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What is a genuine industrial dispute? Attorney General for the State of Queensland and the State of Victoria & Anor v Riordan & Ors; Ex Parte the Australian Liquor Hospitality and Miscellaneous Workers Union & Ors

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What is a genuine industrial dispute?
Attorney General for the State of Queensland and the State of Victoria & Anor v Riordan & Ors; Ex Parte the Australian Liquor Hospitality and Miscellaneous Workers Union & Ors.

Commentary on an appeal to be heard by the High Court against a judgment of the Full Court of the Industrial Relations Court of Australia

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Industrial law - jurisdiction - application for prerogative relief against AIRC - dispute finding based on non-compliance with log of claims - amended finding after second log of claims - whether claims made in logs were "plainly fanciful" so as to be incapable of giving rise to industrial dispute - authorisation of log of claims - whether service of second log terminated dispute arising out of non-compliance with first log - whether claim for career path capable of creating industrial dispute.

Headings in this case note:

1. Introduction
2. Factual background: the logs of claim
3. Paper disputes and genuine demands
4. A consideration of the Appellants' arguments
5. Conclusion

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1. Introduction

{1} There is a long standing doctrine that the service and rejection of a log of claims can generate an industrial dispute within the meaning of s 4(1) of the Industrial Relations Act 1988 (Cth). It is the scope of the qualification to this doctrine, namely that the demands in a log of claims be 'genuine', that is at the heart of this appeal. The appeal arises out of a finding made by Senior Deputy President Riordan of the Australian Industrial Relations Commission ('the Commission') that the service of a log of claims by the Australian Liquor, Hospitality and Miscellaneous Workers Union ('ALHMWU') and the Ambulance Employees Association of Victoria ('AEAV') on various employers in the States of Queensland, Victoria, South Australia and Western Australia and the Northern Territory gave rise to an industrial dispute.

2. Factual background: the logs of claim

{2} In April 1993, as a consequence of a decision to pursue federal coverage, the ALHMWU and the AEAV served a log of claims on the Commissioner of Queensland Ambulance Services. A similar log was served on employers operating ambulance services in Victoria, the Northern Territory and Western Australia. The log was accompanied by a letter requiring that the demands made in the log be observed within seven days. The log was extensive, containing some 77 items. A number of items are of particular relevance to the appeal. A demand was made for a weekly minimum wage of $2000 for all employees, together with increases to take into account inflation calculated in accordance with the Consumer Price Index. Additionally, a further claim was made for service payments for all employees of $100 a week for each year of service. A 30-hour week was demanded, with overtime to be paid at treble rates. Another demand was for a minimum of eight weeks annual leave, with an additional three weeks leave for employees required to work on a weekend. The employer was also required to implement a job classification and career path as determined by the union.

{3} The demands in the April log were not acceded to by the employers. Accordingly, the unions notified the Commission of the existence of an industrial dispute. A dispute finding was made by Senior Deputy President Riordan on 11 October 1993 based on the service and non-acceptance of the April log of claims. The employers appealed against that finding to a Full Bench of the Commission.

{4} In December 1993, and before the appeal to the Full Bench, was heard the ALHMWU and AEAV served a new log of claims. Whilst the log was similar in form to the April log there were some important differences. Instead of a weekly wage of $2000 a demand was made for a basic wage of $800 to be increased to up to $2500 depending upon the employee's skills and experience. The demand in relation to classification and career path was redrafted so as to make career progression dependent upon certain goals and not upon union prescription. Other demands such as treble time overtime and a 30-hour week were retained.

{5} As with the April log, compliance within seven days was demanded. The employers did not accede to the demands. The unions gave notice to the Commission of a dispute. Instead of making a new dispute finding based on the December log, Senior Deputy President Riordan confirmed the original finding but varied it to include the new parties and reflect the change in ambit. An appeal against this finding to a Full Bench of the Commission was dismissed. Applications were then made for prerogative relief against various members of the Commission. The applications were dismissed by a Full Bench of the Australian Industrial Relations Court.

3. Paper disputes and genuine demands

{6} It is a precondition to the exercise by the Commission of its award making jurisdiction that there is an industrial dispute extending beyond any one State: s 101 *Industrial Relations Act* 1988 (Cth). This requirement reflects the constitutional limitation on the Commonwealth's power to regulate labour found in s 51(xxxv) of the Commonwealth Constitution.

{7} It has long been accepted that the requirement for a dispute does not necessitate that there be an actual or threatened industrial dislocation or disturbance (see e.g. *Metal Trades Employers Association v Amalgamated Engineering Union* (1945) 54 CLR 387). This has since been reaffirmed by the High Court on a number of occasions (*R v Cohen; ex parte A-G (Q)* (1981) CLR 331 at 337, *R v Ludeke; ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 181, *Re State Public Service Federation; ex parte A-G (WA)* (1993) 178 CLR 148 per Mason CJ, Deane & Guadron JJ at 267 and per McHugh J at 302). Consequently, the High Court has held that a dispute may be created by the delivery of a formal written demand (a log of claims) and a failure to comply with that demand within the time stipulated (*R v Ludeke; ex parte QEC* at 181, *R v Cohen; ex parte A-G (Q)* at 336 and *Re State Public Service Federation; ex parte A-G (WA)* at 266 per Mason CJ, Deane & Guadron JJ). This mechanism is referred to as a 'paper dispute'. It has enabled unions to create an industrial dispute by the relatively simple expedient of serving a log of claims on employers in different States.

{8} In determining the existence of a dispute based on the making and refusal of a written demand, the High Court has held that the dispute must be 'real and not a mere fiction'. By this it is meant that the demands must be 'genuine' demands (see e.g. *R v Cohen; ex parte A-G (Q)* at 337-338 and *R v Ludeke; ex parte QEC* at 181). This qualification serves to prevent paper disputes being used as a mechanism for giving the Commission a general regulatory power over terms and conditions, thereby evading the constitutional restrictions on Commonwealth power.

{9} The question of whether or not a demand is genuine cannot be answered exhaustively. The question is approached by identifying when it is that a demand is not genuine. The role of the Court is to provide a framework within which to make that judgment, recognising that similar facts might be given different weight in different cases according to the industrial context. The High Court has sought to provide this framework by saying that a demand will not be genuine or bona fide if it is not genuinely advanced. So, for example, a demand will not be genuine if made for the purpose of invoking the jurisdiction of the Commission to resolve a dispute over which it would not otherwise have jurisdiction such as an intra state dispute (*R v Cohen; ex parte A-G (Q)* at 337, *R v Ludeke; ex parte QEC* at 181 and *Re PKIU; ex parte Vista Paper Products* (1993) 67 ALJR 604 at 610). The genuineness of the demand will not, however, be negatived by showing that the demand was served for the purpose of creating a dispute to enable the Commission to make an award for a particular industry. That most logs of claim are served for that very reason is a necessary consequence of the Commission's jurisdiction being dependent upon a dispute finding. The fact of service of the log will in most cases lead to the inference that the union wants to obtain improved conditions (*R v Ludeke; ex parte QEC* at 182). Consequently, the demands will be regarded as genuine so long as the log is genuinely advanced for the purpose of attracting the Commission's jurisdiction to make an award settling the dispute within the framework of the log (*R v Ludeke; ex parte QEC* at 182 & 191, *R v Cohen; ex parte A-G (Q)* at 340-341 and *Re PKIU; ex parte Vista Paper Products* at 610).

{10} The difficulty in providing a framework for determining whether or not a dispute is genuine is also exacerbated by the doctrine of ambit. As the Commission's jurisdiction can only be exercised in relation to disputes, it follows that an award made in settlement of the dispute cannot go beyond the scope of the dispute (*R v Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch* (1938) 60 CLR 507 at 538). This is called the doctrine of ambit. Its purpose is not to determine the existence of a dispute but to ensure that there is the

proper nexus between the award made and the prevention or settlement of the dispute that has been found to exist (*R v Holmes; ex parte Victorian Employers' Federation* (1980) 145 CLR 68 at 76 and *R v Bain; ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163 at 176). The doctrine applies not only to the initial award made in settlement of the dispute but also to any subsequent variation of that award. The original dispute can therefore be relied upon as the basis of the Commission's jurisdiction and any award variation will be valid as long as the Commission remains within the ambit of the original dispute (*R v Kelly; ex parte Australian Railways Union* (1953) 89 CLR 461). An obvious consequence of the doctrine of ambit is that demands for improved terms and conditions are often inflated beyond reasonable expectations. This serves to give a margin to the Commission in settling the dispute and also gives a jurisdictional basis for future variations.

{11} In determining whether or not a demand is genuine it has been said that the union must 'really want what it demands' (*R v Cohen; ex parte A-G (Q)* at 337). This aspect of genuineness focuses on the quantum of the demands, as opposed to the motive or purpose for serving the log. In making this determination account must be taken of the doctrine of ambit and its consequences. It has thus been held that it is not necessary that the union has or reasonably believes that it has real prospects of successfully obtaining each item of the claim, nor that it is 'intent on obtaining forthwith every item which is mentioned in the log of claims'. It is sufficient that the union is able to show that the demands are made with a view to 'obtaining improved terms and conditions within the framework of the claims made'. Therefore, a dispute will be created even where the claims might seem to be extravagant or unrealistic (*R v Ludeke; ex parte QEC* at 183).

{12} There must, nevertheless, be a point at which the extravagant nature of the claims is such that it cannot be said, even taking into account the doctrine of ambit, that the demands are being genuinely advanced. This question was dealt with by the High Court in the 'SPSF' case (*Re State Public Service Federation; ex parte A-G (WA)* (1993) 178 CLR 148). There the High Court was concerned with dispute findings based on the failure of employers to accede to demands made in three logs of claim. One of the logs made three simple claims: a minimum wage of $5,000 per week for all employees, a minimum allowance of $2,500 per week for all employees and a further claim that pay and allowances be adjusted to take into account cost of living increases in accordance with the Consumer Price Index. The High Court held that the service and refusal of this log of claims did not create an industrial dispute.

{13} Mason CJ, Deane and Guadron JJ, in a joint judgment, held that whether or not a claim is fanciful is to be determined by reference to general industrial standards and general patterns of industrial regulation. The high rate of weekly earnings applicable to all employees regardless of level of skill or work performed, which was plainly at odds with established wage fixing principles, led their Honours to the conclusion that the claims were fanciful (at 269). The extravagance of the claims could not be explained by reference to the doctrine of ambit, particularly when a specific claim was also made for an increase in wages to take account of inflation. McHugh J took a similar approach. His Honour emphasised that the extravagance of a claim does not of itself destroy the genuineness of the demand provided that the demands are a reflection of a genuine desire to provide for changes either at the time that the demand is made or in the foreseeable future (at 306). Nevertheless, His Honour went on to say that if the demand is 'so extravagant that it cannot reasonably be understood as intended to provide for changes in the foreseeable future, ordinarily the proper inference to be drawn is that the organisation making the demand does not really want what it demands' (at 306).

{14} Given, however, that the union had obviously taken the pursuit of its claims seriously Mason CJ, Deane and Guadron JJ concluded that the union was pursuing some more realistic claim; a claim for increased wages and allowances as determined by the Commission. Their Honours held that a bare claim for increased conditions could not give rise to an industrial dispute (at 270). McHugh J agreed with this approach (at 307). Dawson and Brennan JJ, in separate judgments, concurred with the joint judgment of Mason CJ, Deane and Guadron JJ.

{15} Toohey J held that a demand may not be genuine if it is so 'far-fetched, so lacking in industrial reality that it cannot be taken seriously' (at 290-291). His Honour recognised that drawing the line is difficult but that it was nevertheless possible to see on which side a particular log might fall in a given case. In this case, the unreality of the demands made, even taking into account the doctrine of ambit, appear to have led His Honour to the conclusion that the demands were not genuine.

4. A consideration of the Appellants' arguments

{16} The appellants contend that the logs of claim are at their 'core' fanciful and so cannot be regarded as genuine. This is to be established by reference to the total overall amount of the claims, which when viewed by reference to their cost to the employer if granted, are totally unrealistic and at odds with the Commission's first award principles. From this the appellants say that it must be inferred that the unions do not genuinely want what they are demanding. Added to this the appellants argue that the industrial context in which the logs were served establishes that the demands were nothing more than a step towards enabling the Commission to exercise jurisdiction. In this regard the appellants point to the history leading up to the service of the December log of claims and the existence of adequate State regulation of terms and conditions of employment. The appellants also suggest that it was in fact the then recent enactment of the *Employee Relations Act* 1992 (Vic) which instigated the move to seek federal coverage rather than a desire for improved terms and conditions of employment. In relation to this latter point, the evidence supports the conclusion that in serving the logs of claim the unions' motive was to obtain federal coverage. The authorities discussed above show, however, that that of itself will not be sufficient to negative the genuineness of the demands so long as the union seeks both the conditions and the award making provision for them, even if the claims are optimistic or extravagant.

{17} The logs of claim can be described as ambitious or extravagant. This is particularly so of the demand with respect to wages in the April log. The unions could not have expected to be successful in achieving all of the demands made. That is not, however, sufficient to establish that the demands are not genuine in the sense that the unions did not really want what they were demanding or that the logs were served merely as a means of having the Commission determine appropriate increases. The decisions of the High Court clearly establish that a union need not show that it anticipates that it will be successful in each of the demands made. It is sufficient that the log can be seen as presenting a framework of demands on which to base a present award and any variations to it for the foreseeable future. That would seem to exclude determining genuineness by a process of analysing the resultant costs to the employer were the demands to be granted in their entirety. Such an analysis ignores the doctrine of ambit and its accepted consequences in drawing a log of claims. The logs of claim here are detailed and cover a wide range of matters pertaining to the relationship of employer and employee. In that regard they are similar to many logs of claim on which dispute findings

have been made both before and after the decision in SPSF. There is nothing in the SPSF case which changes the High Court's approach to determining whether or not a union really wants what it is claiming. Mason CJ, Deane and Gaudron JJ premised their approach to ascertaining whether or not demands are genuine by stating that, given that there is nothing inherently artificial about paper disputes and taking into account the doctrine of ambit, it will not often be the case that a written demand is other than genuine (at 268). A written demand will, therefore, generally be treated as genuine unless it is plainly 'fanciful' (at 268). Toohey J also did not question that an industrial dispute can be created by the service and rejection of a log of claims (at 287) and acknowledged that in many if not most cases it will be sufficient to establish a dispute (at 289). The SPSF case provides an example of when such claims might fall on the wrong side of the dividing line between genuine and non-genuine. There is nothing in the judgments which provides scope for arguing that a log of claims which viewed as a whole or item by item is extravagant cannot establish a genuine demand and thus provide the basis for a dispute finding. The decision was exceptional on its facts: the claims were unrealistically extravagant, bare and indiscriminate.

5. Conclusion

{18} In summary then, the nature of the question of whether or not a dispute based on the service and refusal of a log of claims is genuine does not allow for a definitive answer which can provide a blue-print for determining each case. Each case must continue to be determined on its own facts with due weight being given to the skill and expertise of the Commission in making that determination. Whilst in this case the demands might be described as extravagant, the wide range of employer/employee matters dealt with, the fact that the demands were relatively comprehensive compared with the bare and simplistic claims made in the SPSF case, point to the conclusion that the demands were genuinely advanced.

{19} The appellants' arguments, however, go further than simply seeking to draw analogies with the SPSF case. They seek to challenge the accepted approach to the use of the 'paper dispute'. The use of paper disputes to invoke the Commission's jurisdiction is now well established and accepted. This has not, however, been without its critics. The paper dispute has been criticised as a mechanism which encourages a system of dispute resolution predicated on the creation of disputes (*R v Portus; ex parte Professional Engineers' Association* (1959) 107 CLR 208 per Windeyer J at 268). To a large extent that result is inescapable, being forced on the parties by the constitutional and legislative limits placed on the Commission's jurisdiction. Early decisions of the High Court holding that the Commission could not be given jurisdiction to make a common rule award led to the view that the Commission cannot exercise jurisdiction unless it has before it an actual dispute (see for example *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311). Thus the prevention limb of s 51(xxxv) and its scope for enabling the Commission to intervene before an actual dispute has broken out has largely gone unutilised by the participants in the industrial relations system (see Mason CJ, Deane and Guadron JJ in *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311). This and the desire to create comprehensive industry-wide awards has perhaps led to an over emphasis or over reliance upon the paper dispute (*Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* per Mason CJ at 321). The tendency to make extravagant claims can, at least in part, be explained by an overly rigid approach to the doctrine of ambit and a misconception of the extent to which that

doctrine places limits on the scope of the Commission's jurisdiction to make an award in settlement of a dispute. As the appellants contend, there are decisions of the High Court such as *R v Bain; ex parte Cadbury Schweppes Australia Ltd, Re PKIU; ex parte Vista Paper Products* and the *Wooldumpers* case which demonstrate that the service of ambitious or extravagant logs of claim are not essential to take into account the doctrine of ambit.

{20} It can be said then, that an unnecessarily rigid approach to the doctrine of ambit and an under-utilisation of the prevention limb of the labour power has led to the service of logs of claim which make extravagant demands that are divorced from the real interests of the union and its members (*Re PKIU; ex parte Vista Paper Products* (1993) 67 ALJR 604 per Guadron J at 612 - 613). From an industrial relations perspective, this is to be regretted. Further analysis and explanation of these issues by the High Court whilst not rejecting the use of the paper dispute might avoid the need for unions to continue making extravagant and unrealistic demands. This would allow the parties to disputes and the Commission to focus on the actual industrial situation and its resolution.