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THE EMPLOYERS' FEDERATION OF NEW SOUTH WALES

ANNUAL LUNCHEON

SHERATON-WENTWORTH HOTEL SYDNEY

FRIDAY, 12 NOVEMBER, 1982

INDUSTRIAL RELATIONS, LAW REFORM AND THE CONSTITUTION

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission
Deputy President of the Australian Conciliation and Arbitration Commission*

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LIFE WAS NOT MEANT TO BE

Well may you applaud. I have just as much right to be sitting down there as any of you. How would you feel, as you contemplated a languid Friday lunch, to receive the message on Wednesday:

'Telephone the Employers' Federation urgently'.

It was a pregnant little message. However, as always, I took comfort from the philosophy ascribed to the speaker, whom I inadequately replace: life was certainly not meant to be etc.

Why for once, I asked myself, could the organisers not just allow a luncheon to pass by, in convivial company, without submitting everyone to yet another speech? Perhaps, I thought, the Employers' Federation of New South Wales represents a last lingering remnant of the Protestant work ethic. No such thing as a free lunch. Especially for audiences. Unalloyed pleasure in fine food and wine has its price. I am the fee.

President Nixon is reported once to have said that the greatest sacrifice a person in public office can make for his country, is the sacrifice of his stomach at official functions. Now, of course John Mitchell and other members of the President's unhappy band who solemnly gathered for cocktails in Washington last week might consider that there are greater sacrifices.

Mr. Anthony, Mr. Howard and other Ministers and parliamentarians were either unavailable, unwilling, or too wise to offer the sacrifice. So the Employers' Federation looked to the judiciary for a solution to the awful prospect of a speechless luncheon. As I shall point out this is not the first - nor will it be the last - occasion in which Australians engaged in industrial relations, have looked to judges to solve sudden, unexpected, urgent problems.

GOOD AND BAD NEWS

One irreligious legal wag I know recently told the tale of that early reformer Moses when he came down from the mountain with the Ten Commandments. Looking at the uncertain people gathered before him - rather as you are before me - Moses apparently asserted that he brought both good news and bad news.

* The good news is that I got Him down to ten.
* The bad news is that adultery stays.

Well, the good news today is that the Prime Minister is apparently recovering well from his operation. In accordance with our traditions, I must not venture upon comments on the Party political scene. But even in hard times, we should not, in Australia, overlook the sense of personal commitment and national service that led Mr. Fraser to submit himself so rapidly to the surgeons knife. We tend to be hard on our politicians in this country. We forget that they are human beings with fragile bodies and a goodly supply of mortal strengths and weaknesses. Above politics, I am sure that I speak for everyone here in wishing the Prime Minister a return to good health. There has rarely been a moment in the history of our country when we so surely need vigorous and imaginative leadership: facing, as we do, a serious economic, industrial and social malaise.

The figures released yesterday by the Australian Bureau of Statistics are the bad news. The national unemployment rate has continued to drift upwards, in the past month, from 7.3% to 7.7%. New South Wales was the State hardest hit, with the rate rising above the National average to 8.3%. Over the past 12 months, on average, 500 Australians each day lost work and have taken unemployment benefits. Yet average weekly earnings, for those in employment, have risen in advance of the national inflation rate, by 18.2% in the 12 months to the end of September 1982.[1] All too many of those

who are in work continue to proceed as if oblivious to the social and personal tragedies of the growing brigade of the unemployed around them. There are some who say that the bright hopes of Australia in the early 70's - of economic progress and liberal values - have been squandered. Are we just a country of tax avoiders and of organised crime, whose police forces cannot cope but need a National Crimes Commission to help and whose industrial relations scene is marked by elements of selfishness and indifference to the plight of failing businesses and the growing poor?

REDUCING THE CHAOS

I was recently attending the meeting of a new body to which I was appointed by the Federal Government. A dispute broke out. What was the oldest profession?

A doctor present had no doubt. The first chapter of the Book, he said, refers to the fact that God created Eve from the rib of Adam. This, he declared, was the first transplant operation. So the medical profession was first.

Not so, declared an architect. The first lines of the first chapter state that God created the Heavens and the Earth. This was the first act of the great Architect. So architecture was first.

A lawyer present at this discussion then intervened. Do you remember what God created the Heavens and the Earth out of?, he asked. Chaos! And guess who made the chaos?

The industrial relations laws of Australia - Federal and State - might not be described, exactly, as chaotic. But they are largely made by lawyers. And they do appear to be in need of major law reform attention, in the national interest. Our system is a peculiar one. The fact that it works at all is a tribute to the talented, ingenious and dedicated work of many judges, officials and officers of industrial organisations, including of the Employers' Federation of New South Wales. Like so many other things in the Australian Constitution, the system came about, unexpectedly, as an outgrowth of a compromise hastily put together at the Constitutional Convention of 1897. A proposal for a wider Federal power to settle industrial disputes had been rejected at the Sydney Convention in 1891. The compromise that led to the peculiar system of conciliation and arbitration we have in Australia originated in the mind of Henry Bournes Higgins, later a Justice of the High Court of Australia and first Judge of the Commonwealth Arbitration Court.[2] Higgins himself, early this Century, described the developing industrial laws over which he presided as 'a Serbonian bog of technicalities'.[3] The resulting duality of powers over industrial relations on the part of Commonwealth and the States:

'has been translated into a proliferation of industrial systems and tribunals...[and] has not only dissipated government control over unions but has also fragmented union power and provided an outlet for intra-union disputes'.[4]

The essential question I want to ask today is how much longer we can continue with this ramshackled arrangement of the 1890's? As times get harder and as the economic and social problems proliferate and bite, is it reasonable to force the solutions to today's problems through specific machinery designed for very different economic and political circumstances nearly a century ago? If the problems are great and the inefficiencies are manifest, is it beyond the wit and will of the Australian voter to change the Constitution? Must we really face the industrial relations problems, the technological problems and the problems of structural change, the difficulties of a vulnerable society, depending so heavily upon a compromise worked out by Mr. Higgins on a busy afternoon of the 1898 Adelaide Convention which has, in any case, been interpreted in directions beyond the wildest dreams of its originator? This is no academic concern of a professional law reformer. It is the practical problem that arises from industrial dislocation promoted or aggravated by inter-union disputes and inter-jurisdictional differences whether at Kurnell, Gladstone, the Omega Base or anywhere else.

THE BASIC PROBLEMS

Everyone in this audience will know the problems that arise under our present industrial arbitration laws. I list just a few:

* The 'dispute' syndrome: The Constitution requires that for a national industrial relations problem to be dealt with nationally there must be a 'dispute'. Disputes, the adversary process, locked positions and the psychology of difference are, constitutionally speaking, at the very heart of our system. No dispute, no Federal award.

* The 'ambit' exaggeration: This requirement, by the genius of legal reasoning worthy of a medieval monk, has been overcome by an almost cynical means: the artificial paper dispute - the log of claims. The intent of the Constitution is necessarily circumvented to solve nationally, some industrial issues that cry out for a national solution. But the price we pay is the ambit claim - the extravagant assertion to give scope for the real bargaining. The professionals know what is going on. But the psychology of unreality and extravagance is institutionally assured.

* The artificial interpretations: The dispute must be about 'industrial' matters. The content of that phrase has changed over time. But it has resulted in some very odd and artificial legal decisions which leave economists laughing and the community perplexed. Firefighters are not engaged in an industry.[5] A dispute about deduction of union dues is not an industrial dispute.[6] Management prerogatives on matters such as pensions, seniority, the decision to hire and fire - all vitally important matters just now - are held to be outside the proper realm of industrial disputes and hence outside the helping jurisdiction of tribunals..

* The bifurcated institution: The artificialities imposed by the arbitration power are exacerbated, in the field of Federal industrial relations by the doctrine of the separation of judicial powers. This doctrine itself led to the demise of the old Arbitration Court in 1956 and the creation of a new Commission and a Federal Court with separate functions.

  ** The Commission cannot give a binding and authoritative interpretation of its own awards. Yet practicality requires it daily to be dealing with and determining what it meant by them. Still it is for the Court not the Commission to say what the award really means.

  ** The Commission cannot make final orders such as orders of reinstatement. Disputes may blow up and come before the Commission. It may make recommendations. But any order for reinstatement must be made elsewhere - perhaps in the Court. Two proceedings. Two sets of costs. Two opportunities for delay and dissatisfaction and dislocation.

  ** Enforcement of awards made by the Commission is not the legal business of the Commission. That function is passed over to other personnel - in the Court.

* The dual system: The dual Federal/State system institutionalises the proliferation of industrial unions of employers and employees that is such a special and, I believe, unhappy feature of industrial relations in our country. In Germany you can count the numbers of unions on the fingers of your hands. In Australia, they run into hundreds. Often State unions are utterly different from the Federal union. As Moore v Doyle[7] taught us, a State union and a State branch of a Federal organisation may not be, in law, one and the same legal entity. Efforts designed to overcome the many legal and practical inconveniences of this consequence of the system appear to have just petered out.[8] Too hard.

* The leapfrog and the demark: The constitution, procedures and degrees of formality in Federal and State industrial tribunals vary significantly. Some are more curial and legalistic than others. Although recent meetings of presiding officers of these tribunals have reduced the opportunity for manipulation of the system, it is one which has built into it all the risks of demarcation and disputes and the use of disparaties achieved in one part of the country to secure their continuous ripple effect elsewhere.

In bygone colonial days when this system was devised it might have been appropriate to Australia's then needs. As we face the challenges of endemic youth unemployment, the competition of our region, the unattended problems of industrial health and safety, the impact of the microchip and the perplexing social and legal issues that face our country, the question we have to ask ourselves is whether the present institutional arrangement should survive? It is enough to tinker with it? Is a new reforming broom needed?

In his farewell speech in 1952 Sir John Latham, the retiring Chief Justice of Australia said of this part of our Constitution:

> 'The industrial power of the Commonwealth, s.52 (xxv) with which I have had so much to do, in Parliament and on the Bench, is such that I am almost ashamed to refer to it. That provision is legalistic in the extreme and it turns on the most important element in modern life, when not only political but economic questions are determined by some form of authority.[10]

That was 30 years ago. Yet the efforts directly to achieve reform of our industrial relations system by constitutional amendment present a 'barren chronicle', as Mr. Justice Ludeke has remarked.[11] No fewer than 9 separate proposals have been made to the Australian people to agree to reform of this power. 1910; 1912 (twice); 1919; 1926 (twice); 1940; 1946 and 1973. The proposals of 1919 and 1926 were put forward by non-Labor Governments. The 1926 proposal achieved an absolute majority of voters. It failed to carry sufficient States. One after another of the constitutional enquiries, in 1929, 1959 and 1978 have tackled this issue. They proposed change. Yet none has achieved reform.

THE GREATEST PEOPLES ON EARTH?

There is presently before Federal Parliament a Bill which is likely to pass in the present Session. It arises out of the failure of the States to agree to Mr. Fraser's invitation for the complete transfer of State powers in industrial relations to the

Commonwealth Parliament. The Prime Minister had said that the Commonwealth was prepared in these difficult times, to offer to take over full industrial relations responsibility if the States were prepared to transfer them, if necessary on a trial basis for a period of years. It seems that no State agreed.[12] Accordingly, a more modest approach is now being offered.[13] It will allow:

* joint sittings of the Australian Conciliation and Arbitration Commission with State industrial tribunals;

* expansion of the powers of local industrial boards, when constituted by a State industrial authority, to permit them to exercise Federal jurisdiction; and

* the exercise by agreement of State jurisdiction by the Federal Commission.

This Bill is surely a step forward. But it presents no large prospect of a less fragmented, more coherent industrial relations system to tackle the challenges ahead. No-one could call it a major effort to overhaul the system.

I am alive to the fact that some competition between courts and tribunals might not be a bad thing. I also recognise the formidable problems of careers and vested interests that have a stake in the continuance of the present system. The Employers' Federation itself, with its comprehensive industrial service before State tribunals would undoubtedly face special problems if all that were done in the name of reform were to enhance Federal regulation in areas that have long been a State responsibility.[14]

The reform I contemplate goes much further. Ultimately, it comes back to democracy and responsibility. All too often in Australia responsibility is shirked. All too often we are ready to pass our problems over to unelected judges and other officials, absolving the responsive and elected arms of government from answerability, even for major social and economic decisions. Democratic accountability is the special feature that is said to distinguish us from the late Mr. Brezhnev's Russia. Yet Australia is one of the few countries where the national government does not have direct substantial power and responsibility for so vital a facet of natonal economic policy as industrial relations. It is the only country - including the only Federal country - where that power is constitutionally forfeited from politically responsible officials to an unelected independent Tribunal, whose decisions can be castigated by all with the sweet knowledge that electoral accountability is not required. It is a system which a Man from Mars would simply not believe. Yet it is the system which looks like accompanying Australia into its next century, unless we act.

On Australia Day 1888, Sir Henry Parkes declared:

> 'As sure as the sun rises on the first day of our second century tomorrow...at the close of that century shall we be one of the greatest peoples on the Earth'.

Are we, the generation of today, worthy of that prediction? Or, in the sphere of industrial relations, are we so caught up in the institutions devised in Parkes' time that we lack the imagination, courage, selflessness and appreciation of our national problems to tackle the necessary constitutional and legal reforms?

If Parkes were with us today, I am sure that he would declare that, in industrial relations, we have become the captives of institutions which have been overtaken by new problems. The time is ripe for reform even constitutional reform.[15] Hard times - times of economic downturn - can be good times for reform if we face our uncertain future and examine our individual and institutional capacities to respond to it.

FOOTNOTES

* The views expressed are personal views only. They should not be attributed either to the Law Reform Commission or to the Australian Conciliation and Arbitration Commission.

1. Australian Bureau of Statistics, Monthly Statistics on Employment, A.B.C. Radio News, 11 November 1982, 12.30 p.m. broadcast.

2. See J. Quick and R.R. Garran, The Annotated Constitution of the Australian Commonwealth, 1901, 646.

3. Quoted in R.R. Garran, Prosper the Commonwealth, 1958, 225.

4. M.R. Cockburn and D. Yerbury, The Federal/State Framework of Australian Industrial Relations, in K. Cole (ed.) Power, Conflict and Control in Australian Trade Unions, 1982, 52.

5. Pitfield v. Franki (1970) 44 ALJR 391.

6. R. v Portus; ex parte Australia and New Zealand Bank Ltd. (1972) 46 ALJR 623.

7. Moore v Doyle (1969) 15 FLR 59, 119.

8. Report of the Honourable J.B. Sweeney, Judge of the Australian Industrial Court, 1974.

9. Cockburn and Yerbury, 58.

10. (1952) 26 ALJ 3.

11. J.T. Ludeke, 'The Reference of Industrial Powers from the States to the Commonwealth' (1980) 54 ALJ 88.

12. J.M. Fraser, speech at the opening of the Lowe by-election campaign (1982) 7 Commonwealth Record 178, 180.

13. Conciliation and Arbitration (Complementary Industrial Relations System) Bill, 1982 (Cwlth).

14. Ludeke, 90.

15. For various recent proposals for reform see Ian Viner, Speech to American Chamber of Commerce (1981) 6 Commonwealth Record 1447; Gareth Evans, Speech for Constitutional Convention, Perth, 1978, Item W 17, mimeo; N.K. Wran, cited [1980] Reform 83, and F. Cawthorne, Review of the Industrial Conciliation and Arbitration Act, 1972-1981, South Australia, Discussion Paper, 1982. See also [1982] Reform 70.