The Statutory Guarantee of Freedom from Interference: Section 580 of the Fair Work Act (2009)

Article 10 of the Australian Charter of Employment Rights deals with the rights and obligations of employers and employees to participate in good faith dispute resolution processes, and "where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy". Earlier this year, the Hon. Geoffrey Giudice AO retired as President of Fair Work Australia after a long stint as head of that tribunal and its predecessor, the Australian Industrial Relations Commission. In this article, he reflects on the importance of the independence of the tribunal, of which he was a strong champion during his tenure.

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Industrial tribunals are charged with responsibility for resolving workplace disputes, whether individual or collective ones. The need for tribunals to operate free of outside interference is implicit in the nature of that obligation. We often take it for granted that our industrial tribunals will determine matters in accordance with the circumstances of the case and the relevant statutory and award provisions.

But independence is not just an aspiration or a matter of good intentions. The legal system bolsters and protects the independence of tribunals, including industrial tribunals. It does this in two ways. First, the rules of natural justice require a tribunal to be truly impartial in its proceedings and in its decisions. Where a tribunal is biased, or there is a reasonable apprehension that it might be, its decision is liable to be set aside.

Secondly, the law protects the tribunal itself from extraneous pressure or influence. This short article examines this second area. It deals in particular with the legal protections against attempts to influence administration and decision-making. The focus of this examination is the national industrial tribunal, Fair Work Australia (FWA) and Section 580 of the *Fair Work Act 2009* (the Fair Work Act).

Section 580 provides that an FWA member has, in performing his or her functions or exercising his or her powers as an FWA member, the same protection and immunity as a Justice of the High Court. Members of FWA's statutory predecessors were protected by similar provisions[1]. The operation of this section requires some explanation, but some related provisions should be noted first.

There are a number of sections in the Fair Work Act which deal with the obligations on FWA and its members in relation to the Executive and the Parliament. There is a requirement that the President provide an annual report to the relevant Minister for tabling in the Parliament[2]. There is also provision for removal of a member by decision of both Houses of Parliament for proved misbehaviour or incapacity[3]. These provisions have antecedents going back to 1904. There are some new provisions which require the Governor General to terminate the appointment of a member of FWA for specified conduct[4].

Section 580 extends the "protection" and "immunity" of a High Court judge to members of FWA. While "protection" and "immunity" can be different concepts, the cases do not clearly distinguish between them, perhaps because the concepts overlap to a large degree. A convenient starting point in considering the operation of the section is the doctrine of the separation of powers.

At the core of the doctrine is the idea that it is essential for good government that the legislature, the executive and the judiciary should function independently of each other. While FWA is not a court and its members are not part of the judiciary, s.580 invokes the same protections as apply to judges of a superior court. For that reason, what is said below in relation to courts and judges applies equally to FWA and its members.[5]

The need for the judiciary to be independent of the other two branches of government is almost self-evident. Judges must decide cases by applying the relevant law, free of extraneous pressure or influence of a personal, political or any other kind.

As an example, the implementation of government policy, except to the extent that it is incorporated in

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relevant legislation, should play no part in the judicial process. It is not unusual for the executive government, in one guise or another, to be a party to litigation or to have a significant interest in the outcome.

The idea that the executive, through a Minister or a public servant, for example, might seek to influence the outcome of proceedings other than through the proper judicial process or to influence the administration of the courts, or to whom a case is allocated, would be inconsistent with judicial independence. The same considerations apply to actions by the legislature. The general principles are set out in a relatively recent Australian case[6].

In the following passage from the reasons of Gleeson CJ in *Fingleton v R* it is pointed out that judicial independence is not confined to the proceedings but extends to matters of court administration[7]:

"53 In recent years, the Supreme Court of Canada [24], and the Constitutional Court of South Africa [25], have found it necessary to examine the theoretical foundations of judicial independence for the purpose of considering whether arrangements in relation to particular courts satisfied the minimum requirements of that concept. In that context reference was made to 'matters of administration bearing directly on the exercise of [the] judicial function.' [26] The adjudicative function of a court, considered as an institution, was seen as comprehending matters such as the assignment of judges, sittings of the court and court lists, as well as related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out that function. Judicial control over such matters was seen as an essential or minimum requirement for institutional independence [27]."

In His Honour's reasons for decision in the same case, the then Chief Justice pointed out that maintaining the independence of the judiciary requires protection not only against the possibility of interference by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.[8] In this context, government is not to be regarded narrowly, and the capacity to carry out functions "free from interference by, and scrutiny of, the *other branches* of Government is an essential aspect of judicial independence" (emphasis added).[9]

Another important component of judicial independence is the protection against any requirement to disclose reasons for decision, other than the published reasons. This important protection is exemplified in the following passage:

"The entire, general, protective immunity of a Justice of the High Court is conferred on the member of the [Refugee Review] Tribunal by s. 435(1) of the [Administrative Appeals Tribunal] Act [163]. The rationale for immunity from compulsory disclosure is the assurance that judges should be free in thought and independent in judgment. That rationale naturally extends to an immunity from disclosing any or all aspects of the decision-making process itself [164]."[10]

When the terms of s. 580 are considered in light of these authorities it is apparent that the protection provided by the section includes protection for members of FWA against retaliation by persons or interests disappointed or displeased by tribunal decisions and against interference by, and scrutiny of, the other branches of government. The protection is unconfined and extends to the performance of all functions and the exercise of all powers under the Fair Work Act. [11]

Endnotes

1 These were in order: Commonwealth Court of Conciliation and Arbitration, Commonwealth Conciliation and Arbitration Commission, Australian Conciliation and Arbitration Commission and Australian Industrial Relations Commission.

2 Section 652

3 Sections 641 & 642

4 Sections 643 & 644. These provisions are unusual as they require the removal of a member of FWA without the need for the approval of Parliament.

5 The executive and the legislature control the supply of money to the judiciary, but that does not extend to prescribing the way in which money is spent. All of the federal courts have a block allocation of funds in the Budget which is described as a single-line budget. FWA has a single-line budget. There is no specification of how money is to be spent, apart from some broad outcomes.

6 See for example *Fingleton v R* (2005) HCA 34; per Gleeson CJ at [38] and Kirby J at [188] &[189]

7 Cited above

8 At [39]

9 At [52], citing *Minister for Immigration and Multicultural Affairs v Wang*

10 *Muin v Refugee Review Tribunal* (2002) HCA 30; per Callinan J at [299], see also at [300]; Gleeson CJ at [25]; Kirby J at [196]

11 In the circumstances the requirement currently imposed upon the President of FWA by the Senate to attend Budget Estimates Hearings and to answer questions is problematic.

Quotation footnotes: *Fingleton v R*

[24] *Valente v The Queen* (1985) 2 SCR 673; *R v Genereux* (1992) 1 SCR 259; Reference re: *Public Sector Pay Reduction Act* 1997, 3 SCR 3.

[25] *Van Rooyen v The State* (2002) 5 SA 246.

[26] *Valente v The Queen* (1985) 2 SCR 673 at 708.

[27] *Valente v The Queen* (1985) 2 SCR 673 at 709.

Quotation footnotes: *Muin v Refugee Review Tribunal* **(2002) HCA 30**

[163] http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/

[164] *Herijanto v Refugee Review Tribunal* (2000) HCA 16; (2000) 74 ALJR 698; 170 ALR 379.