wilson* [1995] 2 AC 454 in the Full Court, above n1 at 697–699.

38 See Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992).

39 (1996) 73 IR 140.

40 Id at 145 quoted in the Full Court, above n1 at 690.

41 As argued above, the issue of BHP's intentions was relevant to the discussion of s298M.

42 Full Court, above n1 at 693.

it had not discharged the onus in s298V.[43] Before ss298L and 298V come into play, the unions had to assert that there was 'conduct' as specified in s298K.[44] Importing the consideration of BHP's intent into the definition of 'conduct' was a way of circumventing the onus on BHP in s298V. This ignores the bias inherent in relying on internal documents and management testimony and puts pressure on the plaintiff to rebut the intention.[45] The intentions of BHP were therefore considered by the Full Court in relation to both alleged breaches of the freedom of association provisions without stating what those intentions were or the weight given to them in the decisions.

While the injunction was still granted because there was a serious question to be tried in relation to s298M, limiting the definition of conduct in s298K to direct actions 'singling out' employees and considering the defendant's intent in relation to s298M undermines the ability of the *WRA* to promote the freedom of association. This interpretation of the provisions creates an undesirable lacuna in the protection of employees against victimisation. Therefore I agree that Justice Gray's focus on the effect of BHP's behaviour in relation to both breaches is preferable.

4. *Factors to Consider When Interpreting Part XA*

A. *Indirect Discrimination*

Indirect discrimination has been identified as a key issue in discrimination law. It recognises that discrimination does not merely manifest itself in obvious or direct ways but can be disguised in policies and practices which appear to apply to all persons equally.[46] If the Full Court's narrow interpretation of s298K is followed, only direct discrimination will be prohibited. This will do little to prevent discrimination and may render the freedom of association provisions of the *WRA* meaningless. In practice, discrimination against employees on the basis of union membership would increase as employers realise that discrimination is allowed so long as it is discreet. Therefore to have any real effect, the legal boundaries against discrimination must include a prohibition against indirect discrimination.

A body of law has developed to protect employees against the impact of indirect discrimination on the basis of a variety of characteristics such as disability, religious beliefs and sex.[47] These types of laws have developed to secure fair

43 Id at 686.

44 *Maritime Union of Australia v Geraldton Port Authority* (1999) 165 *ALR* 67 at 114 (Nicholson J).

45 As argued above, this can often be impossible. See text surrounding n27–29.

46 *Scott & Anor v Telstra Corporation Limited* (1995) EOC 92–717. New South Wales Law Reform Commission, *Discussion Paper 30: Review of the Anti-Discrimination Act* 1977 (NSW) (Sydney: NSWLRC, 1993) at para 3.62. For a clear example of indirect discrimination see *Sapevski et Ors v Katies Fashions (Australia) Pty Ltd* (Industrial Relations Court of Australia, Judicial Registrar Patch, 23 June 1997).

47 See for example, the definition of indirect sex discrimination under the *Sex Discrimination Act* 1984 (Cth) which was introduced under the *Sex Discrimination Amendment Act* 1995 (Cth).

treatment and just outcomes.[48] They protect certain groups against practices and policies that have a negative impact due to essential characteristics or activities specific to members of the group, for example, disabled employees may need new facilities[49] and female employees may take time off work to have children.[50]

Such developments in the jurisprudence of discrimination could be expanded to protect the freedom of employees to join and to have an active role in a union. Justice Gray's reasoning and interpretation of the provisions supports that approach. In particular, the finding that s298M only required conduct leading to a result, is in line with 'anti-indirect' discrimination's focus on outcomes.[51] The fact that Justice Gray held BHP's intention was irrelevant[52] reinforces this, because whether the effect of indirectly discriminating conduct is intentional or unintentional is also irrelevant to a finding that indirect discrimination has occurred.[53]

An important link in the chain of Justice Gray's reasoning was that combined with BHP's 'neutral' offer, the failure to negotiate collectively had a discriminating effect on union members. In terms of the discrimination jurisprudence outlined above, it affected the union members differently because collective bargaining was an essential part of being a union member. This link in Justice Gray's reasoning requires further analysis, as whether or not Justice Gray's broad approach should be used to interpret the provisions depends upon whether collective bargaining is seen as an essential part of belonging to a union.

B. Meaning of Membership

Building on the approach of indirect discrimination, it is pertinent to ask: is collective bargaining an essential characteristic of union membership? A union member's preference to negotiate collectively could be compared (to some extent) to a Muslim employee's right to wear a turban or a female employee's right to take time off work to have a child.[54] While some could argue that the decision to engage in those types of actions is a personal choice,[55] the law recognises that employees should not have to make a choice between exercising these rights or

48 The development of these laws is a reflection of the growing integration of labour law and anti-discrimination principles in industrial relations discourse. See above n38.

49 While not relating to an employee, the decision in *Hills Grammar School v Human Rights & Equal Opportunity Commission* (Federal Court of Australia, Tamberlin J, 18 May 2000) is a recent case that shows how indirect discrimination jurisprudence has developed to include a requirement of unreasonableness.

50 See *Hickey v Hunt & Hunt* (Human Rights & Equal Opportunity Commission, Elizabeth Evatt, 9 March 1998).

51 While Gray J's reasoning was more explicit, to some degree, the Full Court's broad interpretation of 'otherwise' allowed s298M to prohibit indirect discrimination.

52 Gray J found that BHP's intention was not a relevant factor in relation to s298M. Intention was only relevant to BHP's rebuttal of s298L, not the definition of 'conduct' in s298K.

53 Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 (1994) at para 3.22.

54 This is comparison is made to illustrate the way indirect discrimination operates, not to equalise the values behind these rights.

55 See the argument of the Full Court in relation to s298K.

suffering the side effects of discrimination. For example, maternity leave laws provide that women should not have to choose between losing their job and having children. Does the law protect collectively bargaining in the same way?

Justice Gray suggested that membership was 'more than a mere formality' in relation to s298L(b) and (c).[56] It was also stated by the judge (in relation to s298M) that without the ability to engage in collectively bargaining, the concept of union membership would be 'a mere shell'.[57] This suggests that the legislation protects collective action. This finding was supported by the majority of the Full Federal Court in *Davids Distribution* when they stated:

> [T]he objective of s298K is to ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee's right to join an industrial association and to take an active role in that association to promote the industrial interests of both the employee and association.[58]

It seems logical to argue that discriminating against a member for invoking the assistance of their union in relation to their employment is the same as penalising them for being a member.[59] There are strong reasons for giving the meaning of membership a 'functional' element. As Justice Gray argues, there is no point in paying dues if membership does not affect the terms and conditions of employment. For employees, the act of association is a means rather than an end in itself.[60] The benefit of acting collectively is one of the services expected when employees join their unions. Without collective action, union membership was described by Justice Gray as 'devoid of any meaningful benefit to the employees because they would be unable to exercise their rights as members.'[61] Both of the Federal Court decisions concede that collective bargaining is so essential, that without it, membership may decline.

This argument is contrary to the finding in the decision of *Associated Newspapers*.[62] The majority held that collective bargaining was not an essential union service because unions could provide other important and valuable services.[63] This interpretation of union membership has been criticised as 'predictably narrow and legalistic.'[64] The case was referred to by the Full Court and quoted in detail, but little attempt was made to acknowledge the important differences between the British and Australian legislative provisions,[65] let alone

56 Gray J, above n1 at para 35.

57 Id at para 46.

58 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550 at 581 (Wilcox & Cooper JJ) (hereinafter '*Davids Distribution*').

59 *Associated British Ports v Palmer and Others* [1994] ICR 97 at 102 (Dillon J).

60 Ferdinand von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (1987) at 84.

61 Gray J, above n1 at para 46.

62 This case was referred to by the Full Court at 697. See above n37.

63 Above n37 at 484–485 (Lord Lloyd).

64 Keith Ewing, 'Freedom of Association and the Employment Relations Act 1999' (1999) 28 *Indust LJ* 283 at 286.

65 The wording of s239 of the *Employment Protection (Consolidation) Act* 1978 (UK) is quite different from any of the provisions in Part XA.

the differences between past and present industrial relations systems. Unlike Australia, Britain had no legally entrenched system of collectivism to roll back in the 1990s. Anti-union governments were in power longer and many of the statutory supports for collective bargaining were removed earlier. This British interpretation of the old freedom of association provisions was more reliant on a common law approach, whereas the Australian freedom of association provisions have long been tied to a system based on arbitration and collective bargaining. [66] The Full Court also failed to mention that the legislation has been amended significantly by the Blair Labour government.[67] While these comments may be brief and general, they are an improvement on simply assuming that the reasoning behind English provisions can be directly imported into our unique system.

In Australia, extra services and the ability to negotiate collectively outside a union does not diminish the connection between the collective organisation and collective bargaining. A union without the ability to bargain collectively is like a football club that is not allowed to play games. Sure the club can do other things, meet on Sundays, raise money and have BBQs but that is not the point of the club and it is not why the members have joined.

Kahn-Freund stated: 'The purpose of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.' As important as playing football is to a football club, the common purpose of trade union members is to balance the inequality of bargaining power between individual employees and their employers.[68] In practical terms, this means improving the terms and conditions of employment for employees. The main tool available for this is collective action. This type of action is an alternative form of justice that aims to uphold the dignity and freedom of employees, while mitigating their subordination.

Many commentators argue that the ability of employees to mitigate their position through collective representation is an important human right.[69] The enforcement of this right requires laws that legally recognise the ability of trade unions to function as representatives of employees at the collective level.[70] While the behaviour of the Federal Government in the *Patricks* dispute[71] would suggest that not all Australians see the right to belong to a trade union as a human right,

66 The process of union recognition is also another major difference. See Stephen Deery & Richard Mitchell, *Employment Relations: Individualisation and Union Exclusion* (1999) at 18.

67 This statute has strengthened the rights to belong to trade unions and in certain circumstances for these unions to bargain collectively. See above n64.

68 Otto Kahn-Freund, *Labour and the Law* at 8.

69 John Hendy & Michael Walton, 'An Individual Right to Union Representation in International Law' (1997) 26 *Indust LJ* 205 at 209.

70 Frances Raday, 'Trial and Tribulations of Associated Newspapers in Foreign Forums' (1997) 26 *Indust LJ* 235 at 245.

71 For an overview of the role of the Federal Government in this dispute see Graeme Orr, 'Conspiracy on the Waterfront' (1998) 11 *AJLL* 159.

discrimination on the basis of trade union *activity* is still prohibited by national human rights legislation.[72] This supports the idea that in the context of Australian legislation, the right to union membership is not limited to holding a union card.

The right to trade union membership has also been broadly interpreted at an international level. The legitimacy of encouraging collective bargaining through laws is implicit in the Conventions of the International Labour Organisation, in which freedom of association and the function of collective bargaining are included together under the same rubric.[73] Convention 87 translates the principle of the freedom of association into specific rights capable of enactment in law and applicable in practice. Part 11 on Protection of the Right to Organize is concise and comprehensible. This right was expanded upon in 1949 in Convention 98, the 'Right to Organise and Collective Bargaining'. The overlap between the concepts at an international level suggests that Justice Gray's broad approach is in line with international jurisprudence.

C. Legislation: Hybrid or Hydra?

This broad understanding of the meaning of membership is supported at a more local level. The artificial distinction between bargaining collectively and unions is not in line with the spirit of Australian law, nor its interpretation in case law. The majority of the Federal Court in *Davids Distribution* held:

> [I]n the context of the (*Workplace Relations*) Act, Part XA does not stand alone. It is aimed at ensuring that employees may band together, if they wish, for collective bargaining of the type provided for in the Act to achieve the broader objectives of the Act as contained in s3.... That which is protected by such legislation is more than the right to be a member. It is the right to participate in protected union activities, including the taking of collective industrial action against an employer to seek to obtain better industrial conditions.[74]

Therefore it is strongly arguable that freedom of association provisions include the right to collectively bargain.[75] While the *WRA* was an attempt to de-collectivise the legislative framework, it still allows for collective rights.

This was acknowledged by Mr Peter Reith, Minister for Employment, Workplace Relations and Small Business in response to the ILO expressing its concerns over provisions of the *WRA*. Mr Reith's department used the first BHP case as an example of Australia's compliance with international law:

> In suggesting that federal legislation gives primacy to individual over collective relations through Australian Workplace Agreement procedures of the WR Act,

72 See for example, the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) which incorporates the International Labour Organisation 111 Convention concerning 'Discrimination in Employment and Occupation'. This legislation prohibits discrimination on the basis of many characteristics (race, sex, religion, disability) and places trade union activity in the same list.

73 Above n69 at 244.

74 Above n58 at 583.

75 Joellen Riley, 'Individual Contracting and Collective Bargaining in the Balance' (2000) 13 *AJLL* 92 at 98.

> the ILO has ignored the recent Federal Court injunction stopping BHP from offering individual contracts to Pilbara employees who want them – because the unions wanted collective bargaining.[76]

There is little attempt to hide the political back flip involved in these comments as the same government web site contains a press release from Mr Reith's department before the injunctions were granted. It congratulated BHP on its 'flexible' approach.[77]

The Federal Government has shown great support for the de-collectivisation process by winding back traditional collective mechanisms such as the AIRC, setting up new institutions such as the Employment Advocate and encouraging new individual agreement options such as Australian Workplace Agreements. It has also made its anti-union position clear by giving support to individualisation strategies in the *Patricks* dispute.[78] Australian case law suggests that these strategies may be in breach of the Government's own legislation. How can this be?

The fact is, the legislation is a hybrid beast with a long heritage of support for collective bargaining. Active encouragement of individual contracting in Australia is incongruent not only with the traditional perceptions of Australian industrial relations, but with current legislative protections for employees.[79] This is because unlike some of the deregulations in other jurisdictions, the *WRA* was only a partial rolling back of a legally entrenched system of collectivism. The legislation continued some of the Labor government initiatives and added a little anti-union sentiment of its own but it was subject to a great degree of compromise with the Democrats.[80] The resulting legislation reflects these political tensions.

Disputes such as those on the waterfront and in the Pilbara, highlight the 'tension between the federal government's workplace relations reform agenda and the present law.'[81] The Federal Government's rhetoric seems to ignore that under the current legislation, unions and collective bargaining are still given legal recognition and protections. The freedom of association provisions in the *WRA* are an example of this dilemma as the amendments to the freedom of association provisions were really an attempt to extend the protection of employers. The Federal Government also introduced the right not to belong to a union[82] which is totally incompatible with the freedom of association as it appears in ILO standards.

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76 Press Release 10 March 2000 'Government Rejects ILO Observations' <http://www.dewrsb.gov.au/ministers/reith/mediarelease/2000/pr36.htm> (13 May 2000).

77 Press Release 11 November 2000 'BHP Forges Ahead While Victoria Lunges Into the Past' <http://www.dewrsb.gov.au/ministers/reith/mediarelease/1999/pr138_99.htm> (13 May 2000).

78 See above n71.

79 Above n75 at 92.

80 The Democrats demanded approximately 170 amendments to Federal Government's first Bill. See *Senate Employment Workplace Relations, Small Business and Education Legislation Committee, Supplementary Report of Senator Andrew Murray in Consideration of the Provisions if the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* (1999, November 1999) at 389.

81 Above n74 at 92.

82 This right is derived from Neo-liberal and individualistic conceptions of freedom.

It appears the Mr Reith's Department may have assumed that for reasons of costs, the unions would be reluctant to use the freedom of association provisions in court.[83] The Federal Government was caught in a mode of thinking from the 1980s when the courts had used the remedies of injunctions and damages to curb the powers of unions.[84] Combined with an extension of the freedom of association provisions, this was a dangerous mindset as the provisions became a 'loaded gun' in the hands of the unions.[85]

Decisions such as *Patricks*, *Davids Distribution* and now *BHP v AWU* show that the scheme of the *WRA* continues to 'provide a framework for effective collective bargaining, despite the political catch-cry of 'flexibility', a euphemism for the unhindered exercise of managerial prerogative.'[86] While the current freedom of association provisions contain values prioritising collective rights over commercial interests,[87] it may not be long before the Department turns its re-regulatory intentions to Part XA.

5. *Conclusion*

While the ideal of freedom of association commands universal support, different groups have irreconcilable views on what it means. This can be seen in the comment of Bob Kirkby, one of the BHP executives, 'there's not a problem with unionisation or collective agreements, provided they don't put a hand-brake on operations. The challenge for the union movement ... is to have collectivism, but in such a way where it is not negative for companies.'[88] This attempt to smooth over the tensions between BHP's employers and its employees does not carry much weight in light of BHP's recent behaviour. It can be seen that Mr Kirkby is advocating for a limited form of collectivism, one that does nothing to mitigate the inequality between employees and employers, one that in reality, gives employer's unilateral control over employees. A narrow definition of the freedom of association provisions provides for this limited form of collectivism. It superficially complies with international standards while allowing managerial prerogative to reign supreme.

This is not the purpose of the freedom of association in the context of Australia's legislation. As the *Patricks* and *BHP* cases show, the rights embedded in the freedom of association provisions may take precedence over the rights of companies to decide how they bargain and how they carry on their operations. It

83 Nicholas Way, 'Industrial Relations: Reith's Reform Caught in the Act' *Business Review Weekly* (18 June 1999) at 66.

84 Ron McCallum, 'A Priority of Rights: Freedom of Association and the Waterfront Dispute' (1998) 24 *Australian Bulletin of Labour* 207 at 208.

85 Above n83.

86 Above n75 at 98.

87 *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 626.

88 Nicholas Way, 'Industrial Relations: Divided Workforce BHP's New Challenge' 22 *Business Review Weekly* (18 February 2000).

is not up to management to determine the meaning of membership, nor is it up to the Federal Government. Only the Courts and the provisions themselves stand in the way of the individualisation strategies of employers.

It has been reluctantly acknowledged by Mr Reith himself, that Australia's provisions do protect the right of unions to bargain collectively.[89] This is because the freedom of association provisions aim to protect trade unions and allow them to contribute to social justice by securing more equitable outcomes in the working environment. If the *human right* to collective action in the workplace is to survive, it must be encouraged and fostered by the law.[90] In the BHP case Justice Gray acknowledged that union membership is meaningless without *legal recognition* of a right to participate in collective action. For unions to maintain the ability to mitigate exploitation, the meaning of membership must be read broadly and legal protections must prohibit both direct and indirect discrimination against trade union members.

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89 See above n84.

90 See Ron McCallum, 'Crafting a New Collective Labour Law for Australia', (1997) 39 *J of Industrial Relations* at 405.

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