

PEACEFUL PICKETING IN AUSTRALIA: THE FAILURE
TO GUARANTEE A BASIC HUMAN RIGHT

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Picketing is both a mode of speech and one of the ways in which people assemble together for a common purpose. Australian law effectively prohibits picketing, and thereby denies two important rights to the Australian people.

The law does not prohibit picketing per se, but rather achieves this result by the application of a bewildering range of criminal and regulatory legislation as well as providing civil law sanctions against picketing in the form of the various economic or industrial torts and the secondary boycott provision's of the Trade Practices Act 1974 (Cth).

The law on picketing in Australia needs to be restated so as to make it clear that peaceful picketing is a right to be enjoyed by all Australians free from the fear of becoming entangled in the confused and confusing range of legal provisions Which are presently arrayed in opposition to rights of free speech and expression and the right Of peaceful assembly.

What Is Picketing?

Picketing is the act of two or more people' congregating together at a particular place for the put pose of informing all others who come by of their views and opinions on the matter of controversy

1. Single-person picketing is theoretically possible but rare.

that concerns the picketers and, perhaps, to persuade those others to adopt the views and opinions of the picketers and to change their behaviour accordingly. Other commentators define picketing in ways which place different emphases on the various aspects of the picketing process².

Another commentator has provided a useful classification which identifies four different types of picketing (whilst recognising that different types may be present in any one situation):

- " - *peaceful picketing* involves the use of pickets simply to advise persons that a stoppage is in progress;
- *organisational picketing* may be used to secure recognition of the trade union involved by the employer concerned. To the extent that the community provides adequate procedures for securing trade union recognition, the need for this form of picketing disappears;
- *secondary picketing* involves the picketing of establishments not involved in the primary dispute. This immediately raises the question of harm to third parties. Some industrial relations systems distinguish between neutrals (innocent third parties) and the struck employer's allies who are legitimate targets for picketing;
- *mass picketing* occurs when large numbers of strikers (and perhaps others) gather at the entrances of a struck establishment. Their very number often blocks access to the enterprise. This form of picketing usually arises when there is a possibility of "scabs" or "strikebreakers" taking over the jobs of employees on strike."³

2. Creighton, W.B. et al, "Labour Law", Law Book Co. 1983, p. 781.
Sykes, E.I., "Strike Law in Australia", Law Book Co. 1982 p. 55.

3. Young, F.J.L., "Picketing and The Law - 1: Missing The Point" [1981] NZLJ 345 at 346.

Picketing Occurs Not Only In The Context of Labour Disputes

Much of the law on picketing has developed out of labour disputes but it is important to note that the right to picket is often sought to be exercised in other contexts within the community. Consumers picket supermarkets and stores which continue to sell unsafe products, pro-life groups picket medical clinics where termination of pregnancies are performed and groups of people picket cinemas which show movies depicting themes which the picketers find blasphemous or obscene. These are a few examples of situations in which Australians, other than in an employer-employee context, seek to express their views and opinions on a variety of topics in the public domain, thereby exercising their right to picket.

Australia's Obligation To Protect The Right To Picket

The International Covenant on Civil and Political Rights provides, amongst other things:

"Article 19

- 1 Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or ..through any other media of his choice.
- 3 The exercise of the rights provided for in paragraph 2 of .this, article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

5.

and

"Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

As a signatory to this Covenant Australia has an obligation to ensure that its laws are in conformity with the provisions of the covenant. An evaluation of the present laws governing picketing reveals that the Covenant's relevant provisions are being breached in Australia.

The Australian Law on Picketing

It is not possible in one seminar paper to present a comprehensive statement on the Australian laws which regulate the conduct of picketing. The scope of the topic is simply too large and cumbersome. There is federal law passed by the Commonwealth Parliament, there is State law passed by the six State parliaments, there is the law applicable to the federal Territories and there are the local government laws passed by city, municipal and shire authorities around Australia. A lot of this law was passed last century to cater for the needs of a different type of society, yet it is still valid law. New laws are being passed all the time. As well as this body of statute law, there IS the common law, inherited over the centuries and still being developed to-day, which provides a variety of causes of action which have a direct bearing on the regulation of picketing.

The impossibility of stating succinctly what the law is on picketing is part of the problem itself. The right to picket in Australia is diminished in proportion to the enormous range of statutes, regulations, rules and common law principles which in a given set of circumstances, can directly bear on the legality of the picketing.

To get a better perspective on the matter, picketing should be dichotomised into peaceful picketing and non-peaceful picketing. In the latter case the picketing, by definition, is unlawful as being in breach of the criminal law and there is accordingly no right to engage in non-peaceful picketing in Australia. Presumably no-one is arguing for such a right.

What of peaceful picketing? Is there a right to engage in this in Australia? A right protected by enforceable laws? The answer appears to be, no. Every jurisdiction in Australia has provisions in its criminal law, traffic or highway legislation and summary or police offences legislation (to name but a few of the applicable statutes) which are clearly wide enough to render even peaceful picketing a criminal or quasi-criminal offence. True it may be that many potential situations don't, in practice, "become criminal" unless the local law enforcement agency decides to apply the local law against the peaceful picket. It may be the case, the evidence is merely anecdotal, that some communities in Australia enjoy an enlightened law enforcement policy towards peaceful picketing

whilst other communities experience intolerant policies. The right to peaceful picketing should not depend on the changing whimsy of local law enforcement policy. It should be affirmatively mandated by federal legislation. The legislation should be in clear and specific terms understandable by the average person in the street. Any limitations on the right should equally be in precise and exact terms. The task should be to narrow the range of executive and judicial discretion and to enlarge the scope of a guaranteed and enforceable right to peacefully picket.

Recent Australian Cases

A brief look at some of the recent Australian cases amply demonstrates the wide range of laws that can be brought to bear against picketing.

The Mudginberri cases⁴ show the extensive and devastating reach of s.45D of the Trade Practices Act 1974 (Cth) - the secondary boycott provisions. The meat workers' union had picketed the premises of Mudginberri Station Pty Ltd in circumstances which caused the Union to be in contravention of s.45D without, in the court's opinion, being entitled to the defence available under s.45D(3) which, broadly stated absolves a contravention if the complained of activity is being engaged in for the purpose of enhancing the employees' working conditions. An interlocutory injunction was issued by the Federal

4. AMIEU v Mudginberri Station Pty Ltd (1985) AILR 245, 311, 312, 326, 379, 393; (1986) AILR 21, 71.

Court ordering the Union to dismantle the picket line. The Union's refusal to obey the interlocutory injunction led to its being fined \$10,000 and \$2,000 per day for each day thereafter that the picket remained.

Subsequently, the interlocutory injunction was made permanent. Again the Union refused to obey the terms of the Federal Court's order and for breach of the permanent injunction the Union was fined \$100,000. In addition, in both cases the court ordered the sequestration of all of the Union's assets by the Federal Court to secure payment of the fines and associated costs.

In *Dollar Sweets Pty Ltd v Federated Confectioners Assn. of Australia*⁵ the Union had placed a picket at the company's premises as part of a complex industrial dispute. The company sought an interlocutory injunction to restrain the picket. This time the tool chosen was the common law tort of nuisance and the venue chosen was the Supreme Court of Victoria. Although the non-peaceful aspects of the picketing made victory for the applicant company virtually assured, the case is illustrative of the ease with which picketing, peaceful or non-peaceful, can be declared unlawful. Indeed the real impossibility of stating just what the law on peaceful picketing is in Victoria has been the subject of specific comment by a notable authority.⁶

5. 1986 AILR 29.

6. Sykes, El., "Uncertainties Regarding the Law of Peaceful Picketing in Victoria", (1979) 53 ALJ 241.

In *Bolwell v Jennings*⁷ a magistrates court's conviction for picketing was quashed on appeal by a State Supreme Court and this case warrants close attention. The conviction was for an offence against the Public Order 'Protection of Persons and Property) Act 1971 (Cth), a piece of legislation covering certain activities, including picketing, on property owned by the federal government. During the course of a strike the defendant, as a picketer, had obstructed a delivery vehicle attempting to enter federal property. The Act makes *unreasonable* obstruction an offence and the question of the unreasonableness of the obstruction was at issue in the appeal. In finding in favour of the defendant and quashing the conviction the Tasmanian Supreme Court said:

"The obstruction qua obstruction must be unreasonable. It is not hard to imagine situations where the duration of the obstruction, its nature and when or where it occurs will clearly render it unreasonable. In the instant case it occurred on a Monday morning, when few people were about, it lasted a short space of time, it inconvenienced one person only, it was not shown that it was essential that that person should have vehicular access to the premises, the applicant and his two colleagues were not intending anything other than a transitory obstruction and the obstruction caused no damage to personal property"⁸

7. 1986 AILR 48.

8. *Ibid.*

Several points need to be made in evaluating the significance of Bolwell for picketing law in Australia. It is a case on the interpretation of one piece of legislation only and it has no application beyond that. The legislation in question applies to a relatively small number of places in Australia, namely federal Territories and federal government property. It is a single judge decision only and his views have yet to run the gauntlet of various appeal courts over a series of similar cases. Finally the Court specifically stated that "it is not hard to imagine situations where the ... obstruction (be) unreasonable". The picketing in Bolwell was completely ineffectual: why bother with even a token conviction?

Observations from Some Overseas Jurisdictions

(a) The USA

Any analysis and understanding of American law requires an appreciation of the significant role that the American Bill of Rights plays in that country's legal system. The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion; or prohibiting **the** free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people 'peaceably to assembly, and to petition the Government for a redress of grievances".

9. Ibid.

11.

The history of the relationship between the First Amendment and the various Federal and State laws concerning picketing provides an enriching insight into how the American legal system has attempted to balance the various competing interests. That history is, of course, too vast and complex to deal with here, but an overview will be presented together with a statement of the contemporary position.

Firstly the Americans draw a sharp distinction between non-coercive picketing and coercive picketing. Non-coercive picketing is entitled to First Amendment protection in certain situations depending on the circumstances. First Amendment protection means that any law, statute or common law, federal or State which would otherwise apply to the picketing activity is inoperative and of no effect. Coercive picketing is not entitled to any First Amendment protection and it has to take its chances in the thicket of all the federal and State laws that apply to it.

Throughout the 19th Century the unions in America had as hard a time of it as they had in Australia. All peaceful picketing was regarded as tortious. This View persisted until 1940 whertin Thornhill. v Alabama,

"the dissemination of information concerning the facts of a labor dispute must be **the Supreme Court held that:** regarded as within that area of free discussion that is guaranteed by the Constitution."

10. 310 US 88 at 102 (1940).

On this basis the Court declared invalid a State statute which prohibited peaceful picketing.

Almost immediately the Supreme Court began to express uneasiness with this wide-ranging protection and case by case over the ensuing few decades the Court whittled away at Thornhill until now there is no First Amendment protection to peaceful labour dispute picketing at all. Firstly the Court began to deny protection to picketing that had, what the Court termed, an illegal objective. Secondly, the Court held that picketing involved two components, speech *and* conduct and therefore the First Amendment's application had to be treated separately from its application to those situations where speech, and speech alone was involved. Finally the Court drew a sharp distinction between public-issues picketing and labour dispute picketing. The present Supreme Court grants First Amendment protection to public-issues picketing but not to labour dispute picketing. Two cases will illustrate the difference.

In NAACP v Claiborne Hardware Co¹¹ civil rights workers protesting racial discrimination peacefully picketed stores owned by white traders urging all others to boycott the stores being picketed. A massive legal attack was mounted against the picketers which saw injunctions issued and substantial damages awarded by the Mississippi courts. The United States Supreme Court, on appeal, declared in

11. 102 S. Ct. 340 (1982).

sweeping terms that peaceful picketing on an issue of "public concern" was fully protected by the First Amendment.

However two years earlier (1980) in *NLRB v Retail Store Employees, Local 1001 CSafecol*¹² the same Court had put the *Thornhill* approach to labour dispute picketing to final rest by holding that picketing of that kind was not speech at all, rather it was economic activity: labour dispute picketers are using economic pressure to pursue their interests. The First Amendment says nothing about protection from laws which seek to regulate economic activity.¹³

(b) The United Kingdom

The miner's strike of 1984-85 in the United Kingdom generated extensive litigation which has clarified some and clouded other aspects of the English law on picketing. The most useful case to illustrate the present English situation is *Thomas v National Union of Miners*¹⁴.

12. 447 US 607 (1980).

13. For a full discussion see: Morris C.J., "The Developing Labor Law", 2nd edition, 1983, BNA, Washington USA (Part VI).

14. [1985] 2 All E.R. 1.

A careful reading of this case and of the extensive literature which has developed out of it leads any reasonable observer to the conclusion that the only lawful picketing in England is ineffectual picketing: anything else is swiftly crushed by a battery of old and new laws, both statute law and common law and, if these prove inadequate to the task, new torts can be created to meet the task at hand.

Thomas was an application for, amongst other things, an interlocutory injunction to restrain unlawful picketing at a colliery. The application was made by working miners against the National Union of Miners and its officers who, it was claimed, were organising the picketing.

In England there is a statutory immunity from tortious or criminal liability for acts done in the course of picketing. s.15.(1) Trade Union and Labour Relations Act 1974,. provides:

"It shall be lawful for a person in contemplation or furtherance of a trade dispute to attend -

- (a) at or near his own place of work, or
- (b) if he is an officer of a trade union, at or near the place of work of a member of that Union whom he is accompanying and whom he represents, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working."

The key concept in this immunity provision is "peaceful".

As to this in *Thomas* the Court said:

"The position therefore is that the picketing will not be actionable in tort if it can be brought within s.15. In my judgment, on any reasonable view of the defendant's own evidence, the immunity of this provision cannot be claimed for the persons who regularly assemble at the colliery gates. It may be that the six persons who are selected to stand close to the gates could bring themselves within the provision, but the many others who are present cannot do so. What is their purpose in attending? It is obviously not to obtain or communicate information. Is it peacefully to persuade the working miners to abstain from working? If that is the case what is the need for so many people, what is the need for the police, and what is the need for vehicles to bring the working miners safely into the collieries?"¹⁸

Why is gathering in large numbers thought to be, of itself, non-peaceful? As Kidner notes in discussing this aspect of *Thomas*:

"... in theory it is possible for a group to gather which behaves quite peacefully and where each individual only has the intention to peacefully persuade."¹⁸

Thomas of course is a civil law case, but the statutory immunity has received an equally narrow interpretation in the criminal law.¹⁷

Having decided that the mere fact of congregating in large numbers (50 - 70 in this instance) was, of itself, non-peaceful the Court in *Thomas* said:

"It does not, however follow that because picketing cannot be brought within ... s.15, the picketing is therefore tortious. In order to decide whether or to what extent picketing that falls outside the section is tortious, recourse must be had to the general law of tort. 18

15. [1985] 2 ALL E.R. 1 at 20.

16. Kidner, R., "Mass Picketing" J. Crim L 270 at 272.

17. Khan, AN,, "Picketing on Private Property" 128 Sol. J 91.

18. [1985] 2 ALL E.R. 1 at 20.

The Court experienced some difficulty in finding any tortious behaviour on the part of the, defendants. The argument that the picketing was tortious because it was a criminal breach of s.7 of the Conspiracy and Protection of Property Act 1875 failed because of the decisions in Ward, . Lock & Co. Ltd. v The Operative Printers' Assistants Society ¹⁹ and Fowler v Kiblick.²⁹

There was no tort of assault since the working miners were swept through the colliery gates in heavily guarded vehicles and therefore even if the picketers wanted to attack them, the working miners had nothing to fear.

There was no tort of interference with contractual relationships since the working miners were able to work.

Having exhausted all known authority without finding any liability, the Court the flatly stated:

"Unreasonable interference with the rights of others has long been recognised by the law as being actionable in tort and unreasonable interference with the victim's rights to use the highway can be described as a species of private nuisance²

19. (1906) 22 TLR 327.

20. [1922] 1 Ch 487.

21. [1985] 2 ALL E.R. 1 at 22.

After reviewing the factual circumstances of the picketing at the colliery gate the Court decided that, in its view, the conduct was unreasonable and accordingly found the defendants liable for what subsequently has been described as the new tort of harrassment.²²

But Thomas was merely a Civil case. The picketing in that case, as with picketing in other cases, could easily be rendered unlawful by application of the criminal or regulatory statutes:

... it seems highly likely that a number of criminal offences were being committed. Thus, cases could probably have been brought against individuals for public nuisance, obstruction of the highway ... and for breach of the peace. 23

The lawfulness or otherwise of even peaceful picketing in England is still far from clear.²⁴

(c) New Zealand

The New Zealand position can be -neatly stated by referring to two articles in the same issue Of the New Zealand Law Journal. The first article is a report by the Public Issues Committee of the Auckland District Law Society Which, after surveying the applicable law, declares:

"There exists in New Zealand ... a clear liberty to picket by which is meant a liberty peacefully to demonstrate, to communicate and persuade so long as, in doing these things, the general law is not broken and the rights of others are not infringed. 25

22. Carty, H. "Picketing on the Highway: Nuisance, Harrassment and the Numbers Game", Public Law, Winter 1985 s.42 at 543.

23. Kidner, R. .Op Cit at 270.

24. Carty, H., Op Cit at 542.

25. Report, "Picketing" (1981) NZLR, I16.

The second article, commenting on these observations, states:

"I wish I could agree with these statements and I would be happy if the law were really as it is described to be. Paragraph (d) of s.33 (1) of the Police Offences Act 1927 (which seems to have been glossed over by everybody commenting on the problem), however, clearly and directly prohibits picketing, even peaceful picketing."²⁶ and later

"... para (d) of S33 (1) makes even the passive watching of the workplace and standing before its entrance a punishable-offence."²⁶ and later still

... one must draw the logical conclusion that S33 of the Police Offences Act not only prohibits violence and force but outlaws..all picketing, even in its most peaceful and passive form. 26

26. Szakats, A., "Is Peaceful Picketing Lawful?" (1981) NZLR 122.

19.
CONCLUSION

There is a vast range of law available to those who seek to oppose picketing. Law enforcement agencies have the various criminal laws, regulatory laws and local government laws. Private interests have available to them a formidable collection of so-called civil law rights including the economic torts and the secondary boycott provisions of the Trade Practices Act.

The discretion to prosecute plays, one suspects, an important role in this, as in other areas of the law. Although no research data is available, anecdotal evidence would have it that there are notable variations in the prosecution policies of the various law enforcement agencies, federal, State and Local, throughout Australia. The same type of picketing activities may be rigorously prosecuted for serious criminal offences in one place, be the subject of a few token Traffic Act or Summary Offences Act charges in another place and not be prosecuted at all in a third place. Regional differences in law enforcement policy may very well be a hidden, yet important factor in assessing and evaluating the "right" to picket in Australia.

There can be no excuse for the continuation of the present deplorable state of the law on peaceful picketing in Australia. It needs thorough and fundamental review and reform. The objective should be to devise a legislative structure within which peaceful picketing will be declared lawful, in a way that satisfied the demands of all the competing interests. This will involve sweeping away reliance on outmoded English statutes as adopted and modified in the

Australian colonies and to end the use of common law actions in tort devised in other jurisdictions in circumstances far removed from the realities of late 20th Century life in a developed industrial economy.

Australia needs a federal law that guarantees the right to peaceful picketing. The law should be of national application attracting the paramountcy provisions of s.109 of the Constitution and should prevail over any inconsistent federal Law.

The current review of the industrial relations legislation in Australia, consequent on the presentation of the Hancock Report, provides the opportunity for the Australian Parliament to provide a legislative framework for peaceful picketing within which Australians will be able to enjoy the rights of free speech and expression and the right of assembly spelled out in the International Covenant on Civil and Political Rights.