

## **Paper to the Annual Labour Law Conference of Union Lawyers and Industrial Officers, NSW – 26 February 2015**

### ***Interest Based Bargaining under the New South Wales Industrial Relations Commission***

- 1 Deputy President Harrison sends his apologies. He is attending to his wife who has taken ill. I should also give my apologies as the lateness of notice necessarily means that what I have to say may be less well developed than otherwise might be the case.
  
- 2 The Deputy President and I have had innumerable discussions about the topic of interest based bargaining and have been engaged in more recent dialogues with representatives of the New South Wales Government. We have also begun to prepare fledgling changes to various aspects of the Commission's practice and procedure. I emphasise that those changes are evolutionary in nature only but we shall be encouraging consideration of interest based bargaining as an additional dispute resolution model.
  
- 3 Let me turn to the topic at hand. Perhaps somewhat enigmatically, I would commence the discussion hereunder with a note of caution about the mere adaptation of interest based bargaining into either the federal or New South Wales systems of industrial relations. The term 'interest based bargaining' is a domain of scholarship and action which has been clearly institutionalised in the labour management context in the United States, particularly in the public sector. It represents a quite discreet field of training, experience and, ultimately, institutionalised practice which may or may not be relevant to importation into, for example, the New South Wales industrial relations system.

- 4 Rather, it is the core principles of interest based bargaining which are of particular interest so far as they enable conflict resolution and, ultimately, the enhancement of workplace relations and productive outcomes in conformity with the objects of the *Industrial Relations Act 1996*. The New South Wales system has always contained significant elements of what is typically described as interest based bargaining (although those elements have been the subject of innovation and evolution over time, now characterised by what we would describe as the 'New South Wales model'). (The Deputy President and I have decided to scotch the previous reference to the 'Hunter Model' because the model is now endemic in the New South Wales system, particularly in the Illawarra and more recently in the public sector.)
- 5 Ultimately, the system needs to be considered in the context of the specific institutional arrangements which operate in the state of New South Wales under the *Industrial Relations Act 1996*. I will return to those considerations after a brief description of the core principles to which I have referred.
- 6 To explain these principles I will use, as far as possible, the nomenclature of New South Wales industrial relations dispute resolution.
- 7 In an industrial dispute there are three possible outcomes whether arrived at by means of negotiation, conciliation or arbitration. One way is a victory or win in a dispute. In other words, one side of the dispute loses.
- 8 The second way a dispute may resolve itself is by means of a settlement by which the parties reach a compromise with, typically, both sides ceding

some of the positions they adopted. The arbitral counterpart of this is that both sides lose some aspects of their cases.

- 9 The third way involves, plainly enough, a difference, the definition of which may be, to some extent, illusive, but is nonetheless a powerful instrument for collective gain. For present purposes, I will use the description given by Joel Cutcher-Gershenfield in an article entitled “Interest-Based Bargaining” in which he describes the third way as “integration”. By integration, the parties move beyond representing their respective interests to produce something new which is not fixated upon an either-or scenario.
  
- 10 From this point, the discussion of interest based bargaining often proceeds along the lines that a focus on interest increases the potential for mutual gains solutions or better crafted solutions. It is important to recognise, however, that the interest which is hereunder consideration is often that which underpins or may be the genesis of the position which may be propagated in a claim or counterclaim or resistance to a claim. It may also simply identify a mutual objective, the attainment of which is productive of the resolution outside of a strict position centred around a claim. For example, in the recent case of *Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2014* [2014] NSWIRComm 33, there were, for many reasons, irresolvable claims for improved wages. However, there was also a common interest in resolving the vexed problem of having retained firefighters turn out for duty. The problem was not only about administrative difficulties or the efficacy of firefighting, but that, in simple terms, NSW Fire & Rescue, on the one hand, had to find costly alternatives to retained firefighters who did not attend as may be expected and, on the other, the award arrangements under which retained firefighters either turned out or did not resulted in inequitable outcomes.

- 11 So it may be seen that interest based bargaining or its equivalents commence with the identification of mutual interests and out of them alternative options for the resolution of conflict. In short, the underlying approach moves away from the chess game or battle scenario into a set of problems to be mutually defined, explored and resolved through the identification of fundamental common interests without a predetermined set of rules. (Lest it be thought that the retained firefighters example was but an aberration, the same process was replicated for permanent firefighters and then to death and disability arrangements for firefighters with equal measures of success.)
- 12 Can I then turn from this more theoretical discussion to the application of these principles within the NSW industrial context.
- 13 Interest based bargaining and engagements with parties to build cooperative and productive relationships have been a feature of the Commission's operations over many years in both the Hunter and Sydney Metropolitan areas and the Illawarra. Other models have been developed which are innovative and complementary to these initiatives. For example, the BlueScope arbitration system, as it is known, is essentially an inquisitorial method of resolving workplace problems dispensing with the traditional 'adversarial' procedures which are associated with conciliation and arbitration (see *Operational Ambulance Officers (State) Award and others* [2008] NSWIRComm 156).
- 14 However, each of the models have, at their centre, the discharge of functions by the members of a significant public institution which forms part

of the framework of laws in New South Wales. It will be possible to speculate upon whether the possession of a wide set of powers such as conciliation and arbitration powers assists in the fulfilment of those models, but what cannot be doubted is that their effectiveness lies in the trust reposed in such a significant institution and its members who are recognised as having relevant skills and experience. In other words, the New South Wales model relies substantially for its successes on the guidance given to parties by the New South Wales Industrial Relations Commission to find mutual interests and upon agreements being made and the parties being kept on course by that institution.

- 15 As to the requisite skillset for members of the Commission undertaking these challenging processes, I would not wish to discourage steps to have tribunals such as the Industrial Relations Commission constituted by members from diverse areas of learning and experience, particularly those bearing upon modern types of employment relations. But it would be a mistake to suggest that those coming from a traditional conciliation and arbitration background are not equipped to face such challenges.
  
- 16 Members of industrial institutions steeped in the learning of conciliation and with experience of industry, in one form or another, have long practiced (albeit in the absence of public announcements or acclaim), the principles of cooperation which are espoused in interest based bargaining. It has long been part of the institutional practices of the New South Wales Commission for its members to acquaint themselves closely with the nature of the industry they are dealing with and the participants within it, with a view to fostering non-adversarial solutions to problems. I do not mean by this merely a finely tuned sense of where problems might be anticipated and the taking of corrective action, but engagement with workplace participants to build cooperative arrangements. The

Commission has long encouraged the practice of receiving briefings from the respective interests with a view to encouraging cooperative approaches to, for example, workplace change or even significant shifts in the foundations upon which industries operate. Deputy President Harrison (who has now reverted to a full-time member of the New South Wales Industrial Relations Commission operating in the Hunter) is an example of these practices par excellence.

- 17 It should also be explained that the models developed in New South Wales cannot properly be described as alternative dispute resolution models as that expression is used often in conjunction with the general court system. The models have been developed very much as part of the wide range of powers and functions conferred on members of the Commission under the New South Wales *Industrial Relations Act 1996*. Reference may be made to Object 3(h) which provides that an object of the Act is “to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations”. Mention might also be made of the definition of ‘industrial dispute’ under the Dictionary to the Act. Attention is often focussed upon cooperative arrangements as distinct from the resolution of dispute under the systems of conciliation and arbitration, but it is important to refer to paragraph (c) of the definition of an industrial dispute which is very broad and certainly wide enough to encompass the full reach of new systems encompassed by the Commission such as the Hunter model. Paragraph (c) is in the following terms: “a situation that is likely to give rise to an industrial dispute if preventative action is not taken”. The definition operates not only in relation to a dispute, but a “question or difficulty”. To this may be added reference to s 163(1)(b) of the Act which is more commonly known as the provision which excludes rules of evidence, but which also contains the following reference to the functions of the Commission, namely, “the Commission ... may inform itself on any matter in any way that it considers to be just”.

18 Can I further illustrate the development of this approach by reference to an example sitting outside the now familiar reference to construction projects in the Hunter Region, namely, the local government sector. On 23 February 2015, the Commission approved the Lake Macquarie City Council Enterprise Agreement 2014. The decision in *Lake Macquarie City Council Enterprise Agreement 2014* [2015] NSWIRComm 3 at [4] described the industrial arrangements as being founded on “stability, sustainability, and fairness as the basis for job security, productivity and efficient service delivery.” The objects of that Agreement are to be achieved through a number of means including:

- Maintaining a high performance, high trust organisation through a genuine partnership between management, staff, unions, councillors, and the community.
- The embracing of change and a commitment to continuous improvement by all within Council.
- The development of a learning organisation based upon teamwork, flexibility, competency in skills and opportunities for development.

19 Lastly, the Deputy President insisted that I emphasise, and I now do, that, in the case of unions, the notion of trust underpinning these arrangements should not involve a focus upon whether you can trust the employer but whether the employer can trust you!

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