Outline of the Waterfront Dispute
Outline of the Waterfront Dispute

Steve O'Neill
Economics, Commerce and Industrial Relations Group
12 May 1998
Inquiries

Further copies of this publication may be purchased from the:

Publications Distribution Officer
Telephone: (02) 6277 2711

A full list of current Information and Research Services publications is available on the ISR database. On the Internet the Information and Research Services can be found at http://www.aph.gov.au/library/

A list of IRS publications may be obtained from the:

IRS Publications Office
Telephone: (02) 6277 2760
### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Legislative changes</td>
<td>1</td>
</tr>
<tr>
<td>Importance of the waterfront</td>
<td>4</td>
</tr>
<tr>
<td>Waterfront Industry Reform Authority</td>
<td>4</td>
</tr>
<tr>
<td>Players in the waterfront industry</td>
<td>5</td>
</tr>
<tr>
<td>Waterfront reform post WIRA</td>
<td>6</td>
</tr>
<tr>
<td>The Patrick dispute</td>
<td>8</td>
</tr>
<tr>
<td>Some implications of the dispute</td>
<td>10</td>
</tr>
<tr>
<td>Endnotes</td>
<td>12</td>
</tr>
</tbody>
</table>
Outline of the Waterfront Dispute

Introduction

The Coalition was elected to government in March 1996 having made commitments to the electorate to improve efficiency and the labour market by substantially restructuring industrial relations, particularly by offering greater choice in many aspects of industrial relations. Legislation became effective in early 1997. One illustration of the implications of the new legislation is the waterfront dispute which began to unfold in January 1998.

The Government's industrial relations policy regarded the awards and orders of the AIRC as being too prescriptive. It sought greater freedoms for employees and employers to set conditions and arrangements in the workplace which best suited their needs, i.e. to be free from unwarranted intervention of third parties such as the AIRC and unions.

This paper summarises the main events of the 1998 waterfront dispute up to the High Court's decision of 4 May 1998. The context is the legislative changes operative in 1997, and the paper reviews the Government's policy of introducing competition into the waterfront primarily by encouraging industrial changes available under its new industrial legislation. It looks at the structure of port operations, although the Productivity Commission's reports on the waterfront provides more detailed information. The paper also reviews the benefits of reform arising from the Waterfront Industry Reform Authority (WIRA, 1989–1992), as well as subsequent negotiations which took place in 1997–98.

The paper also reviews some of the implications of the waterfront dispute for industrial relations and those aspects which show the new legislation having its intended effect, particularly in limiting the spread of industrial disputes. The paper briefly covers the dispute up to the three court judgements which have thus far considered the termination of the Patrick Stevedoring workforce. These judgements are considered in more detail in the Department of the Parliamentary Library Digests of the Stevedoring Levy (Collection) Bill 1998 and the Stevedoring Levy (Imposition) Bill 1998.

Legislative changes

In January 1997 new federal industrial relations legislation (the Workplace Relations and Other Legislation Amendment Act 1996 (WROLA), took effect. This Act amends other Acts, notably the Trade Practices Act 1974 and amends and replaces the former Industrial Relations Act 1988 with the Workplace Relations Act 1996 (WRA). In many respects the
WRA is a departure from the procedural conduct governing industrial relations. Some of its provisions augment the trend set in the Industrial Relations Act of limiting access to arbitral functions performed by the AIRC generally (s. 88A and s. 89), and when parties are under a bargaining process (s. 170N).

Often the interpretation of provisions is as important as the provision itself. The circumstances allowing the AIRC to intervene in protracted industrial disputes were 'read down' in a Full Bench decision of the AIRC in the coal industry dispute at Hunter Valley No.1 mine late in 1997. This decision notwithstanding, the AIRC in Curragh had earlier reaffirmed its authority to resolve industrial disputes under the new Act (s. 111 and s. 113), at least when these actions did not occur during a bargaining period. So what we can say about the new Act is that it encourages the AIRC to use its discretion not to intervene in disputes and to use its arbitration power as an instrument of last resort, rather than posing any blanket restriction on arbitration.

The Trade Practices Act contains significant penalties for industrial action such as 'sympathy' industrial action, known as secondary boycotts. For organisations, conduct amounting to a secondary boycott can attract penalties of $A750,000 per offence (higher penalties can be imposed where conduct is directed towards a substantial lessening of competition in an industry). However, the WRA protects forewarned industrial action, which is formally part of a process in which employees of one enterprise are seeking an enterprise agreement with their employer (s. 170 ML). On the other hand, the WRA introduces s. 127, under which the AIRC may issue orders to prevent industrial action.

The WRA also upholds 'freedom of association' where employees have a right to belong or not to belong to a trade union (s. 298A-L), and thus bans the 'closed shop', sometimes referred to as compulsory unionism, although the WRA uses neither term. Membership of unions is voluntary, however a closed shop can exist when either the employer advises a potential employee to become a union member, or, if after taking up employment, other workers will not work with a non-union employee unless the new recruit joins the union. One industrial relations glossary defines a closed shop as 'an arrangement where the employment in the trade or occupation depends upon union membership'. The Act allows a person who objects to union membership in such circumstances to obtain a certificate stating this from the Australian Industrial Registrar, and pay a prescribed fee (s. 267).

The WRA also requires federal awards to be 'simplified' by removing any provisions, which are deemed not to conform to the prescribed allowable matters (s. 89A). No such prescription is required of certified agreements. Consequently, unions, including the Maritime Union of Australia (MUA), have been engaged in the exercise of translating award provisions into certified agreements. Award provisions outside the 20 allowable matters should become unenforceable after 30 June 1998. A proposed amendment to the WRA has been introduced in Parliament to remove superannuation as an allowable award matter.
Outline of the Waterfront Dispute

As well, and for the first time in federal industrial relations, the WRA allows an employer to enter a legal employment contract with one employee (not necessarily a group of workers) called an Australian Workplace Agreement (AWAs, s. 170VF). Australian Workplace Agreements can be scrutinised by the Employment Advocate, and if he is not satisfied, by the AIRC, to see if they disadvantage employees in relation to what would otherwise have been their employment 'contract'—a relevant (and if one is not applicable, by a designated) award. As noted later, the use of AWAs to employ labour replacing union labour has been a central feature of the waterfront dispute.

Underpinning these provisions are the objects of the WRA, which, inter alia, recognise that workplaces can choose industrial arrangements which best suit their needs (s. 3(c)). As a consequence, the AIRC might be more reluctant to make a new federal award, if it can be shown that the enterprise is operating satisfactorily under other arrangements, including arrangements not registered under either federal or State jurisdictions (i.e. informal arrangements). The AIRC should cease dealing with an industrial dispute where State awards or agreements govern the employment relationship (s. 111AAA).

In short, alternatives to the federal award/agreement system might become more common. These provisions together form the main changes to federal industrial legislation, and constitute what is being often referred to as the 'new industrial relations'. The story of the waterfront dispute, in all its constituent parts, appears to centre around an objective of establishing a container port operation in which any new operator is not made party to the existing relevant industrial awards (at least those to which the MUA is respondent).

This objective can be achieved through a number of devices including the use of redundancy of an existing waterfront workforce. But redundancy of say 20 per cent of a workforce will not be successful in these terms, in the sense that the remainder will still be working under the previous industrial instruments. Redundancy of an entire workforce might succeed, if there are no challenges to the redundancy. If the employer simply replaces the workforce with another workforce under supply from a labour hire company, then it is likely that the courts will not regard the redundancy as genuine, since the work is continuing to be performed. The terminations are likely to be challenged by disgruntled employees, and their union. It is easier for an employer to terminate employees on a sequential basis, if the paramount concern is to keep the enterprise operational, except for the 'disadvantage' that the industrial instruments are retained.

Where an employer can set up a 'greenfields' site (i.e. have no previous employees, and no previous industrial awards), the employer can make the offer of a job conditional upon the new employee signing an AWA and thus set out terms and conditions of employment. Should a union then seek to enjoin the employer in an industrial award, it is likely one will be refused (see above), and if granted, would still not displace the AWA. It is easier to understand the manoeuvres of parties involved in the waterfront dispute, if these objectives and constraints are kept in mind.
Importance of the waterfront

The Government also made commitments at the 1996 election to reform the Australian waterfront. Waterfront reform has been on the national political agenda since the mid-1980s. Indeed the (then) Inter-State Commission investigated and reported on the waterfront in 1989. As an island continent producing mineral and agricultural exports for distant markets, Australia has an interest in ensuring that its port facilities are world class. The Productivity Commission reports that Australia exports 370 million tonnes of cargo by sea, and imports 50 million tonnes (1995–96 data). The total import and export trade is worth $60 billion but the volume of exports (via containers) constituted only 2.6 per cent of the volume of exports, but 40 per cent of the value of exports. For imports, the container trade accounts for 66 per cent of the value of imports and 16 per cent of the volume. Ports such as Townsville (QLD) (a bulk export terminal for coal) operate at world class levels in respect of tonnage loaded, turnaround times and reasonable manning levels.

However, a number of industry and government studies have identified the container ports, mainly in Australia's capital cities as being below world class practice in respect of containers lifted and moved. The government states in Waterfront Reform: Seven Benchmark Objectives (8 April 1998) that Australian port cranes lift on average 18 containers per hour whereas some lesser industrialised countries achieve 25 lifts per hour or better. The Department of the Parliamentary Library has elsewhere reviewed the debate on crane lifts. Dr Clive Hamilton of the Australia Institute doubts that the Government's level of productivity can be achieved without changes to the pattern of container discharge off ships. In any case, there have also been criticisms of poor productivity levels due to overmanning in container ports. The stevedoring companies would like to reduce their permanent workforces and increase their use of casual labour.

Waterfront Industry Reform Authority

Over the 1980s, waterside companies, unions and the then federal government devised a strategy under auspices of the WIRA to improve port productivity. The program operated from 1989 to 1992 and attempted to address the issues of excessive costs and delays. One outcome of WIRA according to the Bureau of Transport and Communications Economics (BTCE) was that over 4000 waterside workers were made redundant at a cost of $419 million, which included a government contribution of $165 million. This money was raised from the Australian Industry Development Corporation via the Stevedoring Industry Finance Committee. The loan was to be repaid via levies on the loading and unloading of cargo. One legislative instrument used for this purpose was the Stevedoring Industry Levy Act 1977, and there has been other legislation introduced to support WIRA. The BTCE estimated annual benefit of WIRA reforms to container operators at $168 million in 1993, while the total benefit was $275 million, and slightly lower benefits than these were obtained for the year before.
Similarly, the Productivity Commission’s recent report on the waterfront shows improvements. Charges for moving containers fell from $370 per container in 1985 to about $203 currently. The Productivity Commission also suggests that a further reduction of $50 in the cost of moving containers is attainable, although it might be noted that similar cost improvements of the magnitude achieved since 1985 do not appear able to be repeated.

Players in the waterfront industry

There are now about 3000 waterside workers left in container port operations. Waterside workers (operational workers) are eligible to be members of the MUA. As with many other heavy industries, waterfront operations have attracted substantial capital investment facilitating major technological change and decreases of labour requirements. This trend is unlikely to slow in the coming years.

Primarily two port operators control container traffic: the international shipping operator P&O Ports and Patrick Stevedoring, although Sea-Land has a major container operation in Adelaide. Between them they control about 95 per cent of national container lifts. Patrick Stevedoring (formerly Strang Patrick Holdings) increased its involvement in port operations in 1994 by purchasing the 50 per cent interest of ANL Stevedoring P/L in National Stevedores Holdings P/L for $28 million. At the same time Howard Smith Ltd sold its 50 per cent interest in National Stevedores Holdings P/L to Strang Patrick for a similar amount. However Patrick does not have security of traffic compared to P&O Ports, which is also a major international shipper and thus able to direct custom to its stevedoring operations.

Negotiations between the MUA and Patrick for new industrial agreements had been underway for much of 1997, but its employees generally resisted attempts to improve the cost effectiveness of Patrick, particularly by insisting on retaining arrangements which generated large amounts of overtime (work beyond the daily shift or roster). This work practice is being given more investigation. A solution being sought by the employers has been described by one industrial relations newsletter in the following terms:

What the stevedoring companies are looking for in general, is to create a situation where annualised salaries are introduced, but with no overtime component. The companies want excess work to be done by casual employees who have been trained up to do the supplementary work. Additionally, companies also want to ensure that there is no idle time.

The annual labour bill for Patrick’ workforce is estimated at $112 million (prior to the dispute) and annual losses appear to have reached $8 million within the Patrick Stevedoring operations.
The farming constituency, represented by the National Farmers Federation (NFF) has developed a keen interest in waterfront operations. Although the bulk of Australia's exports exit via the bulk terminals, certain classes of primary products, such as frozen meat, rice and wool, are being increasingly exported via container loads of product. The NFF had been involved in some milestone campaigns involving the waterfront with the promotion of the live meat export trade in the late 1970s and the efforts to 'free-up' the movement of bulk grains at certain ports in the late 1980s. The container trade is seen as another example of farmers bearing excessive costs and delays concerning movement of their product and the import of farm machinery and materials, and so appears to have become the new testing ground.

**Waterfront reform post WIRA**

In 1995 the then Opposition stated that the waterfront reforms to date had been unproductive given their considerable cost, and the container ports were still inefficient by world standards:

> It is quite clear, by any objective measurement, that what the Government has been doing about waterfront performance is both a disaster and an expensive flop. Why is it an expensive flop? We spent $430 million undertaking this waterfront reform program...We obviously have not benefited from it because we have not got improved performance.  

Not long after assuming government in 1996, the Prime Minister, the Hon. John Howard MP, reaffirmed the Government's commitment to waterfront reform and again stated the government's intention to lift productivity on the waterfront and to insure that it was competitive on a world basis. That waterfront reform had become a major priority of the government in its first few months of office is evident in the commissioning of consultancies to research issues associated with waterfront reform. One estimate of the cost of eleven consultancies on waterfront reform (to date) has exceeded $900 000. This includes the cost of legal advice from a number of firms on the implications of waterfront reform.  

An alternative approach to achieving industrial change on the waterfront however, would be to allow a new entrant to start operations on the docks as a third player to the two operators but employing non-MUA members which could free up labour operations and produce significant cost savings. According to the former Transport Minister, the Hon. John Sharp MP, a consortium of OOCL/COSCO sought to start container operations in the port of Melbourne in late 1996. The Melbourne Port Corporation welcomed the potential new investment in container facilities at the port, which might have reached $200 million. According to Mr Sharp, the Federal Government was also prepared to assist the new operator in using the provisions of the WROLA Act in obtaining a cost competitive labour arrangement. However, support for the OOCL entry into Melbourne lapsed when it
was appreciated that OOCL would only adhere to work arrangements for its future employees as discussed with the MUA.

The existing operators P&O Ports and Patrick took legal action against the Melbourne Port Corporation (MPC) in respect of their leases, as the new capacity would jeopardise their investments. The manager of P&O Ports, Mr Richard Hein claimed in the same interview that OOCL could have a serious impact on the trade available to P&O, with the potential for profits to fall 'by a half' and volume to 'cut by a third'. The two operators appear to have had assurances from the former Victorian Government, that a third operator would not be allowed to set up operations in the port. The formal reason given for OOCL withdrawing from the arrangement concerned the proposed rental for the port space (i.e.- high port charges).

In any case, part of the settlement of the legal action against the MPC allowed Patrick to use new space at the port (the Phillips Road area of East Swanston Dock) thus making its Webb Dock available for other purposes. (News of this settlement was communicated to Patrick Stevedoring employees in January 1998, when they were denied entry into No. 5 Webb Dock, and a new operator set up operations).

In September 1997 a small port operator in Cairns Queensland, International Purveyors, attempted to bring in non-MUA labour employed under Australian Workplace Agreements. But the MUA sought international union support through the International Transport Workers Federation (ITF) to hamper the port operations of the parent company Freeport McMoran, a company with international mining interests. The company quickly reverted to employing their former employees.

In December 1997, a company called Fynwest commenced training about 30 Australian Defence Forces (ADF) personnel (either on leave or separated from the ADF) as waterside workers in the United Arab Emirates (UAE) at the port of Rashid in Dubai. The plan apparently was to train up to 80 personnel in container port operations and bring them back to work on Australian ports, or to train others. Under media investigations into this training exercise, and with threats of international waterfront action against the UAE, the UAE cancelled the training exercise and the personnel were returned. Contracts of employment with these individuals had been entered into in the form of Australian Workplace Agreements.

Much of the contractual documentation between Fynwest and Patrick Stevedores in respect of the Dubai training exercise was released to the media in May 1998. Should ADF personnel have been persuaded to forego their ADF service to take an alternative career route, only to find that the alternative had been cancelled, then the loss to an individual would have been significant. This is because ADF personnel have access to a number of services and subsidies not available to the bulk of the workforce; housing and health care are but two of these entitlements. A detailed review of ADF entitlements has been prepared by the Department of the Parliamentary Library.
The Patrick dispute

On 28–29 January 1998, waterfront events escalated when Patrick locked its employees out of its Webb Dock operation in the port of Melbourne at midnight. At the same time a new waterside operation, P&C Stevedores (PCS) which apparently has the support of the National Farmers Federation, commenced training a workforce at Webb Dock with a view to becoming operational as a container port operator within a few months. Patrick had leased the dock to PCS, but under terms concerning the cargoes which might be handled by PCS.31

In January and February, the MUA used an opportunity of seeking certified agreements with Patrick in different ports. This also acted as a means for securing protected industrial action. Also on the agenda at the same time as these other actions were negotiations with a number of employers over the principal waterfront award, the Stevedoring Industry Award. The MUA argued that if key award clauses could be retained (after award simplification) it would agree to cost savings of up to $10 000 per employee under its proposed agreements. This would appear to be an important concession and one noted by Dr Clive Hamilton:

The MUA has a policy of cutting overtime, and if it succeeds will see waterfront wages fall over the next couple of years.32

Industrial action to pursue new enterprise agreements took the form of 48-hour strikes and/or bans on overtime. Industrial action was switched between ports, particularly Sydney, Fremantle (WA), Melbourne and Brisbane. This action caused considerable delay and thus cost to the Patrick Stevedores operation. Patrick responded by not paying for the core (non-overtime) hours actually worked (in the case of the overtime ban). For this it relied on s. 187AA and s. 124 of the WRA which prevents an employer paying strike pay, and prevents the AIRC hearing these matters. It appears that about 300 Patrick employees had been engaged in protected industrial action over February-March in part over enterprise bargaining and in part over award simplification.

On 2 April, another union, the Australian Workers Union, threatened to shut down oil refinery operations in support of the MUA members locked out of Webb Dock. However caution prevailed and the union did not carry out its threats. On 6 April the MUA sought orders from the Federal Court preventing Patrick from dismissing its workforce. Orders were not granted but the company was advised to abide by its awards/agreements.

On 7 April, Patrick locked out its national workforce of 1400 permanent waterside workers, and it appears, another 300 or so part-time employees as well.33 Supervisory staff do not appear to have been terminated. It has since been revealed that substantial restructuring of assets of four Patrick employer companies was undertaken in September 1997 to make these companies labour supply companies only (ie restructure the companies so that they were not in possession of other physical assets). Any interruption to the supply of labour could cause the contracts with the parent Patrick company to be terminated.
On 8 April, the Minister for Workplace Relations and Small Business, Mr Reith, who has responsibility for the waterfront industry, introduced a package of waterfront initiatives designed to pay MUA members, including those working for Patrick Stevedores, their redundancy payments. Redundancy payments are payable when a permanent employee with sufficient service is terminated because his/her services are no longer needed, i.e. is surplus to requirements. The Productivity Commission identified waterfront employees' redundancy payments as being very generous compared to other schemes. Superannuation contributions can be accessed as well if an employee is made redundant, often making for total 'payouts' of over $100 000 for an individual employee.

A levy, to be raised and collected under Federal legislation, has been proposed to finance the exit of MUA members from the waterfront. It is to be introduced at a maximum of $10 per vehicle loaded or unloaded (imported/exported) and $20 per container loaded or unloaded (imported/exported) under proposed federal legislation. If passed by the Parliament, the levy would repay a $250 million loan to be raised by the Maritime Industry Finance Company (MIFco) to pay out MUA members. All container port operators would have to pay the levy, not just Patrick. It is designed to force companies to reduce labour costs and improve productivity. Both P&O Ports and Patrick have made written commitments to support the Government's initiatives, and bring average crane lifts up to 25 per hour.

Patrick employees had their services dispensed with as from 7 April 1998 since the employing companies were no longer trading. At the same time, PCS using non-MUA labour commenced stevedoring operations in a number of ports, in lieu of the Patrick workforce under contract to Patrick.

On 8 April, the MUA sought court injunctions preventing the termination of the Patrick employees. An interim injunction (for one week) preventing the terminations was granted by the Federal Court but stayed. However the PCS operation set about docking ships and moving containers over the Easter break (10–13 April).

On 14 April Patrick Stevedores, the NFF and the Federal Government attempted to challenge the jurisdiction of the Federal Court to hear the terminations application. On 17 April, the High Court (Justice Gaudron) rejected the challenge to the Federal Court's jurisdiction. On 21 April 1998, Justice North essentially restored the employment situation which existed prior to 7 April, but these orders were appealed. The MUA is pursuing substantive matters concerning illegal conspiracy and breaches of freedom of association and breaches of employment contracts. Part of Justice North's decision makes this observation of the request made to the Court:

The Court has now been asked to make orders to return the situation to the pre-7 April position. The union and the employees seek orders that the Patrick employers continue to employ the employees and the Patrick owners use only those employees to do the work, which has always been done by the employees.
The Court was prepared to grant interim injunctions to restore the pre-7 April arrangements. It was revealed that the parent Patrick company terminated contracts with another four subsidiary Patrick companies which employed its workforce under labour supply agreements, and placed these four companies under administration. However, Justice North's reasoning for his orders makes reference to the trading position of the employers in February 1998 where revenue was $19.7 million and expenses were $20.2 million, thus 'restoration' appeared commercially realistic especially in light of the MUA's commitment to forgo some portion of wages. It was found that there were arguable cases in respect of unlawful conspiracy (to replace the Patrick workforce) and in respect of the freedom of association provision of the WRA being breached (employees terminated due to membership of a union).

The employers appealed to a Full Bench of the Federal Court to overturn the orders of Justice North. The orders of Justice North were stayed. A Full Bench of the Federal Court found Justice North's decision 'free from appellable error' on 23 April 1998. The employer immediately challenged the decision in the High Court.

Pickets were set up at the ports preventing the movement of port traffic to and from the ports. The stevedoring companies sought and gained injunctions to remove the pickets, and on 20 April the Supreme Court of Victoria (Justice Beach) granted Patrick a far-reaching injunction to clear the entrances to the Melbourne port. Injunctions to prevent pickets from hindering business have also been issued in other States, particularly New South Wales and West Australia. Following an appeal to the Supreme Court of Victoria, the breadth of Justice Beach's injunction was confined to apply to officers and members of the MUA. Nevertheless there have been arrests at a number of ports particularly Fremantle and Brisbane. The effect of the pickets has widened with some key manufacturers; particularly those in automotive production and primary product export, being unable to meet export deadlines. Nevertheless, unions have, so far, been careful to avoid the massive penalties available for breaches of the Trade Practices Act in relation to boycott conduct, and have preferred to back the MUA financially.

On 4 May 1998, the High Court rejected the appeals of Patrick and others against the orders of Justice North. However, the High Court also found that the orders of Justice North had the potential to force the administrator (of the four insolvent Patrick employer companies) to trade while the companies were insolvent. Thus the new orders give the administrator more discretion to manage the business affairs of the four companies. The fate of these companies awaits resolution.

**Some implications of the dispute**

It is difficult to assess the full extent of the implications of this dispute at this stage. The scene is obviously set for protracted (and costly) litigation. There are for example the matters concerning illegal conspiracy, freedom of association and breach of employment
contract issues. There are still matters concerning the withholding of pay (overtime) when ordinary hours were worked during enterprise bargaining. There are also the investigations of the Australian Competition and Consumer Commission into a number of aspects of the dispute. These include the conduct of parties which led to OOCL withdrawing its offer of investment from the Port of Melbourne as well as terms of the arrangement between Patrick and PCS for the lease of No. 5 Webb Dock, and possible legal action against the MUA re the boycott actions. Therefore, it is too early to provide any comprehensive overview of the implications of this dispute given the pace at which events are unfolding. Nonetheless there are some implications which are being cited in the media.

The role of the secondary boycott provisions has been seen to be less than effective when challenged by 'peaceful pickets'. However, not all future industrial disputes will be able to call on mass organisation as has been the case in the waterfront dispute. Using the mechanism of corporate restructuring to both evade paying workers' entitlements and to dismiss a workforce is very sensitive given recent terminations in the Cobar mine, but again it is not clear from this dispute whether a 'green light' has been given to employers to use similar devices. Some commentators have noted that employers' traditional reliance on the common law tort action of conspiracy against unions in industrial disputes has been reversed in this dispute, and it has been the unions who have used this legal approach.

Nevertheless, the dispute has been contained to Patrick terminals and container operations elsewhere have continued, more or less. Thus the Government can point to the effectiveness of its new industrial law, particularly s. 127 of the WRA which allows the AIRC to make orders preventing industrial action (i.e. which might have otherwise taken place in respect of other Stevedoring operations). It might be also recognised that thus far the PCS operation has used the AWA provision to employ its workforce and to deny the MUA award respondency. Again, the WRA has 'worked'. One of the ironies of the dispute has been that the freedom of association provision of the WRA (which in a new direction protects the rights of persons not to belong to a union as well as to belong to a union, or other industrial organisation) has been pivotal in the preliminary judicial findings that the employer acted illegally in dismissing its workforce.

The protracted nature of the dispute appears to have had very costly consequences, for example with those exporting perishable items. P&O Ports has gained extra market share but can't quickly resolve the congestion of containers now stockpiling in various cities. Certain supplies are caught in the action, and thus small and large business suffers from the dispute. Finally, the public is now privy to offers and negotiations between Patrick, the MUA, the Government, PCS and the administrators of the four Patrick labour companies which allows one to think that the dispute has returned to the industrial relations sphere or is heading back in that direction, rather than being confined to the courts.

Could the exercise of improving productivity on the waterfront have been better handled? Tony Mealor assisted ICI Botany in the late 1980s to curb excessive overtime, 'call-ins' and other practices. He has documented the ICI method of moving to annualised salaries in the context of 24 hour production needs. He has also outlined the consequences this has
had for far superior working relationships, productivity, output, change of culture and efficiency. This was at a time when the then Conciliation and Arbitration Commission exercised more control over deviations from the standard working day and the standard working week than is the case at present. After the waterfront dispute, his text might be more readily consulted.

Nevertheless, the signs are that this dispute has been the most heated industrial contest since the Clarrie O'Shea case of 1969, when unions challenged penal provision of the then federal law. The waterfront dispute will have significance because of the in-depth debate on waterfront efficiency and productivity and because of its implications for the conduct of general industrial relations.

Endnotes

1. As a discipline, industrial relations analyses the organisational nature of employment and job regulation and/or control. It analyses the relationships of unions (organisations of employees), associations of employers and the role of intermediaries such as the courts, in the undertaking and performance of work. The principal legal institution governing national industrial relations is the Australian Industrial Relations Commission (AIRC).

2. The Coalition's industrial relations policy Better Pay for Better Work in its introduction mentions the need for direct relations between employer and employee without the 'uninvited intervention' of trade unions, employer organisations or industrial tribunals.


5. AIRC, Print P8382, 29 January 1998.

6. AIRC, Print P 0859, 12 May 1997. There it was said: 'The matter of the reduction of hands is one about which, in the absence of s. 170N, there would ordinarily be jurisdiction to arbitrate'.

7. Note interview with Alan Fels, 'Mayne Nickless ordered to pay $7.7 million in penalties and costs following a TPC action over collusion and price fixing' P.M., 6 December 1994.


9. The Workplace Relations and Other Legislation Amendment Act 1996 imposed an 18 month transition process, during which time some 3000 federal awards would be redrafted to ensure that each of their award provisions complies with 'allowable award matters'. These are specified in s. 89A of the Workplace Relations Act and cover issues like classifications, annual leave, wages but exclude consultation clauses, technological change clauses and others.


26. On 15 May 1997, the Hon. John Sharp MP, Minister for Transport and Regional Development, in an answer to a question on notice in the House of Representatives (Q.No. 1324) reported that $65 000 had been paid to the consultancy organisation ACIL between April and June 1996 to devise an industrial relations strategy to achieve waterfront reform.

27. 'Wharf reform: we're paying' *The Sydney Morning Herald*, 18 April 1998.


29. 'Victoria: Announcement that the Hong Kong based Orient Overseas Container Line is the preferred bidder for a new cargo terminal', *P.M.* Tuesday, 4 February 1997.

Outline of the Waterfront Dispute

37. Australia's Corporation Law imposes a duty on directors to prevent insolvent trading by a company. Where this is likely to arise, the directors are required to place the affairs of the company under external administration. The administrator will assess the state of affairs of the company and make recommendations to creditors.
39. 'Chairperson of the Australian Competition and Consumer Commission comments on aspects of the waterfront dispute' AM 21 April 1998. Allan Fels: ‘…we have been looking at the Patrick and producer and Consumer Stevedores agreement down at Webb Dock, the lease and the associated side agreements. And also, we've been looking for some time at the OOCL litigation where an agreement came to light between Patrick and the Port of Melbourne Authority…