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INDUSTRIAL RELATIONS : WHERE ARE WE GOING?

Hon Justice M D Kirby

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The Hon. Mr. Justice M.D. Kirby **

INTRODUCTION

The customary role of a judge in a forum such as this is fairly straight forward. He should be presentable, grave, eloquent and thoroughly irrelevant. He is a decoration, a bauble to dazzle the crowd after which, like the good school boy in days gone by, he must be seen and not heard.

Being a reformer, I am allowed a certain degree of latitude: but not much. I will try to identify some of the major themes that we will have to come to grips with. However, I emphasize that the views expressed are my own. I am currently on leave from the Conciliation and Arbitration Commission. I follow, of course, the great debates which are settled in that forum. But any opinions I express must not be attributed to my colleagues, who have enough problems without my adding to them. I will resist being a mere decoration. But the price of this judicial adventure must be a recognition that my personal views are not entitled to any more respect than the next man's.

CONSTITUTIONAL REFORM

We are going through a period of severe economic downturn. Plainly, governments are held responsible by the electorate for the state of the economy. In these circumstances, if things get worse, indeed if they do not get better, one can clearly understand the view developing that the present harness imposed by the Constitution is unsuitable for modern times.

The result of this "harness" is that although our economy is now basically a national economy and although control of taxation has caused citizens to look more and more to Canberra for economic and social direction, the Commonwealth Government must work its economic will within severe constitutional limitations. In a number of critical areas, it can influence policy only indirectly -

"The Prices Justification Tribunal oversees the advancement of prices; the Restrictive Trade Practices Tribunal concentrates on enterprise competitiveness; the Industries Assistance Commission influences the industrial structure and tariffs... the Arbitration Commission essentially confines its attention to industrial relations and wage settlements...and so on".¹

In these circumstances it is not surprising that the Commonwealth Attorney-General should be called upon to consider the powers that may exist under the corporations power to deal with wages and prices. Equally unsurprising is the demand on the part of the Opposition for the Commonwealth Government to be armed with constitutional power to deal generally with prices and incomes.

At the moment, within the sphere of industrial relations, there is no escaping the tight restraints imposed by the Constitution. Leaving aside the corporations power and the Commonwealth's power in respect of its own employees, only by the conciliation and arbitration of interstate industrial disputes can the Federal Commission exert its will. Only as to the residue can the State Commissions do likewise.

As Mr. Brooks will point out, imaginative things are being done by the Federal Commission as an informal conciliator. The realities of industrial life are often less depressing than their appearances. But there is no getting away from the limitations which exist and will continue to exist while the principal vehicle for determining incomes is a curial body armed with strictly limited powers. As we approach the twenty-first century and face up to the problems of a complex national economy and sensitive industrial relations it is clear that more and more of our fellow citizens will ask whether the compact of the 1890s allows an adequate institutional framework within which to solve the country's economic and social problems, including the problems of industrial relations.

Of course, we cannot solve this problem in the present Forum. However, it is important that we should not just accept without question the blinkers and bridles of the Constitution. They should be kept under constant review. All of our institutions, including the industrial tribunals, should be judged against the economic, social and human problems that have to be solved in our society.

INDUSTRIAL DEMOCRACY

The second major issue that will have to be tackled is industrial democracy. It is important to put this movement in its historical context. In the nineteenth century power and authority relationships in society changed. We are now witnessing similar changes. The industrial sphere and industrial relations cannot be quarantined from these changes. One attribute of the change is variously described as "worker participation" or "worker management" or "joint consultation". This is an international movement in Western economies which simply reflects the demand of citizens in a free society to secure an ultimate say in decisions that control their lives. Just as the property franchise disappeared from political institutions against much opposition, similarly I believe we will see the property franchise disappear from corporate institutions.

The precise road we shall take towards "industrial democracy" is not at all clear. The pace at which we will pursue the goal is equally obscure. What is important is that we should have a fairly clear idea of the forces that are at work. I am fully alive to the resistance that presently exists to the notion of worker participation at Board levels and of the problems which this notion will inevitably produce.

One of the major stumbling blocks we have in Australia in dealing with this international movement is the limited powers of the Commonwealth to enact laws dealing with corporations. It is heartening to see the recent announcement of agreement between the Commonwealth and States for a fresh attempt at uniformity in this area. What is truly frightening I suggest to you, is the prospect that different jurisdictions in different States would tackle the question of worker participation and board composition in different ways. One could imagine the confusion which would arise if a board of directors of a company with nationwide operations had to be differently comprised in the eight major legal jurisdictions of Australia. Yet if we do nothing as a nation to face up to the problem and seek to find Australian solutions to it, that is what will surely happen. One or more

States will go it alone. It will be expensive to unscramble the omelette once different attacks are made, State by State, upon the implementation of worker participation.

The Commonwealth Minister for Employment and Industrial Relations, Mr. Street, suggested in October last year that schemes of participation which bring employees into the decision making process and allow them to share in the ownership of the enterprise could solve many of the industrial relations problems now confronting Australia. This is what he said -

"The commitment of the individual to his work is likely to be greater when he is a stakeholder not only in terms of his employment-wages contract, but where he also has a stake-holding in its ownership and reaps rewards accordingly. Initiatives in the area of work reconstruction, joint consultation and financial participation are creative departures from our inherited management methods".

We must remove the blinkers of our past approach to industrial relations and see it as a much broader field than the settlement of a log of claims in an industrial tribunal. It will probably be impossible to look to the industrial tribunals to solve the questions of industrial democracy. These are almost certainly matters beyond their legal and constitutional power. There are positive disadvantages of attempting to simply "muddle through" this issue. It is an important international development which commands a rational, Australia-wide approach. It is in part a problem of the reform of the law. Much more fundamentally, however, it involves a reform of attitude, some of which may have been encouraged by the adversary processes of the arbitration system.

QUALITY OF LIFE

Just as the "industrial democracy" movement is a partial consequence of the higher standards of education in our society, the rising levels of affluence and the changing power structures, so, I believe we must understand the new focus of interest which will be given to industrial relations in the last quarter of this century. Whereas in the

past, industrial tribunals have settled disputes about wages and basic conditions, the disputes of the future are likely to expand to matters that are not so susceptible to arbitral resolution. The role of unions is certainly still evolving. Their interests are clearly expanding so that they now ask -

"What's the use of wage rises and increased leisure time if you don't have the means of enjoying them, if the social system is inadequate, if the air isn't fit to breathe, if we don't know how usefully to fill our leisure hours?"²

It is this feeling which has produced the so-called "green bans" and other crises that are so difficult to solve but which are likely to increase in number. At the moment, negotiations and Royal Commissions apart, the best that can be done is to bring the parties together in the industrial tribunal in the hope that their confrontation will produce a resolution. Again the institutional framework is strained to deal with contemporary problems. Yet we have no other institutions and the problem will not conveniently go away.

CONCLUSIONS

This Forum assembles at a critical and difficult time in the economic history of Australia: The participants will instruct and no doubt agitate us. I have suggested some of the major questions which we have to face up to. Fundamentally, we must ask whether the constitutional framework within which we are solving the nation's industrial problems is still adequate. Constitutional introspection has become something of a national fad of late. There is no reason why the industrial and economic powers of the Commonwealth should be immune from this scrutiny. On the contrary, there may be particular reasons for giving these powers careful measurement against contemporary problems, including the problems of industrial relations. Secondly, I have suggested that the movement for industrial democracy and worker participation will have to be faced up to in Australia. Seen in its historical context, some form of "participation" is bound to come. The disadvantages of a hotch-potch of State laws on the structure of corporations is a spectre which should move this country to a major effort in corporate law reform. We should tackle this issue in a

national way and avoid the tremendous disadvantages which diversity of laws would present. Thirdly, we should realize the changing focus of the interests of unions and particularly in the light of the limited capacity of present institutions to service those new interests. The great merit of the arbitration system has been this capacity to assist in the resolution of disputes "in a low key-way ... as a routine business" ³ keeping controversy within limits and handling it without passion. The problems for the future may not be susceptible to this form of resolution. How will disputes affecting work, environment, quality of life, greenbans and so on be resolved? Are we to return to the rule of power alone or can these issues be resolved in generally peaceful and rational ways?

This Forum should provide all of us with the opportunity to consider these and other fundamental questions. We will not provide all of the answers. But understanding what the problems are is the beginning of wisdom.

FOOTNOTES

- * Text of a speech delivered at the opening of a Forum conducted by the Australian Institute of Management, N.S.W. Division on 28 March 1977 at 2.15 p.m.
- ** B.A., LL.M., B.Ec.(Syd). Chairman of The Law Reform Commission of Australia, Deputy President of the Australian Conciliation and Arbitration Commission.
- 1. P. Bentley *Industrial Relations Ceda*, M Series No. 40, 1975 p.52.
- 2. E.G. Whitlam *The A.L.P. and New Unionism* (1976) 1 *Commonwealth Record* 1053 at p.1055.
- 3. Sir Leslie Scarman *Fourth Goodman Lecture*, 18 May 1976, mimeo, p.2.

An expanded expression of the author's views is contained in an article *New Challenges for Industrial Relations: Can we Muddle Through?* to be published in a forthcoming issue of *The Journal of Industrial Relations*.