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SERIES ON THE ECONOMIC SUMMIT

FOR REAL PROGRESS IN ECONOMIC CO-OPERATION : READ CONSTITUTIONAL REFORM

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JUSTICE MICHAEL KIRBY **

GOOD AND BAD NEWS

An irreligious legal wag I know recently told the tale of that early reformer Moses, when he came down from the mountain with the Tablets. He brought good and bad news. 'The good news is that I got Him down to ten'. 'The bad news is that adultery stays! '.

The good news for Australia is that the economic summit is happening at all. It has widespread community support. There is even a touch of optimism. It brings together the chief actors relevant to national reconciliation and economic recovery. The bad news is that the Australian Constitution stays like Banquo's Ghost to haunt our industrial relations scene. Lasting reforms, essential for the good economic management of Australia, may require significant constitutional reform in a most sensitive matter : the power over industrial relations. The present constitutional arrangements instil the psychology and procedures of disputation. If we are serious about long-term economic reconciliation, we must pay attention to the legal and institutional reforms necessary to assure a permanent improvement in the way we do things.

** The Hon Mr Justice M D Kirby CMG, Chairman of the Australian Law Reform Commission and Deputy President of the Australian Conciliation and Arbitration Commission. Personal views only. Adapted from a speech to the Employers' Federation of New South Wales Annual Luncheon, 'Industrial Relations, Law Reform and the Constitution', 12 November 1982.

Our system of industrial relations in Australia 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 unions and employer industrial organisations. 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 Convention in 1891.

The compromise that led to our peculiar system of conciliation and arbitration 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. Higgins himself, early this Century, described the developing industrial laws over which he presided as 'a Serbonian bog of technicalities'.

How much longer we can continue with this ramshackle 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, the needs for industrial democracy and enhanced work safety 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. It is an issue for the agenda of the Summit.

SIX BASIC PROBLEMS

Just consider the problems that arise under Australia's present industrial relations system. 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: The requirement of a 'dispute', by the genius of legal reasoning worthy of a medieval monk, has been partly overcome by an almost cynical means: the artificial paper dispute - the log of claims. The intent of the Constitution is 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 may know what is going on. But the psychology of unreality and extravagance is virtually 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'. A dispute about deduction of union dues is not an 'industrial dispute'. Management prerogatives on matters such as pensions, seniority, the decision to hire and fire - all vitally important matters just now - have been held to be outside the definition 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 Australia. 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. 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. Too hard.

* The leapfrog and the demarcation: The constitution, procedures and degrees of formality in Federal and State industrial tribunals vary significantly. Some are more legalistic than others. Although recent meetings of presiding officers of these tribunals have reduced the opportunities for manipulation of the system, it is one which has built into it all the risks of demarcation 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?

The efforts to achieve direct reform of our industrial relations system by constitutional amendment present, as Mr Justice Ludeke recently remarked, a 'barren chronicle'. No fewer than nine 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.

WILL IT SLIP THROUGH OUR FINGERS?

In 1982 the States failed to agree to Mr. Fraser's invitation for the complete transfer of State powers in industrial relations to the Federal Parliament. Mr Fraser 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. A more modest approach was proposed. It would 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 lapsed with the Federal Election.

Some competition between courts and tribunals is probably not a bad thing. Certainly, there are formidable problems because of the careers and vested interests that have a stake in the continuance of the present system. But the reforms that may be necessary go much further than talk, good will and the ideas people have so far contemplated. Ultimately, they come back to democracy and responsibility. All too often in Australia responsibility is shirked. We are too ready to pass our problems over to unelected judges and other officials, absolving the elected arms of government from answerability, even for major social and economic decisions. Democratic accountability is said to be the special feature of our political system. 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 unelected independent Tribunals, 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 there is sufficient resolve to change it.

The national economic summit provides Australia with a unique opportunity to look again, 100 years later, at our industrial relations system. The summit is a fresh idea. It is endorsed by the People. The Prime Minister, by his training and background, is uniquely placed to address the constitutional and institutional problems I have listed. In Senator Gareth Evans there is a Federal Attorney-General who is interested in and optimistic about constitutional reform in Australia today.

Will this unusual combination of hope, needs, circumstances and people slip through our fingers? It may, if the obligations of relevant constitutional law reform are not addressed. For long-term economic reconciliation and growth in Australia read institutional and constitutional reform.