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INSTITUTE OF PERSONNEL MANAGEMENT AUSTRALIA

NEW SOUTH WALES DIVISION

FORTIETH ANNUAL DINNER

REGENT HOTEL, SYDNEY, THURSDAY 9 JUNE 1983

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June 1983

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

FORTY YEARS ON

We have it on his own authority that Winston Churchill was a miserable schoolchild. Poor in mathematics and indifferent in Greek, he would have presented a personnel manager with a bleak record. Doubtless, but for a dash of Dukely blood, a healthy serving of luck and a distinct spark of genius combined with great endurance, he would have ended his days as an irascible, querulous clerk in the Indian Civil Service or, perhaps, a plantation manager in far-away Sarawak.

Churchill's school, Harrow, still sings the song that the young Winston sang at the apogee of the reign of Queen Victoria:

> Forty years on, when afar and asunder
> Parted are those who are singing today.[1]

It is a great song and many of you will know that it ends with the invocation to 'Follow up! ':

> Till the field ring again and again
> With the tramp of the twenty two men.

If we cast our minds back to 40 years ago, what a revolution has come upon our community, its laws and personnel management in Australia in the interval. In 1943, Australia was facing perilous times, at war. Today, the dangers are great but national survival itself is not an issue. The Duke of Gloucester was about to take up residence with

cockroaches and rats at Yarralumla. Last week, the last remaining vice-regal representative not born in Australia was politely told that his term would not be renewed by the Western Australian Government. Manpower was acutely scarce because of the drain of war. Today we face unprecedented post-War unemployment. Already, in 1943, the Labor Government was looking to post-war reconstruction. The plans of great national schemes, such as the Snowy Mountains Hydro-Electric scheme, were beginning to form in the minds of Federal bureaucrats. No Federal/State tensions intruded in those days : in fact nobody was so impolite as to raise the constitutionality of the Commonwealth's action. The great debate over a national health service was beginning. We were on the brink of the surge of migration which turned our country from an Antipodean refuge of Englishness to a diverse, multicultural society.

In the book of Numbers, it is recorded that the Lord spoke to Moses saying:

And your children shall wander in the wilderness forty years.[2]

At that first annual dinner, 40 years ago, did anyone reflect upon 40 years on? Did they consider how far and asunder they would be parted? If they did, could they possibly have foreseen our time : the age of interplanetary travel, nuclear fission, in vitro fertilisation and the mightly micro? If one of us had been there and had whispered these prophecies, almost surely we would have been laughed at. That after a millenium of looking at the Moon, in our generation, man should walk on the Moon and explore, with vivid pictures, the surface of Mars and the rings of Saturn. That with a single bomb, man could wipe out a city, and that, not frightened off, he would continue to accumulate such bombs, so that there were many more than were needed to destroy all civilisation. That human life could be artificially and deliberately created on a piece of glass and that cloning of the human species would become feasible. And that the microchip would reduce into a tiny wafer of silicon the rooms of circuits and valves that even at that moment were seeking to decode the enemy war messages.

We live in the age of science and technology. I do not think it can be said that Australians wandered in the wilderness for 40 years. The 40 years have not been without their problems. Yet, despite Korea, Malaya, Vietnam, Iraq and the Falklands Islands, we have at least avoided another World War. We live from day to day under the threat of nuclear mistake or folly. But we still live. Great numbers of ordinary people move around the world in relative comfort of a Jumbo armchair. They travel in their busloads around the famous monuments which, until this time, were seen only by the few. Australia, by

world standards, has enjoyed high levels of employment, political stability and relative prosperity. Only in the last five years have the endemic problems of the economy cast a pall of gloom over the otherwise 'lucky country'. Have we now entered the wilderness? What do the next 40 years offer? Where is the prophet who will whisper to us the marvels of the year 2023? Because science and technology advances at such a pace, we can be sure that the miracles that lie ahead will make the achievements of the past 40 years look puny by comparison.

Unfortunately, the general cutback in Commonwealth funding has hit the judiciary. Where once the silken robes and horsehair wigs were paid for Federal Judges by the Commonwealth, now you have to buy them yourself. User pays. And if ever the Commonwealth did hand out crystal balls to Federal Judges, to give them the gift of prophecy, the order has now been cancelled. No crystal ball was issued to me. I heard on the radio this morning of a visiting American futurologist who is here for a science fiction conference. Because science fiction today becomes tomorrow's reality, I am sure he would have been a more appropriate dinner speaker : to prognosticate for you the future as it affects you as citizens and personnel managers. Unaided by a crystal ball, and without benefit of science fiction, I want to suggest a few changes that we may see in my own discipline, the law. I shall concentrate on matters of relevance to your discipline. If the prospects appear modest, even conservative, ascribe that to the problem that faces a law reformer in Australia. The hare of science dashes on with inventiveness. The tortois of the law comes creeping slowly, majestically, almost imperturbably.

INDUSTRIAL RELATIONS MACHINERY

I took the occasion of my Welcome as a Judge of the Federal Court on Tuesday of this week to pay tribute to the ingenuity and importance of the industrial relations tribunals of Australia. Our system is complicated. It is an outgrowth of the constitutional provisions that reflect a social experiment ventured at the turn of the century. In a world that has changed so much, since the golden Autumns when our Constitution was settled in Melbourne and Adelaide in the closing days of Queen Victoria's reign, it is remarkable that the industrial relations system remains virtually untouched. There are State and Federal industrial courts and tribunals. There are hundreds of industrial organisations : ranging from great national industry-wide organisations to small virtually in-house societies of loyal corporate officers. There are hundreds of awards, Federal and State. A whole religion of relativities that has grown up, complicated lately by central wage fixation and the 'Pause', Freeze, call it what you will.

The system is a complex one and many careers, of Judges, lawyers, union officials, personnel officers and others depend on its continuance. Yet we must surely ask whether it will still be with us, unreformed, in 40 years' time. Will the great changes of the economy, of communications and the development of national industries still be dealt with under the same industrial laws and institutions at the eightieth anniversary of this Institute?

The complexities of the system can be seen from recent proceedings in the Australian Conciliation and Arbitration Commission, for an injunction to restrain the New South Wales Industrial Commission from extending a 4% increase to engineers working in the State under Federal awards. Some engineers complained that State brothers had received the increase, so why should not they? Yet if Federal engineers received the increase, the ripple effect through Federal awards could be considerable. The injunction was granted. The issue is now before the High Court of Australia. It illustrates, once again, the barren intellectual arguments that can arise from our divided industrial relations system.

There are many other problems. And they will be familiar to all of you:

* The constitutional needs for a 'dispute' to activate the Federal Commission, instils the psychology of difference at the heart of our industrial relations machinery.
* The procedural device of the log of claims, adopted again for constitutional reasons, instils the psychology of exaggeration, lest the 'ambit' of the dispute be insufficiently wide to support a subsequent award.
* The artificial distinctions that have been forced by the separation, in the Federal sphere, of the judicial and arbitral functions : between the Federal Court and the Arbitration Commission are well known. At least in the State tribunals, no such inconvenient dichotomy exists.
* The dual system of Federal and State awards also helps to generate conflict. There are not only hundreds of Federal organisations. There are hundreds of State organisations : proliferating the opportunities for demarcation, leap-frog, confusion and uncertainty. The computer has arrived just in time because the complexities of the system defy the intellectual retention even of the sophisticated and brilliant minds that work in this field.

At my Welcome Ceremony, I expressed regret that I had been required to resign my commission as a Member of the Arbitration Commission before taking up my post as a Federal Court Judge. It seemed to me that an exchange of commissions between the court and the Arbitration Commission was a practical, speedy and uncomplicated way of solving the confusion and complexity of competing tribunals. I am told that earlier this week, Mr Justice Ludeke, a Deputy President of the Australian Conciliation and Arbitration Commission, received a commission as a Deputy President of the Industrial Appeals Tribunal of Tasmania. This is the first time such an exchange of Federal and State commissions has been attempted. It will mean that, at least in some Tasmania in industrial disputes, there will be a judicial officer who, compatibly with the Constitution, can operate under Federal and State laws in solving the whole of one dispute. It is fitting that this innovation should be entrusted to Mr Justice Ludeke. Some years ago, he suggested a solution to the border conflict between New South Wales and Federal industrial tribunals could be found in reciprocal appointments of some members at least to both bodies.[3]

A glance at Australia's record of constitutional change will leave even the super-optimist depressed. Six times the people of Australia have been afforded the opportunity to reform the industrial relations system. Six times they have refused to do so. We struggle along with the rigidities of the conciliation and arbitration system, because it is virtually constitutionally guaranteed. We must look to the High Court for reform — and it has been showing signs of late of a willingness to breath life into some expressions of the constitutional formula long neglected, such as the power of the Arbitration Commission to 'prevent' disputes. Even this very day the High Court, in the Australian Social Welfare case, handed down an important judgment that promises to enhance the power of Federal regulation. It held, unanimously, that 'dispute' in the Constitution referred to a dispute about work and did not have to be a dispute in a narrowly defined 'industry'. Fifty years of jurisprudence was consigned to history this morning.

We must also look to the Parliament, where the Labor Party is committed to simplifying the procedures for the amalgamation of industrial organisations. I was myself involved in the amalgamation of the Metal Workers' Union. The technicalities and niceties involved in achieving that union could have found an honoured place in the pages of a novel of Dickens. We must look to Executive Governments to commission judicial officers with dual commissions, so that they can exercise judicial and arbitral functions, and State and Federal functions. The rigidities and artificialities of the divisions of our industrial jurisdictions guarantee, inconvenience and diseconomy. As a country, facing harder times, we should be attending to the solutions to such diseconomies, which we can

no longer ignore. They endanger our future prosperity and our capacity to adapt to a time of rapid change. We should also contemplate the possibility of frank constitutional amendment to the industrial relations power. There was a suggestion in the new Federal Government's policy documents, of an inquiry into industrial relations laws. Such an inquiry was also under contemplation during the Fraser Government. It would be my hope that the direction of reform would point to political accountability for laws governing employment conditions and industrial relations. In Australia, politicians of every colour have been only too glad to pass the buck to unelected and largely unanswerable judicial officers. They do so in the knowledge that they cannot then be held accountable when things go wrong. Perhaps if there were greater political accountability for such laws, and the state and reform of such laws, there would be a greater sense of urgency to modernise and simplify Australia's system of industrial relations.

I suggest that if a few of us are here 40 years on, we will see a radically changed industrial relations system. The pressures of unemployment, of structural dislocation caused by technological change, of endemic youth and aged unemployment, of part time work, will require nothing less. Given the history of constitutional change in Australia, I fear that there will be many more dinners and many more speeches before there is action.

INDUSTRIAL SAFETY

Another field in which law reform will be seen, relevant to personnel questions, is industrial safety. High Court Judges are beginning to call attention to the appalling record of death and injury in Australia, including at work.[4] The interposition of insurance, even with high premiums, takes some of the pressure away from companies to so discipline themselves as to prevent accidents occurring. If the insurer picks up the tab, the risk is spread evenly and largely between safe and unsafe employers. The social acceptance of a high rate of industrial deaths and injuries might be diminished if society had to offer full restitution to the unfortunate victims. A series of decisions of Australian courts has enhanced the rights of recovery. The response, rather than increased efforts to improve safety and prevent accidents, has been a rapid rise in insurance premiums and a search for less generous forms of accident compensation.[5]

In New South Wales, new legislation has lately been proposed on industrial safety. In South Australia, the former government established new institutions for rehabilitation of injured workers. In Victoria, a tax on employers was proposed last year, in order to finance research into the causes of accidents and workers' safety.[6] Various other initiatives have been taken in other States and at the Federal level.

In October 1982, Mr Hayden committed a Federal Labor Government to 'upgrading Australian health and safety practices in the workplace'.[7] He stressed that he did not have in mind a 'top heavy' Federal administrative structure. But he did envisage an authority to license the use of chemicals in industry and an undefined 'system' to collect information on health and safety, and to conduct research and help in the training of occupational health workers.

I believe that we will see moves towards comprehensive Federal legislation on industrial safety in Australia before too long. In the United States, a comprehensive Federal Act was passed by the US Congress in 1970. It deprived the States of much of their traditional area of responsibility in respect of work safety. It introduced a uniform national law on the subject throughout that country. The law was based on the Federal 'interstate trade and commerce power' as it has been interpreted in that country. In the Australian Constitution, there is a virtually identical constitutional head of power for our Federal Parliament. Unfortunately, the High Court of Australia has taken a narrow view of interstate trade, virtually requiring actual movement across the border. The court has ignored the economic reality of the close interconnection of such intra and inter State trade and commerce.[8] Its rulings would bring a smile to an economist, looking at the reality of trade in the Australian situation.

If the hurdle of constitutional impediments can be overcome, I believe that it is likely that we will see developments on individual safety laws such as have been occurring in Canada and the United States. These include:

* the gathering of more information and statistics on the causes of accidents and diseases at work to facilitate prevention;
* the training of a greater awareness of key personnel and alerting public attention;
* the promotion of expert advice in preventative design of equipment, vehicles, products and work environment;
* the creation of on-site work bodies;
* the replacement of the myriad of local, State and Federal laws with which an employer must comply, with a single Federal law operating throughout the country.

In Canada, legislation has been enacted or proposed which enhances the employee's right to know the hazards of work, to have joint committees to promote work safety and, even in times of unemployment and economic downturn, to refuse without penalty to work in conditions that are unsafe and unescapably dangerous to health.[9]

It seems likely that in the years ahead more attention will be focused on legislation for work safety and this will require the attention of personnel administrators.

DISCRIMINATION LEGISLATION

Another aspect of the law which will come to complicate the life of those engaged in personnel practices relates to discrimination. A recent decision of the High Court of Australia made it clear that Federal legislation on racial discrimination was intended to be exhaustive and exclusive and a complete statement of the law for the whole of Australia. In the matter of racial discrimination, based on an international convention, the Federal law left no room for the operation of the New South Wales Antidiscrimination Act.[10] The case in question arose out of an incident in Kempsey in 1980 when three people were allegedly refused service in a hotel on the grounds of their race. But it could just as easily have arisen out of a refusal to offer employment on that ground.

Recently, the Chairman of the National Committee on Discrimination in Employment and Occupation, Commissioner Pauline Griffin, said that Australia had only 'touched the tip of the iceberg' in its battle against discrimination and the lack of equal employment opportunities.[11] Commissioner Griffin was speaking to a combined meeting of the national committee with committees based in the States and the Northern Territory. A campaign to launch a major national effort to combat discrimination and to promote equal opportunities in employment is about to be launched. The object is to raise awareness:

> Tough economic times have seen the job of discrimination committees made a great deal harder — particularly in relation to groups traditionally disadvantaged in the employment area — migrants, Aborigines, disabled persons, the young, the old and women. Difficult economic times have seen a revival of discrimination practices that have no place in modern-day Australian society. Far too many people are still afraid to come forward and lodge complaints. They fear losing their jobs because they have lodged a complaint. However, the national committee and its State and Northern Territory committees are still receiving more than 600 complaints annually.[12]

It is sometimes difficult to differentiate the cases where the legitimate interests of an employer and fellow workers come into conflict with principles against discrimination. Thus, an assertion that a person may not suffer discrimination because he or she is mentally retarded, would seem to have no applicability to recruitment and employment in an academic post in a university. There, intellectual excellence is the

essence of the job. Likewise, discrimination against people on the grounds of sex may sometimes be upheld by appeals to long tradition. The recent order of the Catholic Archbishop of Adelaide banning girls from serving at the altar is discriminatory. But the Archbishop sought to rely upon orders from Rome and the long traditions of his Church. Complaints about discrimination on the grounds of religion or sexual preference are rare. Most complaints in Australia relate to sex, race, age, disability or marital status.

It is clear that we are going to hear more of antidiscrimination legislation. It will sometimes be extremely difficult to operate in practice, justly for all employees. A person, seeking to be a nurse, but who was very nearly blind, took her case ultimately to the Supreme Court of the United States. The point made by that court is the point of discrimination legislation generally. It is that we cannot ignore the essential qualifications for jobs. But we have to release our minds and our practices from the prison of stereotypes. Because a person is in a wheelchair does not mean he cannot perform useful work. A blind person cannot be an airline pilot : but he may quite readily become a radio announcer. I know a good friend who is totally blind and who lectures in law with great ability. In fact, our multicultural society is one aspect of the battle against stereotyping. When the history books are written, it may emerge as the most significant contribution Mr Fraser made for the Australian identity. It essentially asserts that people should be allowed to be themselves and to be judged on that basis as individuals. And it is not necessary for everyone to be squeezed uncomfortably into the rigid dimensions of an assimilated white Anglo-Celtic Australian.

The problem of ageism is one that will increasingly confront personnel administrators. We all know of the pressure towards earlier retirement of workers; sometimes voluntarily but often not. The statistics which show the rapid increase in life expectancy demonstrate the growing interval of healthy and potentially active retirement. Not only does this interval impose burdens on the social security system. It imposes personal burdens on people brought up in the tradition of the work ethic. Unless such people can be trained or retrained for leisure, it is likely that they will be disoriented and discontented. Figures show that, as a proportion of the whole population, the numbers of retired persons in Australia will double within the next 40 years. This is a tremendous human resource, much of it going to waste. Public opinion surveys in the United States demonstrate that at least half of retired persons would prefer to be

working. The same is probably true in Australia. In the age of the microchip, much routine work that might be suitable to older workers is disappearing. Within the next 40 years, we will have to discover socially acceptable means of offering such people as want it acceptable ways of occupying their time in constructive and fulfilling leisure. Unless we do, we will face social and personal discontent of unprecedented proportions.

PRIVACY LEGISLATION

Finally, I want to say something about the mighty micro. It is already revolutionising the information practices of Australia including in the personnel field. Information technology, including computers linked by telecommunications, present remarkable opportunities for efficiency, speed, economy and detail in the movement of information. But it also poses new problems for individual privacy. The Law Reform Commission has been examining these problems. It plans, within the next month, to deliver a major report to the Federal Attorney-General, suggesting new means for safeguarding privacy in Australia today.

In my experience, most people in private enterprise are supportive, even enthusiastic, for the principles of the Freedom of Information Act. The notion that they should be able to use legal machinery to secure information on themselves or on their corporations from government and its agencies, seems wholly reasonable. But the principle of freedom of information is not going to stop at the public sector. It is a principle which will have its application in the private sector as well. Employment records represent an important section of personal information records, most of them held in the private sector. Generally the record is created at the time of an application for employment. An applicant for employment is in no real position to refuse to provide the information which is sought from him. Any such refusal would be likely to result in a denial of employment. In the present economic climate, an applicant is not usually able to negotiate about the details that will be supplied by him. In such circumstances, there is little meaning attached to the concept of individual consent to the supply of private data. In practical terms, personnel officers are able to demand from applicants a great deal of personal information, if they choose to do so. Some do. Employment records may also contain opinionative or judgmental information. References or remarks by supervisors in relation to conduct, diligence and efficiency may go on the file. Much of the information in such statements might not be readily susceptible to factual verification. Yet it might have a lasting effect on the employee's career. With the advent of new information technology, the potential of the data to persist, spread and influence increasing numbers of decisions is something that must be taken into account in designing laws on data protection and data security.

In the public sector, even before the Freedom of Information Act, reforms were adopted to endeavour to improve the quality of personal information and enhance the rights of data subjects in relation to that information. For example, in July 1982, the Australian Public Service Board issued a manual which provides guidelines on police record checks carried out by the Australian Federal Police. The police would not carry out a record check without a consent form, nor would they include criminal history information more than ten years' old in response to such an inquiry. A great deal of attention is paid in the forthcoming privacy report of the Law Reform Commission to the standards that should be followed in relation to personnel records, the collection of information, the security for such information and the retention of it after its purpose is concluded. The special vulnerability of computerised personal information is also addressed and particular attention is paid to new techniques such as lie detectors, voice stress evaluation and intimate psychological testing. I cannot disclose to you the details of the recommendations before they are tabled in Parliament. However, I can indicate that particular attention is paid to the 'key provision' of privacy laws overseas. This is the provision that normally, with exceptions laid down by law, a data subject should have a right of access to personal data about himself. The objects of this 'right of access' include the correction or deletion of false information; the annotation of competing points of view; the enhancement of judgments made on disputed information; the recognition of the growing importance of the data profile for decisions that will affect the whole life's journey of the subject and the increase in the capacity of the individual affected to see how others are seeing him.

The regime that is introduced by the Federal Freedom of Information Act should be seen as a response, in the public sector, to the information age and greater openness in dealings. It foreshadows a wave which will not stop at the public sector; but which will, with increasing persistence, require changes in information practices in the private sector as well. The new information technology will permeate and change the practices of personnel management in the decades ahead. That technology will bring with it new rights and duties that will alter the somewhat secretive bureaucratic traditions of our country. The insistent recognition that information is power, including power over ourselves, will result in demands by data subjects to have access to personal data about themselves. In due course of time, I have no doubt that the law will respond to those demands.

CONCLUSIONS

I have looked backwards and forward. The late Kenneth Clark once said that futurology was a discredited science. Just as the diners at the first dinner could not possibly have sketched with accuracy the world of today : the decline of Empire, the social changes and the onrush of technology, so we too falter when we look to the future. Technology, the economy and great historical and social forces will carry us on. The law, as a kind of baggage carrier, will come along slowly at the end of the line. It will respond to demands for more modern industrial relations machinery. It will respond reluctantly to the needs for better laws for work safety and health. It will provide a stimulus for the destruction of stereotypes and to combat discrimination in work. It may provide special protections for the aged and the vulnerable. It will respond to new information technology, including by the provision of privacy rights.

All of these changes promise to make life exciting for the personnel managers of the future. Paul Valery once said that 'the trouble with our times is that the future is not what it used to be'. I hope that when our successors collect at the eightieth dinner of this Institute, they will judge that their past, our future, was 'the good old days'.

FOOTNOTES

1. E E Bowen, Harrow School Song.

2. Numbers, 14 : 33.

3. J T Ludeke, 'The Reference of Individual Powers from the States to the Commonwealth', (1980) 54 Australian Law Journal 88.

4. See eg Raimondo v The State of South Australia (1979) 23 ALR 513 (Murphy J, dissenting).

5. New South Wales Law Reform Commission, Working Paper on Accident Compensation, 1983.

6. The Age, 14 August 1982.

7. Australian Financial Review, 25 October 1982. 3.

8. See eg Minister for Justice of Western Australia; ex rel Ansett Transport Industries Operations Pty Limited, (1975) 12 ALR 17.

9. See eg R M Brown, 'Canadian Occupational Health and Safety Legislation', (1982) 20 Osgoode Hall LJ, 90.

10. Viskauskas and Anor v Niland, (1983) 4 Legal Reporter, No 9, 5.

11. National Committee on Discrimination in Employment and Occupation, media release D5/83, 26 May 1983. Cf Sex Discrimination Bill 1983 (Cwlth).

12. Griffin, 2.