The MUA Affair: The Role of Law vs. The Rule of Law

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Abstract

This paper focusses on what the judicial battles in the waterfront dispute tell us about the role of law and what implications this has for labour relations and corporate law. For labour law, the significance is that reliance on liberal law has limited potential for workers seeking to pursue their causes through the courts. For corporate law, the Court's decision makes it plain that, when there is an overt conflict between wealth owners and workers, the courts will try to obfuscate this, while ensuring the security of property owners. To this end, the High Court – despite scolarly criticism – treated each corporation in the Patrick group as if it were an independent atom. This ruling will be a green light to other anti-union employers and will disadvantage workers in a system which increasingly makes their rights dependent on the legal identity of their employer.

> This is the kind of scheme that was used by greedy tax cheats in the famous Bottom of the Harbour incidents in which Painters and Dockers were involved, conduct which is deliberately associated by innuendo with the MUA. These tricks are now being used again for a different purpose – to avoid obligations to the workforce.
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> Frank Costigan Q.C., *The Age* 23 April, 1998.

> Corrigan's decision to 'sack his existing workforce, has been portrayed as a politically motivated move to smash the Maritime Union of Australia ... Corrigan's motives are not even remotely political .... His primary motives are survival and producing profits for shareholders. Had Corrigan and his fellow directors continued to pump money into

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> Patrick when it was obvious that there was no hope of the stevedoring business becoming profitable, they would have breached their Corporations Law duties as directors'.
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> *The Australian Financial Review* 9 April, 1998.

This is a lawyer's perspective on the MUA/Government-Patrick struggle in court. It is not, however, an attempt to parse the language used by judges in order to get at the legal rules which emerged from the case law, the traditional task undertaken by lawyers who see their role as predictors of how future courts will deal with similar cases. Nor, being a lawyer's essay, is it an attempt to evaluate who turned out to be the real world winners and losers as the parties emerged from the demi-monde of legal politics. The focus of the paper is what the judicial battles tell us about the role of law and, in turn, what implications this has for labour relations and corporate law.

The point of departure is that Australian law is presented, and presents itself, as a liberal institution whose task it is to maintain, deepen and perpetuate Australia's liberal polity. This characterization has an amazing hold on public perception. While sophisticated observers may reject the simplistic portrayal of law which follows, the contention is that it is a widely shared view of the legal system and that this 'simplistic' understanding has profound political effects. The proof is in the pudding.

The MUA's use of the law can only be explained on the basis that it felt that law and its functionaries could not escape the internal logic of legal liberalism. This paper sets out to show that, from a working class perspective, this is a dangerous perception to propagate in a class-divided political economy. The outcome of the case provides evidence of the fact that law is more malleable than its self-portrayal would have us believe and that it has other objectives than the maintenance of liberal pluralism. The discussion will present the complicated ways in which law tries to serve the differing goals and ideology of a liberal polity and capitalism.

Law's Self-Portrayal

The principles of liberalism require that liberal law respects and enhances the sovereignty of all individuals. These are the tenets which underpin human rights and anti-discrimination legislation. They are the foundations on which constitutional bills of rights protecting individuals from the State, such as those found in the United States and Canada (and the more recent

attempts by the Australian judiciary to read such a bill into the Constitution), are based. They also are the premises on which the contentious s.3 (f) and Part X A of the Workplace Relations Act 1996 (Cth), relied on by the MUA in court, are posited.

The central idea is that individuals, as sovereign actors, are to be free to do as they choose, subject only to the requirement that they leave enough space for other sovereign individuals to exercise their choices. The logic of liberalism, then, dictates that a number of restrictions may be imposed on individuals. But, they should be minimal. Restrictive rules should contribute to the aggregate freedom enjoyed by all individuals in a given society (Locke, 1960). Naturally, this creates a terrain of contest which must be regulated. The legal rules designed to frame the field of liberal play are administered by the judiciary. The courts are to interpret and apply the consensus – which is assumed to have given rise to these rules – in as neutral a manner as possible. The individual disputants have equal standing before the courts. Outcomes rest on the even-handed application of the relevant law, not on who the disputants are. Government agencies which have been given discretion to implement the (usually) rather vaguely-framed policies or laws of majoritarian governments, also are subject to the scrutiny of courts. The judges are to ensure that the administrators do not exercise their discretion arbitrarily, discriminatorily, without regard to the rules of natural justice, nor in flagrant disregard of the laws which they are administering. With all this – plus the universal franchise – in place, we are governed, it is said, by the Rule of Law. This is the system which the MUA sought to exploit to its advantage.

The Legal Battle Lines

While the facts on which the MUA based its legal claims were never formally proved in the courts, some are, I dare say, established to the satisfaction of the vast majority of Australians. There can be little doubt that

(i) The coalition government singled out the MUA as a target to enhance its popularity with the right-wing of the political spectrum while, at the same time, it was attempting to provide itself with more ammunition to make its political and legal onslaught on trade unionism more effective.[1]

(ii) Corrigan and the Patrick group of companies may or may not have been motivated by knee-jerk anti-unionism. It is certain, however, that they wanted to make more money. Mr. Scanlan, a major Patrick player, was

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quoted in the *Australian Financial Review*, 27 April, 1998, as saying: 'I am not doing this for the nation.' And, it is equally certain that they believed that they could make more money if they succeeded in displacing the MUA. Their well-documented knowledge of, and participation in, events such as the Dubai affair and their attendance at meetings with the government to map anti-MUA strategies, provide ample evidence that they were bent on ridding themselves of the MUA. The use of scab labour brought in the middle of the night, accompanied by security guards and their dogs to patrol the suddenly-locked gates, spoke volumes about their intent. It is likely that, to a large degree, the Howard government's failure to get as much popular support as it expected for its anti-MUA strategies can be attributed to the anger that many members of the public felt at the government's connection to the disturbing tactics employed by the Patrick companies. People who normally might not side with unions' causes, but who want to believe Australia is a tolerant and civil rights-protecting society, were alarmed by these happenings.

In this setting, the MUA went to court.

What made this move so intriguing from a lawyer's perspective was that the union based its claims on the foundational tenets of liberal law. The MUA's lawyers had devised a stratagem whose irony must have seemed delicious to them. They sought to hoist the MUA's class enemies on the petard of 'their' liberal legal rules. The MUA's argument was that, as the Workplace Relations Act (WRA), in the spirit of liberalism, purported to protect freedom of association, it should be read so as to protect existing associations such as the MUA.

Legal logic permits the making of arguments if they are plausible, in the sense that they are logical as seen from within the framework created by the legal rules. They do not have to make sense from the wider vantage point which reveals why the framework was created in the first place. The fact that the provisions of the Workplace Relations Act relied on by the MUA actually had been intended by the government – as everyone knew – to be anti-trade union in effect, could not prevent the MUA from trying to use them in court to attain the opposite effect. Precisely because, in writing liberal law, politicians want to hold out that they are furnishing all individuals with the same rights, the provisions were written in terms which, on the surface, granted all individuals the same safeguards to exercise their political choices about how to associate with others. No anti-union animus was expressed. But, the government knew that this kind of 'neutral' language has been used effectively to attack unionism in many jurisdictions.[2] The

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MUA lawyers sought to take advantage of what they knew to be the false advertising of the provisions, no doubt with their tongues in their cheeks. They claimed that the case they were making fitted within the four corners of the wording purporting to provide protection to the liberal right to associate with whomever one chose. In short, the MUA's response to the overt class war unleashed against them in the real world of politics, was to fire back with a legal liberal bullet. And, as if this were not enough fun, the MUA's lawyers claimed that the unintended protection of the WRA for unions like the MUA had been undermined by an illegal plot hatched between a number of employers, the government and the vehemently anti-union National Farmers' Federation. This plot, they argued, constituted a conspiracy, the very cause of action used so often and so successfully against unions. What a heady brew for lawyers this must have been!

On the other side of the legal fence were the Patrick group of companies. They, too, had been advised by lawyers. As a consequence, they had relied on what had been conceived of as a legally permissible rearrangement of their corporate structure in order to defeat what the union had thought were its entrenched security rights. Faced with the MUA claim, the Patrick group of companies was now forced to contend that its scheme of rearrangement should allow it to deny the liberal political rights of Australians because the legal right of practising capitalists to do with their property as they wish should trump mere liberal rights.

This put the courts at the centre of a highly politicized struggle. The judges were fully aware of the importance of the outcome of their deliberations. Obviously, it would impact on the parties' negotiating positions and, if there were losers, they would be quick to point the finger at the courts. Even more important to the judges, the way in which the courts dealt with this inflammatory situation would have a bearing on the way in which the public saw the Rule of Law and the courts which administered it.

The very nature of the legitimacy of the Rule of Law hinges on the fact that the judges' only concern should be to be faithful to the methodology of law. They are to find the law, with the help of the parties' lawyers, and to interpret it and apply it in accordance with accepted principles of interpretation. True, these principles of interpretation give courts a good deal of discretion. Normally, their choice of one interpretation over another may be attributable to the personal preferences of the judges and/or to the fact that reasonable lawyers may differ over the state of the law before the courts. But, in this particular setting, the choice between the available interpretations was unusual.

More often than not, courts deal with intra-class disputes. This is why the range of available interpretations ordinarily is relatively narrow and the choice made, at worst, is subjected to criticism dealing with the judges' analytical skills. Here, however, the way in which the case was presented in court, as well as the very public way in which the combatants were stating their antagonistic class-based goals, presented a danger. After all, the way in which the case came forward required the courts to make a choice between the political/participatory rights of the working class and the protection of the private property of members of the wealth-owning class. It was going to be important – whether they acknowledged this to themselves or not – for the judges to find a way to divorce the legal claims from this alarmingly politicized context. In the end, I believe, they were pretty successful.

They left sufficient ambiguity in the final judgments for it to take a lot of digging to find out what really motivated the various judges. In raw terms, five judges (North, Wilcox, Von Doussa, Finkelstein and Gaudron) found unequivocally for the MUA. One judge (Callinan), equally unequivocally, found for the government and the Patrick group of companies, while five judges (Brennan, McHugh, Gummow, Kirby and Hayne) found for both the MUA and the Patrick group of companies. If the five judges' decision solely in favour of the MUA (only one of those judges sat on the High Court) had held up, the MUA would have had potent bargaining chips. But, while the five judges who carried the day in the High Court purported to uphold the pro-MUA finding of the four lower court judges, their partial dilution of the initial order made by North, J. left the negotiating position more evenly balanced. When the dust had cleared, both sets of parties claimed victory.[3] This is not the place to examine the merits of these competing claims. The purpose of this paper is to delve into the nature of the judgments, rather than into their immediate political fall-out.

To foreshadow the argument which is to be made, note that the judges who carried the day in the High Court of Australia accepted the implicit messages that legislators had been sending about the legislative instrument which facilitates and legitimates corporate activities, the Corporations Law. The Coalition government had not only acknowledged the obvious centrality of the corporations to the Australian political economy but, by using the constitutional corporate law power as it did to regulate much of capital-labour disputation, it had also indicated that a return to a less mediated extraction of surplus value was to be fostered. While there is no way to speak with sanguinity about how individual judges feel about this evident change in approach, it is fair to say that, from an institutional perspective,

the judiciary will find this changed attitude to its liking. After all, it was the judges in the common law countries who, with their fierce protection of individual property and contract rights, did a great deal to legalize the oppression of the working classes in their countries. Indeed, the harsh outcomes of this legal oppression tended to delegitimate existing capital-labour relationships, leading to much upheaval. This had to be countered in all advanced, industrialized countries. In Australia, the incumbent government was telling the judiciary through its legislation – as well as by its overt interventions in the MUA/Patrick affair – that it would no longer be improper for judges to return to legal approaches which prevailed when court-based individualistic law held a much more central position in the regulation of capital-labour relations.

The Changing Nature of Capital-Labour Relations Regulation

The story of the birth and development of conciliation and arbitration is well-known. The compromise, the 'Australian Settlement' (Kelly, 1992), made trade unionism a central institution in a regime which took wages largely out of competition. The terms and conditions of employment were industry-wide. They covered unionized and non-unionized employees. In addition, trade unions were given a right of entry into workplaces to monitor awards and the right to demand that trade union members should be given preferential treatment. All this enhanced trade union appeal and security. Further, that security was supported by a racist immigration policy. For their part, employers were given the protection of trade barriers behind which they could manufacture while minimizing the rigours of competition. For exporting employers, they could escape duties if they complied with arbitrated conditions. (Ludeke, 1994; Chin, 1997; Rickard, 1984). Over time, the scheme came to be used increasingly as an instrument of labour economics policy.

The sophistication of the regime has led Australian commentators to note that the usual division of labour relations law as being predominantly either a constituent element in the construction of labour markets and policy-making, or an instrument designed to address the historic inequality between employers and employees (Collins, 1989), fails to describe the complex, mature Australian conciliation and arbitration regime. Creighton, Ford, and Mitchell (1993) argue that the heavily legalized conciliation and arbitration scheme fused these two functions of labour relations law to such an extent that Collins' analytical dichotomous framework becomes very

difficult to apply to the Australian situation. This debate is interesting, but not to the point here.[4] What is important is to isolate some of the institutional arrangements which grew out of the conciliation and arbitration scheme as it evolved.

The system resulted in terms and conditions of employment being Australia-wide. Awards were made applicable to all employers in a described industry. This meant that the identity of the owner of any one enterprise which dealt with workers covered by the award was of little significance. To make this scheme work, trade unions were given monopolies in terms of industrial and occupational categories. The question as to whether a trade union should be registered to represent workers to be covered by an award rested on the answer to the question as to whether the subject workers might not more conveniently be able to belong to an already registered trade union, not as to whether the workers should be unionized (Bennett, 1992). This gave existing trade unions security, a security enhanced by their ability to have preference clauses inserted into awards. In the end result, trade unions became nationally integrated organizations.

The trade unions' position as a lynchpin in the system was symbolized by the grant of a legal personality to them which gave them the same legal status as had been given to for-profit-corporations. While, in part, the trade-off for this was that trade unions' internal affairs were to be subjected to external scrutiny, in part it also was as clear an acknowledgement as can be given by law of the legitimacy of trade unions and of their pivotal role in the workings of the regime (Creighton, Ford, Mitchell, 1993; Chin, 1997). All of this helped trade unions to come to occupy an important role in electoral politics. Security of tenure and organization gave them a platform from which to educate politically and to organize the delivery of a great number of votes to the party of their choice, mostly the Labor Party.

Manifestly, this is a picture of a time gone past. While there always have been those who wanted to change the conciliation and arbitration system, there has been a palpable invigoration of the assault on conciliation and arbitration over the last 20-30 years. As the phenomenon, rather nebulously labelled globalization, has come to be taken as an inevitable political economic development, it has become a common place for politicians and policy-makers to claim that, to save jobs and to generate more economic wealth, there is to be more flexibility for management at the local production level. Management should be helped in its efforts to make work and workers more productive. Managers and workers can best do that by bargaining locally. This, supposedly, will enhance efficiency.

The ideological message which had been sent for a couple of decades about the superiority of voluntary agreement-making over the third party imposition of conditions of employment, was given extra bite in this setting. The seeds sewn by the likes of the H.R. Nicholls Society (1986), the Business Council of Australia (1989), the Confederation of Australian Industry (1991) and by the Niland Report (1989), began to find fertile soil. The Labor Government's Accords, followed by its Industrial Relations Reform Act, 1993, put a new emphasis on localized bargaining, although their 1993 Enterprise Agreements still were to be underpinned by conditions of applicable awards, creating something of a safety net (Naughton, 1994). In 1996, the Howard government took this bit between its teeth and embedded collective and individual bargaining as they had not been since the advent of conciliation and arbitration. The Workplace Relations Act, 1996, pushed conciliation and arbitration into the shadows.

Under the 1996 legislative scheme, there is a clear, new, and very different, pecking order. Voluntary agreement-making, on an employer-by-employer basis between employers and trade unions, by way of certified agreements, and Australian Workplace Agreements between individual employers and employees, all are given pride of place, ahead of conciliation and arbitration, as mechanisms of dispute settlement. The notion is that arbitration is now only to be used in extreme circumstances and, when it is used, it is to have less scope. The Americanization of Australian labour relations law, sought by the big business think-tanks (Bennett, 1992; Dabscheck, 1990) seems to have been completed. What significance are we to attach to this from the perspective of this paper?

The North American labour relations legal system (the fundamental aspects of the U.S. scheme are also the basic premises of the Canadian one) was introduced by the 1935 Wagner Act. It imposed a duty on an employer to bargain in good faith with the freely elected representative of the majority of its workers. Bargaining to impasse permitted lockouts and strikes to take place. The conceptual heart of the scheme was that, given their obvious vulnerability when they could be forced to contract as individuals, workers were to be allowed to have some collective bargaining rights which employers were obliged to honour. Once this had been put in place, the State retreated, leaving it to this reconstituted labour market to dictate the terms and conditions of employer/employee relationships. The purpose, then, was to create a context in which voluntarism would continue to reign, while allowing *some* collectivization. The decision of whether workers were to be represented by unions remained theirs to make (albeit in a supervised setting). This presented another facet of the liberal, voluntaristic regime

intended to be embedded. As part of this, workers had been guaranteed the freedom to associate, which included the right not to associate. This sketch should be enough to give us an idea of some of the implications of Australia's movement toward a North American orientation.

First, while unions have national organizations in North America – even international ones, as American unions have branches in Canada – these national organizations are not, legally speaking, the unions for the purposes of collective bargaining. It is only the local branches of such unions, that is, the agents selected as representatives by the majority of workers at any one place of employment, which have bargaining rights. One corollary of this is that, as the effective organization of workers is localized, the North American national trade union movement is not in as good a position as the Australian (or English, or European) one(s) to deliver votes (contrast money) to political parties. Nor is it easy for it to use nationally organized collective action to achieve political goals, as is commonly done in Europe. Such nation-wide militance is illegal in North America and viciously repressed. This helps explain why the U.S. and Canadian trade union movements have nothing like the electoral clout their Australian counterpart has had for much of this century. To the Howard government and its allies, legislation which might create a system in which trade unions are likely to have much less political influence must be attractive. However, there still is a practical problem to overcome before arrival in the promised land of small, fragmented and politically weak unions. Steps have been taken to tackle this problem.

While the Workplace Relations Act promotes fragmented bargaining in Australia, it does so in the context of a union movement which already is nationally organized and has close links with a national political party. This is a serious stumbling bloc. From this perspective, many of the provisions of the Workplace Relations Act make functional (in addition to ideological) sense.

The decision to have freedom to associate include the freedom not to associate was intended to overcome the bias in favour of the kind of unionization which has come to be built into the conciliation and arbitration system (Bennett, 1992). The (eventually withdrawn) proposal to remove the 'conveniently belong to' rule was of a similar nature. It was supposed to force unions to compete for members, thereby reducing their hold on workers. Similarly, the 1996 reversal of the amalgamation provisions included in the 1993 labour legislation (Part IX, Div. 7(A)) which were intended to make unions larger and more efficient, may make it easier to fragment unions. And, the reinvigoration of s.45(D) (McCallum, 1998), not

only signals the ideological bent of the government and its allies, but it also provides a sharper instrument with which to ensure that bargaining will be containable to a single employer site. By making it easier than ever to ban secondary support action, i.e. action away from a resisting employer's site of production, intended to put pressure on that first employer's commercial relations, and also by its inhibition of primary boycotts in situations such as those involving waterfront enterprises, the government's reform of the Trade Practices Act clearly was reaching both for the position developed by the common law courts before conciliation and arbitration arrived on the scene[5] and for the legal constraints on economic collectivism which prevail in North America today. The danger that localized collective bargaining might spread to other sites of production inheres in a North American-type scheme and much of labour law in North America is aimed at controlling these dangers (Glasbeek, 1987). This brings us to the second, and related, feature of the Americanization of the Australian regime.

The right to bargain collectively in North America was developed to support both an increase in mass consumption to match increases in mass production and the legitimacy of the extraction of surplus value. It was successful in helping the revival of capitalist relations of production (aided, of course, by World War II). While useful in these terms, the scheme always remained anathema to many capitalists interested in their own well-being, rather than that of capitalism. As the duty to bargain with a trade union only arises vis-a-vis a specified employer, the possibility of legally changing the identity of the employer without changing the nature of the business, nor the identity of those who are trying to profit from it, always has been, and still is, sought to be exploited by such self-serving capitalists. In response, courts and policy-makers, to save the scheme and because they are under pressure from trade unions whose very existence depends on the well-being of the legislative regime, developed a number of doctrines and instruments to make it difficult for employers to escape the obligations owed to trade unions elected by their employees. This is not the place for an exegesis on the ornate law which has developed around these doctrines and instruments. It is pertinent, however, to mention a few aspects of these doctrines and instruments to show how anti-union the Workplace Relations Act really is.

One of the difficulties which a union may have to face in an employer-by-employer bargaining system is the sale of a business by the employer who has legal obligations to that union. As unionization is posited on the basis that the workers are employees of a particular employer, these employees will lose their union and the bargained terms, even if they are employed by the new business. Accordingly, successor rights have been

attached to union certification and to any collective agreement the union obtains. While these successor rights are not always easy to enforce, the purpose of this kind of provision is plain: workers are not to lose their bargaining rights as the result of some legal sleight of hand by their employer. Similarly, when an employer is struck, a union's ability to pressure it will be diminished if the employer can continue to carry on its profit-making activities through an associated, but legally distinct, business. Hence, the ally doctrine allows a court or a board to find that, if the business of the struck employer and that of the target of any secondary action by its trade union, are sufficiently integrated, they may be treated as if they were one business for the purposes of labour law. Where the businesses are companies, as they often are, this effectively amounts to a piercing of the veil. The second business is treated as if it were part of the first one, the legally struck one. Legal secondary boycott prohibitions will not apply.

Similarly, a question may arise as to whether the employees of one employer are to be treated as the employees of another for, say, the determination of the appropriate bargaining unit or for deciding whether one employer should be made responsible for the negotiations or negotiated agreement of another. These kinds of questions most often will arise where a web of corporations form one business group. North American labour relations law sets out to side-step the tenets of corporate law. There are provisions which permit labour relations boards and courts to treat such a web of inter-connected employers – which, allegedly, is being used to defeat the goals of collective bargaining legislation – in such a way as to ignore the legal separation between the connected businesses. These provisions, for labour law purposes only of course, treat the group of businesses in the same way as do their owners and creditors: as related or affiliated businesses whose co-ordinated conduct must be viewed as the conduct of *the* business. Typical of this kind of provision is s.1(4) of the *Ontario Labour Relations Act*,[6]:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grand such relief, by way of declaration or otherwise, as it may deem appropriate.

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This account, incomplete as it is, should suffice to point to some extraordinary features of the Workplace Relations Act.

The Australian statute has taken Americanization to its logical extent and further. Its privileging of voluntary agreement-making comes closer to the individual employer – individual employee model than does the North American one. The latter, after all, was established explicitly to enable workers to off-set their vulnerability in individual contract settings. Hence, in North America, it is wrongful for an employer to undermine a trade union by trying to contract with individual workers in a unionized workplace. No such barrier is to exist in Australia. Here the federal legislature, undoubtedly encouraged to pursue extended liberal market principles by the recent draconian labour law changes in Victoria, Western Australia and New Zealand, has gone further than its North American counterparts. In addition to this manifestation of the government's desire to return to the nineteenth century, and more pertinent to this essay, the Workplace Relations Act does not furnish any ameliorating protections, such as the successor right provisions, the ally doctrine, the related and affiliated employer provisions, found in the North American schemes. It is this which made the Patrick group of companies' exploits possible.

These exploits are well-known. The Patrick group of companies are so-called – by the judges sitting on the case, as well as by popular commentators – because they formed a tightly integrated business. That business was that of stevedoring. It required, like all businesses, capital, equipment, premises – in this case cranes and docks – etc., and workers. All these resources and activities were gathered together through a byzantine network of tightly integrated corporations. There was a minimum of eighteen active corporations in the group at any one time. Lang Corporation, a publicly traded corporation, through a series of interlocking shareholdings, controlled all of these activities. The same directors and shareholders appear everywhere in the organization charts. There was no mystery in the business world, in the real world, as to who ran the show. Messrs. P. Scanlan and C. Corrigan were major shareholders in Lang Corporation. Scanlan also was a director of four of the subsidiaries and a Mr. Dunn was the Company Secretary and/or director of fourteen out of the eighteen companies. Mr. Corrigan was not only the CEO of Lang Corporation, he was also a director of fourteen out of the eighteen companies in the group. This is why the press attributed the activities of the stevedoring business to Mr. Corrigan and this is why, when bottom line adherents thought the corporate shenanigans of the Lang Corporation network were going to succeed in ridding the Patrick group of the MUA workforce, they hailed Mr. Corrigan as something of a

master tactician and capitalist hero.[7] From a real world point of view and from the workers' perspective, until the legal corporate ploy was set in motion, no one cared how Corrigan and his comrades organized their business affairs. After all, those were 'their' business affairs.

The so-called brilliance of the scheme was that Corrigan and the Patrick group of companies exploited the legal doctrine of separate corporate personality which, to the disgruntlement of many straightforward corporate legal scholars, has failed to come to grips with the reality of company groups. The doctrine simply states that, once all legal formal requirements are met for incorporation, the product, a corporation, is a separate, mature, legal person with all the capacities (and more) of a human being. This legal person, whether part of a group or not, must henceforth be treated with the respect we accord all individuals in a liberal polity.

Just over six months before the locking of the gates to MUA workers reporting for their midnight shift, the Patrick group of companies started to behave as if they were unrelated strangers to each other. They engineered what they called a Business Purchase Agreement. The corporations in the group which employed the MUA workers who did the actual stevedoring for the Patrick group as a whole, sold all their assets to a sister corporation. These former employer companies then used nearly all of the moneys paid to them to pay back lenders (mostly members of the Patrick group of companies) and to buy back shares they had issued. They bought these shares back from shareholders who, of course, were other members of the Lang-Patrick group of companies. What this meant was that the former employer companies were left with no stevedoring business or other assets, although none of the assets had been lost by the Patrick group as a whole. The former employer companies then developed a new business: they set out to become the suppliers of labour to the corporation in the Patrick group which had bought the former employer's assets and which now was to obtain the usual stevedoring contracts from the customers of the former employer corporations. The companies which previously had employed the MUA workforce directly to perform obligations under those stevedoring contracts now merely were to supply these workers – as a commodity, as their only saleable asset – to their siblings, the corporations, which had bought their other assets. These Labour Supply Agreements (LSA's), as they were labelled, contained a clause which permitted the Patrick company which now did the stevedoring to terminate the LSA's should there be an interruption of the supply of labour for any reason. The interruption of supply was, of course, inevitable given the Patrick group of companies' obvious endeavours to find non-union labour for its operations. In addition

to the Dubai venture, the frantic (attemptedly hidden) consultations with the government and the expressed sympathy by Patrick's for the National Farmers' Federation's announced intent to develop a non-union workforce, its sub-lease of Webb Dock No. 5 to a National Farmers' Federation company was a rather obvious indication of the Patrick group's intent.

To put it more directly: the MUA industrial action which interrupted the labour supply was provoked, permitting the Patrick stevedoring corporation, which had LSA's with the former employer corporations, to activate the termination clause in those agreements. The LSA only corporations now could not use their only asset, the MUA workforce, to make profits. And, then, their sisters and brothers, together with their common parent, made an 'arm's length', solemn decision not to lend the LSA only corporations any more money or to fund them in any way. By a stroke of a pen, the LSA companies had become technically insolvent. They were put in the hands of an Administrator who, under the Corporations Law, would have the task to put them back in business if at all possible or, if not, to pay off the creditors to the extent this could be done.

In short, the Patrick group of companies or, more accurately, their lawyers, had spawned a scheme which relied on secrecy (the MUA workforce did not come to know of the internal restructuring of the Patrick corporate group until the gates had been locked) and on the rigidity of legal doctrine which treats each corporation as a distinct entity. They had counted on the internal logic of corporate law – designed to serve the wealth owning classes – to overcome the internal logic of labour law – designed, in part, to promote the civil liberties of all Australians. Here, two preliminary observations are offered.

First, even though the law surrounding successor rights, the ally doctrine, related and affiliated statutory provisions, are sufficiently complex to make sanguine predictions about how they will be applied in any one situation fraught with danger, it is clear that, in the North American setting, the MUA would have had a battery of labour law weapons, specifically designed to overcome manipulations permitted by corporate law, at its disposal. This indicates that, if the Workplace Relations Act's regime stays in place, Australian trade unions and their allies would do well – at least, as a first step – to look to the U.S. and Canada for ways in which the Patrick-type exercise can be countered. The need to do something is real. Citing the dismissal of staff by Kellogg three years earlier, the *Australian Financial Review*, 19 April, 1998, reported that: 'Outsourcing has been the hidden face of union busting in the 1990s. Companies have been contracting out business functions to rid themselves of militant workers, downsize their

labour forces and change work practices in the face of union resistance ... What Patrick has done has taken this trend to a new level. .... Once the precedent is set, others are sure to follow.'

Second, the Patrick group of companies was relying on the well-known reluctance of Anglo-Australian judges to pierce the corporate veil. Corporate scholars have written about this timidity copiously, pointing out how, by hiding behind a small corporation, a few individual entrepreneurs may feel freer than they otherwise would to take undue risks in their search for profits. The entrepreneurs' calculation is that, in the end, it is possible to displace the costs of those risks when they materialize. This may happen because the corporation, as *the* legal actor having created a risk, will be *the* person responsible. If the entrepreneurs were directors or senior officers of the corporation, more often than not, their conduct will be treated as the conduct of the corporation, not as their own, thus shifting their responsibility for the inflicted harms or costs to 'their' corporation. As shareholders, these same entrepreneurs have an even more clearly spelt-out limited liability: their potential liability is limited to the amount they have actually invested in 'their' corporation. If there never was much by way of capital in the corporation (and there is no legal requirement for a minimum amount of capitalization!), or its assets have been stripped, financial, trade and other creditors, such as workers, as well as consumers, the environment and the local community are likely to be left to pay for the legal irresponsibility of the human entrepreneurs hidden behind the corporate veil.

It is not true to say, however, that courts never pierce the veil. Sometimes they are so offended by the way in which the corporate shield is used that they call the corporate scheme a sham or a fraud; sometimes other legal actions are available to get at directors and shareholders which have the same effect as piercing the veil, while not requiring the court to do so openly (Pickering, 1968); sometimes other legislative schemes effectively allow the veil to be lifted, as in the North American labour law regimes discussed above and, sometimes, legislators have imposed personal responsibility on directors (Glasbeek, 1995a, 1995b). But, the starting point and the overall stance of common law is that the veil should not be pierced. The exceptions are just that: exceptions.

The law, then, lags behind the realities of the business world. This is even truer than the account thus far suggests because, more and more, the corporate vehicle used is that of a group of corporations, rather than a single corporation whose veil, in any event, is hard enough to tear away. As Hadden (1992) has noted:

> In ... Australia ..., it is ... common for major groups to be structured in a more complex manner, with interlocking webs, of majority and minority holdings, which make it ... difficult to assess accurately the profitability and solvency either of the group as a whole or of its constituent companies or *to identify those who are formally responsible for their operations*.
>
> (At p. 64, emphasis added).

And, again, at p. 62:

> The traditional rules on the duties of directors and officers of individual companies makes little sense within groups ... this makes it too easy for complex corporate groups to be used to confuse or defraud the business or investment communities.

While the Corporations Law addresses some of the problem of corporate groupings, particularly in respect of financial reports, conflict situations for directors, and the oppression of minority shareholders in a group, it does not directly demand that the corporations within a group be treated other than as separate legal persons. Sometimes courts do treat a group of corporations as one business but, more often than not, decisions which acknowledge that a group carries on business as an integrated whole still go on to treat each member of the group as a separate, property-owning entity for most legal purposes. This retention of separate legal personality will be abandoned only if it is crystal clear that the principal corporation in the group can direct the other corporations to do as it wills (Sargent, 1987). When the latter circumstance exists, Australian law permits the directing corporation to be characterized as a *de facto* director. This imposes some responsibilities for group activity on the controlling corporation (Hadden, 1992). These exceptions are narrow. The common law is vastly behind developments in the European Community (Gower, 1997: 66; Sargent, 1985) where it is more common to treat the members of the group as being responsible for the conduct of the others.

Even though English and Australian courts are fairly characterized as hanging on to old corporate law principles in a radically transformed corporate world, there is some logic in their adherence to such formalistic interpretation. If a corporate group may be treated as one business, would there not also be questions about whether to do the same when faced with other interdependent, close-knit relationships constituted by legally separate actors, such as when contractors and sub-contractors have long-term relationships, or in the case of a banking network and/or a franchise arrangement, and the like? Might this not introduce great commercial uncertainty? More, the corporate veil does have supportable objectives

which makes piercing it problematic. The creation of a separate legal person which assumes ownership of the investors' contributed capitals and which limits their personal liability, encourages the aggregation of capitals. They thus can be deployed in a more efficient way and the scheme increases the number of ventures any one owner of wealth may undertake because material risks from one corporate adventure are likely to be off-set by profits earned through another corporation's activities. The point here is not to support the line of argument which endorses a rigid approach to the corporate veil but, rather, to note the availability and importance of this line of argumentation, one which is given greater weight by a judiciary charged with maintenance of the status quo than it is by other institutions, policy-makers or commentators.

From this perspective, the decision of the five High Court judges who won the day in the MUA case is not so earth-shattering. What they ruled was that, while the MUA's position should be safeguarded so that, if its allegations were proved to be true, the rights the union had prior to the alleged wrongdoing could be restored, it was equally important to preserve the rights of each of the employer corporations in the Patrick group of corporations as if they were separate entities which personally had obligations to their shareholders and creditors. To this end, without looking at the group as a whole, the justices decreed that each of the LSA only members of the Patrick group of companies should be treated as individuals whose continuance as business entities should depend on their personal obligations and potentials. The appointed Administrator, acting on their behalf, should be left with the discretion to manage each of them as their *own* board of directors – which owed only a duty to each corporate individual – would have had to do.

Looked at in this way, the decision is a rather unremarkable one in corporate law. While critics might cavil about the stodginess of the High Court's formulation, such criticism would be no different to the many long-standing general laments about the judiciary's inability to deal adequately with the reality of corporate groups. This suggests that this case was not special in any way. Yet as, in this case, the decision also has an effect on trade union rights, some might see it as a decision which, in effect, was anti-union. But, apart from Callinan J., all of the judges sitting on the High Court went out of their way to say that the MUA's claim was a legitimate one and had to be respected. The determining High Court judges upheld the trial judge's ruling validating the MUA claim, merely modifying it to the extent that their neutral reading of corporate law *forced* them to do.

But, there was more to the decision. The technical question of the corporate legal personality of members of a group of companies had been asked in the context of a countervailing principle notionally of equal importance to the courts, viz., the liberal political rights of individuals in a polity governed by the Rule of Law. The decision, then, required answering other questions than the ones explicitly canvassed. The questions were not addressed directly by the judges, but they did answer them, if somewhat subliminally. These questions included:

(i) what, if anything, are the implications of the legislature's increased reliance on s.51(20), the constitutional corporate law power, to regulate labour relations law? And, relatedly,

(ii) what are the implications arising out of the decision for some of the larger debates about corporate law, such as the notorious stakeholder debate?

The Implications of Making the Corporation the Pivot of Capital-Labour Regulations

It is quite likely that the government reached for s.51(xx) of the Constitution as the constitutional basis for much of what is revolutionary about the Workplace Relations Act, in particular the endorsement and prioritising of various private voluntary bargaining schemes (as well as for remedies for unjust termination which previously had been governed via the external affairs power), because it was there. The policy-makers knew it was available because the Labor Party had exploited it to ground its enterprise bargaining provisions in 1993 (Ford, 1994). But, this is not to say that the use of the constitutional corporate law power had no other implications.

S.51(xx) provides that the federal government may make laws with respect to 'Foreign corporations and trading or financial corporations formed within the limits of the commonwealth'. From the point of view of giving federal labour relations legislation based on this constitutional power bite the definition of the corporations named in s.51(xx) needs to be wide. The courts have obliged.

Whereas trading corporations might have been seen as those whose predominant business it was to trade, the courts have not been so narrow-minded. Rather, they characterize a corporation as a trading one if it is one whose trading activities form a significant proportion of its overall activities, or, if any trading in which it engages is not an insubstantial part of its business even though it is incidental to other activities carried on by the

corporation. In short, while not every corporation which trades (for example, where the principal objective of the corporation is religious or educational or where the corporation is a holding corporation whose subsidiary engages in trading) is a trading corporation for the purposes of s.51 (xx), the term 'trading corporation' covers a huge number of corporations (O'Donovan, 1977; Ford 1994, 1997; Hanks, 1996).

Similarly, in terms of what kinds of laws the federal government may make with respect to trading (and foreign and financial) corporations, the reach of s.51 (xx) has been extended. S.51 (xx) will validly ground even a law which is not drafted for the express purpose of regulating the rights, duties, powers and privileges of trading (and foreign and financial) corporations. Such a law will be constitutional if it operates to affect such corporations in sufficient degree or to a sufficient extent. While what a sufficient degree or extent are create a contestable terrain, the purpose of the courts is plain enough: to expand the scope of s.51 (xx). Indeed, the High Court has opined that the motive underlying the legislation enacted under s.51 (xx) will not matter if it technically qualifies as an otherwise valid s.51 (xx) statute. Notionally, this means that s.51 (xx) legislation could be used to advance something not envisaged by this constitutional power. For the purposes of this paper note that s.51 (xx) could be used to justify legislation which has as its objective the regulation of terms and conditions of employment, as long as the legislation is directed at trading corporations, widely defined, or foreign or financial corporations (O'Donovan, 1977; Hanks, 1996; Ford 1994, 1997). And, given that this section of the paper is about the regulation of labour relations through the corporate law power, it is also pertinent to note that s.51 (xx) was held to justify s.45(D) of the Trade Practices Act 1974 (Cth) which prohibits secondary boycotts, even though s. 45(D) imposes obligations on persons which/who are not trading corporations. It was held to be sufficient that the legislation addresses damage which might be inflicted on a trading corporation.[8] It is clear, then, that s.51 (xx) can be used to underpin labour law legislation as a result of the High Court's ever-expanding vision of the scope of the constitutional power.

This imperialism of the corporate law power reflects the growing acknowledgement of the centrality of the corporate vehicle. The corporation is increasingly favoured as the means by which to participate in a market economy. This draws attention to an assumption which justifies the use of the corporate law power to regulate capital labour relations, namely that this promotes the workings of the competitive market.

The government seeks to find resonance for the regulatory scheme it pioneered through the WRA by asserting its zeal for the promotion and

facilitation of competitive market activities. Indeed, its defence of making freedom of association, including the freedom not to associate, one of the stated goals of the WRA (s.3(f)), was that the government was not anti-union but, rather, pro-competition and pro-democracy. Naughton (1997: 113) cites John Howard's Address to the Committee for Melbourne, 18 July, 1995:

> Just as we have removed statutory protection from various industries and activities, the same must apply to the trade union movement. Unions are ultimately a component of the service industry. They compete in the market for labour representation, and they must be subject to market discipline .... Members in an individual workplace should have the right to join an enterprise union rather than an industry or craft-based union, if that's what they want. That is the only way in which democracy can be restored to the union movement and office bearers made fully responsive to their members' needs and interest.

That the government is able to put the matter in this way helps explain how its drive for a more competitive production model, for more competition-enhancing capital-labour regulations and for its 'reform' of unionism, has struck a chord with many in the electorate, way beyond what might have been expected if the only claim being made was that the government was trying to promote economic efficiency. What the government and its allies cleverly exploit when they push the 'let us increase competition' button is the perceived link between the ideals of political liberalism and the idealized market.

The idealized market holds that, if each individual decides how to use her/his resources to enable her/him to exchange her/his products for that of another, each individual is making free decisions about what to do and produce and what products and services made by others to buy. If all individuals behave in this way, competition amongst them will make sure that no one individual will be in a position to set the prices of goods and services. If one competitor makes large profits, others with similar talents and resources will soon compete for a portion of those profits until all demand for the goods or services are satisfied at a particular price level because no one can produce them for less. This makes for the most efficient allocation and use of all available talents and resources. More important to the argument in the paper, all these decisions are to be made without anyone coercing anyone else. The idealized economic market system, in which countless individuals act as discrete atoms, mirrors the idealized liberal polity. Further, it actually enhances the attainment of some of liberalism's goals.

When most of our needs and wants can be met by the spontaneous acts of individuals free to make their own decisions about what to produce and what to ask for, there is relatively little need for any central, governmental economic planning. Thus, while an intelligent market proponent, such as Milton Friedman, concedes that planning may be just as efficient as competition in the production of welfare, although it is unlikely to be so, he contends that what makes a market regime superior is that it reduces the role of the state to that of being a facilitator enabling market practices to reign. 'Freedom from' is enhanced by the scheme, an idea that is dear to liberal hearts (Friedman, 1962).

In this setting, liberal law is to promote the protection of property (so that each individual can do with her/his resource as s/he wants) and freedom of contract (so that each atomistic individual can choose with whom to exchange what) and pro-competition laws. Further, the state should butt out as much as it can; it should not impose contractual conditions on sovereign actors, including employers and employees. Liberal law, thus, will support individual freedom and be facilitating the market. The WRA supports all of these objectives.

There is, however, a fly in the ointment. The use of s.51(xx) makes the corporation the key actor in the liberal/market regime which the Act promotes. The corporation is not supportive of the ideas of either liberalism or the market.

For the use of the corporation to be consonant with market principles, the corporation is to be seen as the equivalent of a sovereign individual, engaged in market activities. It is helped in this by law which treats a corporation as a legal person, distinct from its incorporators, its management and its employees. But, it is obvious that, in reality, a corporation is a collective. It is a means to gather together resources, inorganic and organic capital, to profit from their aggregation. On the face of it, then, the corporation is not a market actor in the idealized sense. Inevitably, a great amount of justifying theorizing goes on in the books to overcome this gap between the tenets of the market and what is purported to be a major actor in the markets. Some of these theories argue that the corporation should be treated as a natural entity, made up of many component parts but which, in its dynamism, is a single organization which transcends, and is separate from, the sum of its parts (G.W. Paton and D.P. Derham, 1972). More prominent than the realist and organization theorists today, is the law and economic school of theorists which contends that the corporation is comprised by a network of contracts entered into between individual market actors: share-

holders, directors, managers, workers and capitalizing creditors. (Easterbrook and Fischel, 1991).

From any of these perspectives, the corporation is a fitting market actor (or, for the law and economics people, a set of market actors). But, whatever the merit of these theories, the fact is that, for the most part, courts treat corporations as separate fictional legal persons, not as real natural entities, as organizations in their own rights, nor as a nexus of contracts (Glasbeek, 1995b; Ziegel et al, 1994). This is evidenced by the way the High Court, and all the lower court judges, dealt with the Patrick group of companies. Each of them was treated as one *fictional*, separate legal person.

The second point to make about corporations in this context is that the corporation is run on a hierarchical basis. Indeed, the neo-classical proponents of the corporation as a means to attain more efficiency for the contractors who have created the network labelled the corporation, insist that its hierarchical model of organization is one of the great strengths of the corporate vehicle (Coase, 1937; Williamson, 1984). What this means is that there are good reasons why the corporation should not treat every person within its umbrella equally. And it does not. Pertinently, it clearly gives shareholders more rights than workers. Again, there is a lot of theorizing about the fact that, whether it is a corporation or an incorporated employer which/who employs the workers concerned, their lack of a legal right to take part in decision-making about the deployment of property and the nature of production, as well as their duty to obey reasonable orders from the employer, stems from their freely given consent to these constraints. It is only if this is assumed that an employment contract can be seen not to offend the tenets of liberalism. It is only when this is assumed that the market principle that each individual freely makes choices about whether to invest her/his resources and talents can be said to operate. But, as many critics have noted, the assumption that the contract of employment is a voluntary one, as opposed to one in which non-wealth owners *must* enter, is highly contestable (Selznick, 1969; McPherson, 1984; Chin, 1997). The corporation's treatment of workers as inferior outsiders, as people with less rights, creates tensions.

It is, of course, the very characteristics which make the corporation a poor fit, both with the market model and with the liberal polity, which make it attractive to capitalism. Here capitalism is distinguished from the market. Capitalism is a set of relations of production, a system; the market merely is a mechanism to give a system life. As long as the market helps capitalism flourish, it will be favoured. If other mechanisms facilitate capitalist goals, such as the fictional separate corporate vehicle, they will be used whether

or not they are a smooth fit with the market mechanism. The corporation is an ideal instrument for the accumulation of wealth, collecting and putting together capitals in an efficient way. More, the accumulation of wealth by the extraction of surplus value from workers is aided by the corporations' perfection of the subordination of workers within its structure. Its very form of governance which includes legal support for the illiberal one dollar one vote principle, makes the corporation more efficient as a subjugator of its labour force than other forms of productive organization. Within a corporation, there are no natural, formal means by which workers can participate in overall economic decision-making, nor are there any means enabling them to confront the actual owners, an opportunity which is more readily available in the non-corporate setting.

Added to this catalogue of disjunctures between liberalism/the market, on the one hand, and the corporation, on the other, there are other reasons for anxiety about the uses made of the corporation as the instrument through which liberalism and the ideal market are to be promoted. Unlike the first set of dissonance-creating problems, these additional reasons have a great deal of resonance with proponents of a liberal polity and of a market economy. Their concerns about the corporation arise because they want liberal democracy to work more like it is supposed to do and because they attribute some of the shortfalls to the sheer size and power of dominant corporations. Their argument has a number of strands:

(i) Management, relatively insulated from shareholders' control in such large firms, has discretionary control over the assets and direction of the corporation. As long as that discretion is exercised in such a way that it satisfies the diffused shareholders by generating good – if not necessarily the best possible – profits and dividends and/or maintains the value of the issued shares at an acceptable level, management will be left alone. Management should be urged/encouraged to use the ensuing discretion for laudable social purposes, rather than to maximize profits at the expense of workers, the environment, consumers, or corporate-dependent communities. (Berle and Means, 1932; Berle, 1931, 1932; Dodd, 1932; Cary, 1974; Galbraith, 1985; C. Stone, 1975);

(ii) Other critics actually argue that such requirements to do 'good' have to be imposed on corporations because large dominant corporations, more often than not constituted as integrated groups of corporations, have the power – by investing or de-investing, by choosing what products to put out, what technology and processes to use, – to affect the way people live or even if they live. They make decisions which, while they are not legally binding in the same way as governmental ones are, functionally

have very similar effects. This was summed up in Nadel's (1975) phrase 'situation bindingness'. In essence, the argument is that there are a number of persons outside the umbrella of such large corporations who cannot avoid the impact of decision-making by these corporations and, therefore, should have their rights and privileges safeguarded by protective legislation or by the right to participate effectively in corporate decision-making (Nadel, 1975; Schrecker, 1985; Dahl, 1970; Deetz, 1992).

This is the thrust behind the social responsibility movement and/or the arguments to give stakeholders, i.e. non-members of the corporation, some say in corporate decision-making. The underlying premise is that, in the absence of a new approach to corporate obligations, the market and liberal democracy both run the risk of losing legitimacy. The corporation will be seen for what it is: a capitalist's vehicle, one whose goals are not consonant with liberalism. A disjuncture between capitalism and liberalism will become visible.

On the left, it is argued that such face-saving as the imposition of this kind of responsibility on directors is incompatible with capitalist and corporate law logic (Glasbeek, 1988). Somewhat curiously, this supports (if for very different reasons) the position of the law and economic scholars who argue strenuously that, as the public and private spheres must be kept firmly discrete, to load a corporation with any responsibility but the maximization of profits would lead to distortions, both in the private economic/efficiency and in the political/democratic spheres (Eisenberg, 1983).

This short account brings us back to a statement made earlier in this paper to the effect that the MUA litigation presented the courts with some stark choices. Either they were going to pay full faith and credit to the ideals of the rule of law and the protection of individual free choice – as embedded in s. 3(f) and Part XA of the WRA – or they were going to permit the Patrick group of companies, an obvious collective of integrated persons and businesses, to claim that it was really a bunch of separate market actors whose individual obligations to a very narrow number of stakeholders be considered separately. These 'individual' obligations would, therefore, be given priority over any other requirements to be made of the Patrick group of companies as a collective. In the end, the narrow reading, the second reading, won out. This reading of corporate law which upholds the very characteristics of corporations which create tensions for the tenets of liberalism and the market, has a significance beyond the actual outcome of the case. In taking this stance, the High Court endorsed the legitimacy of using the corporation as a device for the accumulation of wealth by investors

at the expense of their workers (and, arguably, at the expense of other similar stakeholders) and, just as importantly, it plumped for the promotion of the accumulation of wealth even if this enured to the detriment of clear, statutorily-expressed liberalism-promoting policies and goals. In essence, while the judges never actually said that they supported the role of the corporation as a capitalist tool, the way in which they came to their decision suggests that they saw it to be the role of corporate law to maintain capitalism's goals, even if this meant that the corporation was to be revealed as something more than a facilitating device which enhances free market activities in a liberal polity.

Some Significant Features of the High Court Decision

As seen, the High Court felt that there was no way that the MUA's use of the logic of the Rule of Law could be denied. Even though the MUA's claim depended on standing the intention behind the government's formal provision of freedom to associate on its head, the court recognized that the claim was, in liberal legal technical terms, a good one. Hence, once they had decided the trial judge had not made any legal mistakes in his finding that the MUA had raised a serious question, there should have been nothing left for the judiciary to do. The order of the trial judge was designed to preserve the rights of the MUA and its members so that, if the MUA's allegations were held to be valid in any subsequent trial, the workers would be in a position to claim restoration of their violated legal rights. But, this is where the High Court showed its colours.

Gaudron J., assumed to be (with Kirby) one of the more progressive members of the bench, upheld the trial court's order. While she did not join the five judges who upheld the trial judge's order but modified it, she did agree with these five judges on the need to preserve the principle which caused them to modify the order. This principle was that the pro-freedom to associate order made by the trial judge should not be so wide as to cause the LSA only corporations to be unable to meet any of their primary obligations they owed as individual legal persons. Whereas Gaudron believed that the trial judge's order did not violate this principle, her colleagues did and modified the order accordingly. The unanimity on the central point, however, was clear: while freedom of association was to be safeguarded, corporate law demanded the same protection for of each of the individual corporations' creditors. The Administrator of the technically insolvent LSA only corporations was, therefore, given explicit discretion to close down the operation of the LSA only corporations – and, thereby,

given the right to terminate the supply of MUA workers to associated Patrick stevedoring operations – if corporate and bankruptcy law, that is, the law regulating relations between members of the same class, demanded such a shut-down. As a consequence, the MUA was sent back to the bargaining table with some chips. It could threaten to bring its conspiracy action to trial should the Patrick group of companies prove obdurate during the negotiations. But, the chips had lost some of their lustre. The Administrator might close down the LSA only corporations unless the MUA agreed to reduce its demands so as to enable the Administrator to keep the LSA only corporations financially solvent. That is, the High Court had perceived the trial judge's order supporting liberal political rights to be too harsh on the freedom of corporations to do as capitalism needs them to do.

Yet, the order which the trial judge had made hardly had been a clear-cut victory for the MUA. To get it, the MUA had had to give some remarkable undertakings. If the government had issued an order which had imposed these undertakings as conditions for having the MUA's members reinstated, it is likely that the MUA would have resisted the government vehemently. To get its judicial interim order, the MUA agreed to indemnify the Administrator should he, in his attempt to get the corporations to recover, incur liabilities to workers and other creditors. The Corporations Law makes an Administrator of an insolvent corporation personally responsible for debts of the corporation which were incurred when under the Administrator's control. In addition, the MUA undertook to help the Administrator return the LSA only corporations to solvency by having its members work without pay for a number of days each month until corporations were adjudged solvent. And, to make sure that the LSA only corporations would be able to return to solvency, the MUA also agreed to curb industrial action.

These remarkable undertakings did not satisfy the majority of the High Court, even though the nature of the undertakings indicated that the trial judge and the MUA acknowledged the possibility that the LSA only corporations might not be returnable to solvency and would have to be wound-up by the Administrator. Indeed, this is the way in which Gaudron read the order and why she felt it did not need to be modified. Further, the trial judge's order was premised on the basis that each of the LSA only corporations should be treated as a separate person, each legally independent of the others and separate from the people and corporations which ran the Patrick group of companies. As seen, this was something the majority in the High Court thought should be done. Yet, even though the trial judge's order satisfied this High Court objective, the High Court still felt it had to modify the order.

Concretely, while the High Court's modification of the order technically may have reduced the number of chips the MUA had left when it sat down to negotiate after the litigation, in practical terms the loss was not so great. As noted, the MUA already had accepted the possibility that the Administrator might close down the insolvent corporations and already had undertaken that its members' would help pay for their own jobs. In this context, the explicit directive permitting the Administrator to wind-up the corporations may not have altered concrete reality all that much, although it may well have had an impact on the atmosphere in which the negotiations were conducted. The conclusion is inescapable. The High Court went out of its way to modify the order not so much to affect the outcome of the decision but to make some points about the role of corporate law. These points were hidden in the reasoning.

One of the questions before the Court was whether there was an inconsistency between a federal law, the WRA, and a State law, the Corporations Law.[9] There are constitutional interpretation rules to deal with problems arising out of conflicts between the exercise of federal and state jurisdiction. But, before these rules can be applied, there must be a finding that there is such a conflict. Here, the five judges of the High Court who won the day, held that there was no such conflict. The WRA, they held, deals with the relations between employers and employees or with conduct engaged in by people qua employers, qua employees. By contrast, they found that the Corporations Law was designed to deal with the constitution, administration and assets of corporations. The Corporations Law, they indicated, was there to regulate corporations as entities and the rights and duties of members and creditors of the corporation. The WRA and Corporations Law, therefore, had different objectives and there could be no conflict between them which would require the constitutional principles which deal with jurisdictional conflicts to be invoked.

In so holding, the High Court was saying that, where a trading, financial or foreign corporation acts as an employer, it is subject to the WRA, just as any other employer is. For the purposes of the regulation of the corporation's internal conduct, its relations to its shareholders and creditors, however, the WRA has no application. This explains the High Court's modification of the trial judge's order. It held that the workers' WRA rights should be preserved against the wrongful conduct of employers and others, but not to the extent that this interfered with these employers' obligations, *as corporations*, to their shareholders and creditors. A number of important points arise out of this analysis.

The High Court characterized the relations between the corporation as employer and its employees as a relationship between the corporation and outsiders, i.e., outsiders to the corporate entity. Implicitly, then, the High Court showed itself to be inhospitable to an argument made by proponents of a right for stakeholders to participate in corporate decision-making, much as if they were members of the corporation (Hill, 1995; K. Stone, 1993). Hill elegantly points out that large, publicly-traded corporations should no longer be solely concerned with the rights of shareholders to have the return on their investments maximized. To bolster a case for wider social responsibility, she notes that corporate law already requires corporate actors to concern themselves with the rights of creditors. So, she asks, why should not the rights of workers be protected better than they are?

The argument is attractive. After all, the protection of shareholders' interest and their right to participate in corporate decision-making are posited on the fact that shareholders have taken a risk when investing in the corporation. Obviously the same is true of workers. In spades. Workers, unlike shareholders, cannot limit their risk of their investment. But, this appealing argument, this legally plausible argument, runs slam-bang into the real nature of the corporation, namely, its role as a vehicle for the accumulation of wealth by the extraction of surplus value (as contrasted to a vehicle which merely provides a convenient, an instrumental, way to engage in market activities). Hence, while the High Court's modification of the order may not have had all that much impact on the actual outcome of the eventual negotiations, the High Court went out of its way to indicate that the role of law in perpetuating and maintaining capitalist relations of production was more important than the Rule of Law (as reflected in the political rights of all individuals, including workers') and, as a corollary, that the regulation of employment via the corporate law power signalled a return to less mediated capital-labour relations.

This assertion is supported by the fact that the High Court's modification of the order protected (as the Corporations Law mandates) the rights of creditors (even of employees if they present themselves as creditors, rather than employees) as if they were quasi-members of the corporation. This privileging of creditors over workers has a class basis, i.e. a basis which shows that the law treats the corporation as a vehicle by which to maintain a class-divided polity. As corporations get more and more capital by borrowing, rather than from the issuance of shares, i.e., from the equity markets (Hill, 1995), capitalist logic mandates that creditors be given more rights against the corporation and more power within it (Glasbeek, 1995a). The Corporations Law is beginning to reflect this trend. More important

here is the fact that, in the view of the High Court, the provision of labour power does not rate the same kind of protection as does the provision of money capital to the corporation. This speaks to the High Court's clear understanding of, and sympathy for, the agenda of capitalism as opposed to the agenda of liberalism and the competitive market. Workers within the corporation and financial creditors of the corporation belong to different classes and they are to be treated differently by the corporation and, therefore, by corporate law.

Summation

The MUA litigation is not noteworthy for what it actually decided, nor for what the High Court actually said about labour relations law. Its significance lies in the more hidden aspects:

(i) The use of liberal law – even when apparently successfully employed – has limited possibilities for workers pursuing their causes. In part, this is so because workers have to curtail their demands in order to get relief and, more importantly, they must accept the legitimacy of the law they use, even when it comes to be used against them. This is why the ACCC's launching of an action against the MUA for having engaged in an illegal combination when it took industrial action, could not be dismissed out of hand and created hurdles which were very hard (and very costly) to clear before the MUA could finalize its negotiations with the Patrick group. In the same way, when the MUA went to court to find legal support for its stance, it implicitly accepted the validity of any findings that courts would make in respect of the scope of corporate law, even if this led to a curtailing of labour relations' rights. If they endorse law as a liberal institution, workers cannot raise class arguments when liberalism treats them badly. The reverse is not true.

(ii) A court, when faced with the question of whether to protect wealth-owners over the non-propertied classes, will try to obfuscate the fact that there is such a conflict. In the MUA case, the High Court did this rather well. But, this did not prevent it from signalling its preference for the rights of wealth-owners over that of all others. Wealth-owners can rely on the malleability of law to have their property rights protected, even if this leads to distortion of liberal legal precepts.

(iii) The High Court, while it did not address the issue directly, put a dent in the hopes of those who are advocating that the corporate vehicle should be more like a quasi-public organ, one charged with the common good, rather than an avaricious accumulator of wealth for the benefit

of entrepreneurs largely hidden from view and protected from responsibility. This does not bode well for workers and their unions who are now to be regulated under the aegis of the corporate law power.

(iv) The High Court, to the chagrin of those who want a more realistic approach to the issue of legal personality, continues to treat each corporation as if it were an independent atom. Not only is this regrettable from a corporate law scholar's point of view, it also puts workers and their unions at a disadvantage in a labour relations legal system in which their rights, increasingly, will depend on the identity of their employer. There is a real need to have the WRA amended to address this lacuna exploited to such telling effect by the Patrick group of companies.

Notes

1. A headline in *The Australian* 9 April, 1998, said it all: 'Howard seeks place among the champions of union-busting.'
2. It was language which allowed the making of a claim based on the negative aspect of freedom of association and which underpinned the (eventually failed) attack on the political rights of trade unions in Canada; see *Lavigne* v. *O.P.S.E.U.*, [1991] 2 S.C.R. 211. This idea also supported the successful, Thatcher-inspired, attack on the closed shop in England; see *Young* v. *British Rail*, [1981], I.R.L.R. 408 (Eu. Ct. H. Rts.). And, the infamous 'right to work' laws in the United States are really the right of any State government to exempt itself from the application of the federal collective bargaining law's legitimation of trade unions on the basis that the State wishes to promote the negative aspect of the freedom to associate, the right not to associate. For a summary of recent scholarly debates around the negative aspect of freedom of association, see Naughton (1997), pp. 118-19.
3. The Patrick group has claimed that the final deal will save it up to $50 million a year because of the redundancies and its invigorated right to manage. The MUA claims that it always had been willing to accept redundancies and that, while it had to accept a great number, it had preserved unionism on the wharves. Even the government boasted about the outcome because the MUA is to have much less control over work practices than before; see 'Waterfront: everyone claims a slice of the cake' *Australian Financial Review* 16 June, 1998, p.4; see also *The Weekend Australian*, June 27-28, 1998, pp. 22-23; see also G. Griffin and S. Svensen, 'Industrial Relations Implications of the Australian Waterside Dispute' (1998), 24 *Australian Bulletin of Labour*, 194.
4. I have addressed it briefly in 'E.I. Sykes and the Significance of Law' (Glasbeek, 1998).
5. Of course, those common law legal restraints had never completely disappeared and were being increasingly used as the right wing think-tanks encouraged employers to attack unions which thought they would be protected by the law and lore of conciliation and arbitration; see *Dollar Sweets Pty. Ltd.* v. *Federated Confectioners' Association*, [1986] V.R. 383; *Ansett Transport Industries* v.

Australian Federation of Airline Pilots (1989), 95 A.L.R. 211; *Building Workers' Industrial Union* v. *Odco Pty. Ltd.* (1991), 99 *Australian Law Review* 735.

6. S.O. 1995, c.1, Sch.A.
7. Under the title 'Corrigan's artful warfare' Alan Kohler wrote: 'The brilliant, ruthless attack by Chris Corrigan on the Maritime Union will have ramifications far beyond the waterfront ... The whole operation looks so meticulously planned over such a long period, and secretly involving such a large number of people, that the MUA was lost even before it knew what was happening.' *Australian Financial Review*, 11-12 April, 1998, p. 56.
8. Key cases in these developments include *Commonwealth* v. *Tasmania* (1983), 158 *Commonwealth Law Review* 1; *Re Dingjan; ex parte Wagner* (1995), 126 *Australian Law Review* 81; *Actors' and Announcers' Equity Association of Australia* v. *Fontana Films Pty. Ltd.* (1982), 150 C.L.R. 169.
9. The Corporations Law is in effect, a federally proposed law which the States, which have jurisdiction over general corporate matters (other than those based on s.51(xx) of the Constitution), agreed to pass.

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