521

INDUSTRIAL RELATIONS SOCIETY OF WESTERN AUSTRALIA

FOURTEENTH ANNUAL CONVENTION

PERTH, SATURDAY 13 OCTOBER 1984

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The Hon Justice MD Kirby CMG *
Chairman of the Australian Law Reform Commission

THE INDUSTRIAL RELATIONS MINEFIELD

In a speech I delivered in November 1982 at the Annual Luncheon of the Employers' Federation of New South Wales, I called for fresh attention to the reform of Australia's industrial relations machinery. I did so by listing an agenda for action. It is still relevant. The list of topics mentioned will be of no surprise to you. It included:

- First, attention to the 'dispute syndrome': the need normally to establish a 'dispute' in order to activate the arbitration procedure. Disputes, the adversary process, locked positions and the psychology of 'difference' are partly guaranteed by the very language of our Constitution. Yet a possible way out has lately been shown by the High Court of Australia with suggestions that the power to 'prevent' a dispute is the great unexplored territory of Federal industrial regulation.[1]
- The second problem is the ambit claim. It is a procedure developed for constitutional reasons to define the parameters of the 'dispute'. But it has instilled the psychology of exaggeration and extravagance. It has tended to inject an element of cynicism and unreality. The repeat performers understand. The consumers and the overseas customers find it odd indeed.
- A third artificiality is the responsibility of lawyers. Disputes must be about 'industrial' matters. That little word 'industrial' has attracted artificial legal interpretations that border on the fantastic. The dispute about union dues was said not to be an industrial dispute.[2] Fire fighters were not engaged in an

industry.[3] The very borderland of the jurisdiction of the industrial tribunals rendered them impotent when matters of importance arose of the kind Mr Herbert complained. Again, the High Court has lately shown the way to a solution by more realistic decisions of the scope of 'industrial' matters.[4] Lawyers got us into this mess. Perhaps lawyers will now extricate us.

- A fourth problem is the bifurcation of arbitral and judicial powers which followed an extraordinary decision of the High Court and Privy Council in 1956. The Federal Commission cannot give a binding and authoritative interpretation of its own awards. It cannot enforce them. It cannot make orders for reinstatement. All of these must be done in the Federal Court. A division of responsibility can sometimes lead to an escape of responsibility.
- The duplication of Federal and State industrial tribunals is possibly the price we pay for the Federal system of government — so beneficial in other respects. But in the industrial relations field, it merely multiplies the already large problem of multiple unions. It encourages the 'ripple effect' of particular awards achieved in particular jurisdictions, then used to prime the inflationary pump to spread the increase throughout the system. The semi-religious status of the doctrine of relatively ensures that the increases granted in one place are felt thereafter in many other places. Some competition between tribunals may not be a bad thing. It may sometimes promote advance and progress. But incessant competition between jurisdictions may undermine orderly industrial relations and engender institutionalised inflation.
- Finally, there are the demarcation disputes which so bedevil our community. Are they the price we pay for our industrial relations history and for the large number of small unions? According to Justice Ludeke there were 322 trade unions reporting to the Australian Bureau of Statistics at the end of 1982.[5] Membership exceeded three million persons but was not evenly distributed. Eight unions, with 80 000 or more members each, accounted for 32% of the total union membership. Thirty three unions with 30 000 or more members each accounted for 70% of the total membership. At the other end of the spectrum there were 109 unions with fewer than 500 members each. They covered less than 1% of all trade unionists. The total number of trade unions in our country could be reduced by one third if the 109 small unions were to be amalgamated with larger organisations. But in the way of such amalgamation stands the most complicated provisions of a complicated statute. These provisions positively enshrine the status quo. I know this for I speak from bitter experience because I was involved as one of the Counsel in a monumental effort to secure the amalgamation of what is now the AMFSU.

I am sure that Justice Ludeke is right to point out that there will be little progress in amalgamation of unions in Australia unless a national redundancy and pension fund could be provided to look after those loyal union officers who would be made redundant. In brutal economic terms, it would pay Australia handsomely to act generously in this regard. I am not suggested a flat at Point Piper, or a dacha on the Gold Coast. But our country pays a great penalty for demarcation disputes. They rarely do anything to benefit the working man and woman. They will only be reduced when we reduce their causes. Their causes are well known. They are : too many unions — unions organised for crafts not industries, unions in competition for members, for numbers, for relative power. Not only must we provide retirement and pension funds for displaced officials. We must move to relax the barriers that stand in the way of amalgamation under the present legislation. The message is now out. Large unions tend to be more responsible unions. They tend to have better secretariats, better research and more informed leadership, better understanding of the essential mutuality of industrial relations, particularly in hard and changing times. If I could do a single thing for the improvement of Australia's industrial relations, it would be radically to simplify the amalgamation procedures under our industrial relations legislation, appoint a specialised unit to discuss, in collaboration with the union movement, an agenda for amalgamation and provide a generous fund to cushion the blow of such structural change as it falls on the loyal officials who work so diligently for the 322 unions operating in our country.

REFORM PROPOSALS

But I am not entrusted with the responsibility of reform of industrial relations law. This burden has fallen to Professor Keith Hancock and his committee comprising Mr George Polites and Mr Charlie Fitzgibbon.

It has been interesting to observe the range of proposals that have been put to the Hancock committee and made public. They vary from the frankly cautious to the bitterly censorious. Consider this spectrum:

- The cautious realists : The Minister for Employment and Industrial Relations, Mr Ralph Willis, in a speech prepared for a seminar on changing industrial law at the Australian National University in September 1983, urged that there was no point in effecting a radical change to Australia's industrial relations system. He said that there 'seems little point in trying to invent some fundamentally new system, but to ensure the basic approach is as effective and practical as possible'.[6] Specifically,

the Minister claimed that there was 'no place' for the relationships already established between employers and employees and their organisations to be 'supplanted by artificial arrangements'. He said that the various approaches to the jurisdiction of the Australian Conciliation and Arbitration Commission that had been suggested from time to time varied from 'the tinkering that has gone on over recent years to ideas for complete abolition'. But he said that critics offered 'little or no constructive alternatives to the present system'. He stressed that the government wanted to 'protect basic industrial principles, not undermine them'.[7] Now, the Minister's approach led to a somewhat bitter editorial in the Australian Financial Review. 'The expectation', thundered the editor, 'is that the [Hancock] committee will strongly endorse the maintenance [of the status quo] with little fundamental change of the existing system. This is not unlikely. For, with the greatest respect to the three members ... to appoint them to look into the arbitration system is like appointing an internal police committee to reform the police force. They are all three of them members of the first rank of the industrial relations club'.[8] Perhaps it was an accident or some Freudian gremlin which got into the Financial Review editorial office that day. But the editorial bears the date 'September 7 1893'. By the transposition of the digits in the date, it took the reader back to the time when the arbitration system first developed in Australia out of the great industrial chaos of the 1890s.[9]

- The structural reformists : Then, there are the structural reformists. The most notable of these has been the President of the Commission, Sir John Moore, who has presided in his difficult office with such skill for more than a decade. Although Sir John's submission to the Hancock inquiry urged that the Conciliation and Arbitration Act should be 'torn up and begun again' the approach he took was very much that of the reformer. The system should remain. But it should be streamlined. There should be rationalisation of the inter-relationship of the Federal and State industrial tribunals. In place of the functions of the Federal Court, a new Australian Labour Court should be created to exercise judicial powers but made up of the Presidential Members of the Arbitration Commission who are lawyers. A central Commission should be established with State divisions to remove the competition between Federal and State tribunals. Procedures for the administration of the Act and the making of regulations should be streamlined. The workload of the Commission President should be reduced. Although some commentators feared that the reference to the judicial powers with the spectre of court enforcement of orders would agitate the union movement, with its collective memory of the jailing of Clarrie O'Shea, on the contrary, the ACTU Secretary, Mr Kelty, described the entire package of Sir John Moore's proposals as 'incisive and very practical'.[10] This view was not universal, however. Mr Pat Clancy, National

Secretary of the BWJU, feared the return to the 'detested penal clauses'. The Australian Financial Review[11] returned to the fray. 'Radical change' it declared, 'no matter how necessary, will be beyond the purvue of Sir John Moore'. Conceding the merits of the criticism of the complexity of the Act and the need for internal reorganisation, the editorial asserted that 'Sir John does not really face up to the reasons for the unsatisfactory functioning of the Arbitration Commission as an economic policy-making body or as an industrial relations tribunal'. In essence, this does seem to be the problem. The Constitution imposes on the Arbitration Commission a dispute-settling function. But history, the default of governments and other factors have imposed on it a major and vital function as a body of the highest economic importance, but one for which it is not directly accountable to the people through the electoral process. Furthermore, the procedures still remain very much the legal procedures of arbitration, suitable to the settlement of shop floor industrial disputes. The more discursive fact-finding and opinion-gathering procedures appropriate to an economic policy-making body are not universally followed, possibly because of the discouragement found in earlier decisions of the High Court. Sir Garfield Barwick specifically suggested that the arbitration procedure should not be run like a seminar.[12]

The radicals :Then, there are the radicals. Surprisingly, to those who do not know him, one of the Deputy Presidents of the Arbitration Commission, Justice Ludeke, has emerged in the front rank. He has urged that the system of industrial relations, developed around compulsory arbitration, should be wound down. In its place the industrial powers should be transferred to industry councils where employers and workers could be 'continuously involved in all aspects of their industrial relationship, not only dispute prevention and settlement'.[13] The Arbitration Commission would lose its conciliation and mediation functions, being left only with limited powers to arbitrate where industrial councils could not resolve disputes. Justice Ludeke urged that the need for radical change was evidenced by the failings of the present system and the urgency of addressing the economic and technological challenges to Australia. The Australian Financial Review, with not a little glee, suggested that Justice Ludeke had 'rudely shattered' the 'emerging consensus of the club'. He had cut the ground from under the feet of the Hancock inquiry which could 'no longer safely assume that it would go uncriticised by the Arbitration Bench if it did not consider the various alternatives to the arbitration system'.

Newspaper reports show that similar debates have been held in the Federal Parliamentary Liberal Party.[14] According to a report, a compromise policy unanimously approved by the Shadow Cabinet on Monday, accepts the 'continued pre-eminent role of the Arbitration Commission as a continued system of centralised wage fixation'. This notion had been urged by Mr Macphee, a champion of the system. But the Liberal Party policy also introduces the concept of voluntary contracts into the formal wage-fixing system as part of a highly modified form of the so-called 'opting out' proposal urged by the Shadow Treasurer, Mr Howard. Under the proposed policy, companies and employees (who must be unanimous) could agree on employment contracts covering wages and conditions which were below the prevailing award standard fixed by the Arbitration Commission.[15]

CONCLUSIONS

In the differences of view amongst the Ministerial and judicial commentators and within the Parliamentary Liberal Party, one can see precisely the ambivalence about Australia's industrial relations machinery in a nutshell:

- It does not work perfectly, as the discouraging record of some of our industrial disputes shows.
- Yet it does work in many cases and lately it has been reinforced by the prices and incomes accord which has undoubtedly proved more successful than most people expected, raising the question of whether this is the time to do radical things.
- It is an odd system by world standards. It commits critical issues of economic policy to unelected people who are not accountable at the ballot box. Furthermore, they have tended to be led by lawyers and often to have been locked into procedures which owed more to the trial courts of old England than to the great needs of economic policy identification, evaluation and resolution.
- On the other hand, the system is deeply ingrained in the Australian psyche. It is there in the Constitution. And we all know how difficult it is to change that Constitution either by referendum or by surrender of State powers. Moreover, the High Court has lately come to the aid of internal change by adopting much more realistic attitudes to the language of the Constitution, particularly as to the scope of 'industrial' matters and as to the role of 'prevention' of disputes.
- Apart from these legal questions, there are so many careers bound up in the present system. People at the very top of our nation made their initial mark in its affairs in the system. They are familiar with it. They know its strengths and weaknesses. Union officials have been nourished in it. They are unlikely to turn

their backs on something so comfortable and familiar for the uncertain prospect of collective bargaining and free market contract, which have not been a feature of our industrial relations scene at any time this century.

- Additionally, there is a very Australian consideration. It is that the arbitration system may be economically unjustifiable. But it may be socially warranted notwithstanding. The market might perhaps look after the industrially strong and healthy. It might facilitate the demise of unprofitable industries. But such a cold and unpredictable wind might be unacceptable in our egalitarian, concerned, continental country. It might produce differentials in wages, justified by the market, but unpalatable to most citizens. It might produce sudden changes which dislocate still further what is already happening to the employment of fellow citizens, throwing them on the despair of social security. It might weed out unprofitable industries. But in doing so it might diminish the viability of spreading our wafer-thin population over this large continent.

These are the reasons that lead most people to feel that constructive reforms, at least in the first instance, are more likely to succeed than grand designs out of tune with our industrial relations traditions. That is why I expect that the way ahead for labour and management and for our industrial relations system generally lies not in the direction of 'ultimate achievements' but in the direction of 'modest achievements':

What are these modest but attainable achievements?

- First, to permit an exchange of commissions between judges of the Federal Court and Deputy Presidents of the Arbitration Commission so that, by common personnel, the frictions that has been imposed by constitutional decisions can be reduced.
- Extending this procedure to at least some members of State tribunals so that they can sit in the Federal Commission and vice versa. Also by other procedural means helping to integrate the personnel of the Federal and State industrial relations systems.
- Attending to the hint held out by the High Court concerning the powers of the Federal Commission in respect of 'prevention' so that the statute lays down a much more detailed code for the functions of the Commission, not only to deal with disputes when they arise but to intervene promptly when disputes are in the wind.
- Reforming the procedures laid down by the Act and by convention so that the Commission operates less like a court and more like an inquisitorial investigation. I for one do not regard the word 'seminar' as an insult. Courtroom techniques of witnesses, cross examination and proved evidence may be entirely suitable for

resolving disputed issues of fact. They are hardly appropriate for resolving the great issues of mixed policy, economy theory, social philosophy and disputed opinion that mark so many proceedings before our industrial tribunals. In part, the tribunals themselves already recognise this. But the process needs to go further.

- I have already mentioned the high priority I would place upon facilitating, encouraging and even-promoting amalgamation of unions. We have too many unions and too many demarcation disputes as a consequence.
- The arbitral tribunals should be more concerned with the industrial problems of the future: restructuring employment, youth unemployment, long-term unemployment, mature age unemployment, technological change and safety and health at work. In the past, led by a union movement which has not been innovative in this regard, the tribunals have concentrated almost exclusively on wages and conditions of work. The great employment battles of the future will relate to other problems, most of them associated with structural and technological change. If the arbitration system now nearly a century old is to remain relevant, it must provide a relevant contribution to the resolution of these problems.
- Finally, it is clear that the burden on the President of the Australian Conciliation and Arbitration Commission is unacceptable. He presides over a large and vitally important national institution with mixed and even somewhat incompatible functions. The Chief Justice of the Supreme Court of the United States recently called for the appointment of an Associate Justice for administration of that Court to relieve him of administrative burdens so that he could get on with the job of being a judge. Given the leadership functions of the President of the Australian Conciliation and Arbitration Commission, a similar innovation might be considered in Australia. However, it is inevitable that the President must preside in national wage hearings, take on novel or vitally important national disputes, expound the philosophy of the Commission in public fora and otherwise accept burdens which, by the standard of reasonableness, should not be imposed on a single individual for a sustained time.

No doubt these views of mine will be seen by some as an inadequate response to a highly urgent national problem. But the great lesson of Australia for reformers is that the way is not easy. Nowhere is this more so than when we are dealing with institutions long established, reflecting our inflexible Constitution and, more important, our country's humanitarian, egalitarian, social philosophy. That social philosophy of Australia's may not be an economist's dream. It may even be an editorial leader writer's nightmare. But it is deeply ingrained in our national persona. And it is ignored at great risk.

If this conclusion is sobering for the long-term flexibility and adaptability of the Australian economy, then so be it. Reform means re-form : taking the best of the old and adapting it to the needs of the new. There are limits to the community's ability and willingness to absorb major changes — particularly in central institutions long established and still functioning.[16] There is not the slightest prospect that the system of conciliation and arbitration which we have in Australia will be overthrown and replaced by something that works in Norway, the United States or Japan. We have a different history. We are a different people. What we have to do is to try to make our funny, peculiar, indigenous, somewhat inefficient but initially idealistic system work better.

We must do this for the coal industry. We must do it for our energy exports. We must do it for Australia. Let us hope that Professor Hancock and his colleagues will understand both the opportunities and limitations of their task.

FOOTNOTES

* The views stated are personal views only. There is no matter relating to industrial relations law reform before the Australian Law Reform Commission.

1. See, for example, Justice Mason in R v Gaudron; ex parte Uniroyal Pty Limited (1978) 141 CLR 204 at 210, 211; Cf Justice Murphy in R v Isaac & Ors; ex parte the State Electricity Commission of Victoria (1978) 140 CLR 615, 631.

2. R v Portus; ex parte Australia and New Zealand Bank Limited (1972) 127 CLR 353.

3. Pitfield v Franki (1970) 123 CLR 448.

4. See, for example, R v Coldham & Ors; ex parte Australian Social Welfare Union (1983) 47 ALR 225. See also the hints given in R v McMahon; ex parte Darvall (1982) 42 ALR 449, esp 454-5 (Justice Mason) and 459-460 (Justice Murphy).

5. JT Ludeke, 'Is Now the Time for Radical Change?', Paper presented to the Seminar on Changing Industrial Law, Australian National University, 6 September 1983, mimeo, 20.

6. R Willis, cited Canberra Times, 6 September 1983, 14.

7. Willis, ibid.

8. Australian Financial Review, 7 September 1983, 8.

9. For the history, see Ludeke, 1.

10. WJ Kelty, cited Sydney Morning Herald, 20 March 1984, 6.

11. Australian Financial Review, 19 March 1984, 8. Cf the editorials in the Canberra Times, 9 March 1984, 2 and the Age 19 March 1984, 13.

12. See Chief Justice Barwick in AFAP v Flight Crew Officers' Industrial Tribunal (1968-69) 42 ALJR 44, 49; Cf Cupper, Legalism in the Australian Conciliation and Arbitration Commission : The Gradual Transition (1976) 18 JIR 337.

13. Ludeke, cited Australian Financial Review, 7 September 1983, 1.

14. Australian Financial Review, 3 April 1984, 1.

15. ibid.

16. Cf J Piaget, Structuralism, 1973, 20, discussed in W Grbich, 'New Clarity of Purpose in the Australian Taxation System', Inaugural Address, 3 April 1984, mimeo.