

634
1986 NATIONAL CONVENTION

INDUSTRIAL RELATIONS SOCIETY OF AUSTRALIA

ADELAIDE, SOUTH AUSTRALIA, 26 SEPTEMBER 1986

AT THE CROSS ROADS
OR THE CLUB REVISITED

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The Hon. Justice M.D. Kirby, CMG
President of the Court of Appeal, Sydney*

SYNOPSIS

By reference to the irrelevance of many post Imperial relics in India, and some heavy handed irony, the author derives suggested lessons for tensions between current institutions in Australia, inherited from the nineteenth century, and present day economic and social needs. By reference to the club in India - once the centre of political and economic power - he suggests lessons for the industrial relations Club in Australia. There is now a recognition of the disconformity between some of Australia's institutions and present economic needs. This disconformity reaches into industrial relations. The System is a uniquely Australian reflection of aspirations of fairness, order and egalitarianism. But in present economic and technological conditions much more flexibility and decentralisation of decision making may be necessary as well as the avoidance of the artificialities which are imposed by reliance on the conciliation and arbitration power in the Australian Constitution. Whereas in popular imagery, the trade unions appear to enjoy low public esteem, a significant share of the responsibility for Australia's current economic problems lies at the door of management: often distracted by unproductive take-over struggles or insufficiently interested in new investment and risk taking. But does some responsibility rest also upon the industrial relations System? The brickbats and bouquets for the Hancock Report on industrial relations reform are reviewed, in summary. The Report is placed in a long term historical perspective. Whereas the critics have castigated the recommendations as a "lost opportunity" for fresh approaches to Federal industrial relations, the pragmatists have praised the Report as a "continuation of the experiment". The conclusion may be reached that Australians are willing to tolerate, to some extent, deteriorating economic standards because the institutional alternative is risky and involves the dismantlement of a venerable system and a rejection of an ideal of industrial justice fashioned in earlier times. But the author suggests that the same realism which has been forced on Australia by current economic conditions, requires at least candid acknowledgment that the constraints on industrial relations law reform are now not constitutional and legal. A series of decisions of the High Court has largely cleared those impediments away. Any blinkers are now self imposed. The Hancock Report must thus be seen for what it is: a modest collection of relatively minor changes which leaves the life of the Club largely undisturbed.



The 'heaven born'; the prestige and power of the Indian Civil Service was very great. Administrator's *darbar*, with *dollies* in foreground. Bombay Presidency, c. 1910.



SAM BROWNE'S CAVALRY (12th FRONTIER FORCE) RAWALPINDI 15 JAN 1930

Birks	Boy	Brenda	David	John	
Fiddack	Afford	Gannon	Gannon	Lawson	
W. K.	Mrs	Le Col	Elton	Mrs	Bill
	Gannon	Jack Gannon	Hall	McNair	Megan

The warrior caste; officers and their wives, Sam Browne's Cavalry (Frontier Force), Rawalpindi, 1930.

RETURN TO THE CLUB

A few years ago I visited India. My journey took me to the well known tourist haunts. The Taj Mahal was as dazzling for me as

for Shah Jehan. In the Residency at Lucknow, they still preserve Tennyson's poem about the Mutiny. In Bombay, the Gateway to India welcomes no Emperors, though it is still a marvellous pile. In Delhi, the Red Fort and Lutyens' Secretariat buildings stand as reminders of the pretensions of succeeding rulers. But the most vivid memory for me, of this sub continental journey, is of a pilgrimage to Ootacamund. Up in the Nilgri Mountains in the south of India, there is still the balmy air. The gardens and the vistas which first attracted the servants of the Raj are much the same.

My wanderings took me to a quaint building. Deserted it was, save for an elderly retainer. Around the walls were the trophies of a lost age. The Polocrosse team 1925. The Shoot champions, with tiger, 1931. The Officers' First XI, 1937. The Ladies' Committee 1945. This deserted place of bread and butter custard, of leather armchairs and of a fire in the hearth still exists in the midst of teeming, republican India. It is the Ooty Club. The books in its library bear no date later than 1944. It is a monument to the past, frozen like a time capsule - collecting in one place images of the needs and the system of an earlier society. Standing there, silent, I could recreate in that inward eye which is the bliss of solitude, the regimental dinners, the busy meetings of the Collectors and the Circuit Judges, the swirl of crinoline. For let there be no doubt that, in an earlier time, this place served a vital social, political and economic function. In those far off days, it provided the oil for the machinery of government brought to India by the Heavenborn.

With these arresting images still in my mind, you will understand how pleased I was to be welcomed back to this Club. My membership, in earlier times, was brief - before I went off hunting in another realm. I feel rather like a trapper returning to the Ooty Club after many years absence. I look around and a number of the faces are familiar. True it is, some have passed on to their respective rewards. I feel the icy stares of those who wonder how I could ever have left so congenial a Club as this. I adjust to the bracing indifference of non recognition by those who, had I remained here, would

surely have known me. I look around and the outward trappings seem the same. No one has shifted the furniture. There is still a flurry of activity at 10.00 in the morning and 4.00 in the afternoon. I confess to a nagging feeling about what might have been had I stayed. It is a passing fancy. So I ignore it. From the whispered conversations, amongst the members, I learn of the changes that have taken place - and, even more horrible - of those still awaited. Things somehow do not seem quite so cosy. Outside the Club, there is a sense of alarm, certainly deep concern, about the state of society. Members of the Club, as leading players in society, are visible. They tend to attract the blame for the current state of things. Change is in the air. Mind you, for some, radical change is an alteration of Friday's menu. But for others - can it be believed? - there is a suggestion of entirely new rules, new members, a new President. I hesitate to mention it, but I have even heard others (obviously not clubbable people) proposing that this congenial, cosy and useful institution be razed to the ground. How could they suggest such a thing? They have surely not been in the Club, walked in its gardens, sniffed the occasionally bracing air and seen the valuable work done here for society. Dangerous people, these radical reformers!

My invitation to join you today came from out of the blue. As you know, I had joined another club. Suddenly a letter arrived from Justice Trevor Olsson inviting me here. When I urged the merits of others more suitable, I was rebuffed. I was told that what was needed was "a robust speaker who has an adequate, informed, background and is yet sufficiently removed from the so called "club" to be able to make an independent contribution". Being preoccupied at the time, I did not realise that my correspondent was actually defining, with precision, himself. And it is in this way, that I became fixed with this obligation. Such is the punishment in industrial relations for slow reaction time.

I ask you to forgive the infelicities and naivety of a contributor to your Convention who has strayed from the path these past ten years. I discern from the reference to the "so called club", a possible denial that the Club exists. But this

will scarcely wash. Once industrial relations in Australia were institutionalised in a national body, bringing together repeat players, the creation of symbiotic relationships was inevitable. Of course, as at Ooty, so here. It is a club of individuals. But having to work together regularly, imposes a regime of mutual dependence, shared experience and common interests. This much cannot be doubted. The questions for today, and for this conference, are to what extent the urgent needs of our national economic predicament require entirely new rules for the Club? And to what extent the institutional inflexibilities of the past will prevent this remarkable, and in many ways admirable monument of the nineteenth century from changing its settled and comfortable ways to survive in rougher times.

Now, I am too much of an old stager to make the five cardinal errors of a speaker on an occasion such as this. The most fundamental is to go on for too long. There should be a trap door for the removal of boring public speakers, the fall controlled by a democratic majority of the audience. The second error is to use the occasion to get off his chest some obsession he has been saving up, just for you. The third is to speak on matters about which he knows absolutely nothing - sadly a common failing. The fourth is to endeavour too much, like an enthusiastic chef pressing indigestion upon an audience with too many exotic courses. But the most fatal sin for a judicial speaker is to intrude into the minefield of political debate. In 12 years, since I was first sworn in as a Deputy President of the Arbitration Commission, I have accidentally touched off a few land mines. I have even been decorated for gallantry in action. But as you can see, I have so far avoided being killed in action. I plan to keep it that way. That necessitates at once avoiding the Scylla of party political commentary whilst at the same time steering clear of the Charybdis of irrelevant banalities.

THE CROSS ROADS DISCOVERED

I have titled my address: "At the Cross Roads". I believe it is generally recognised that our country has reached a cross roads. As the Bicentennial looms, we realise that, in the life

of most of us, Australia's place in the world has changed from that of a comfortable, loyal outpost of the British Empire to that of a nation, of rather modest power, occupying an empty continent spanning two oceans at the base of Asia. From a country which rode on the sheep's back and saw the "mineral boom" come and go, we now realise that, for reasons largely beyond our control, the terms of trade have lately proved adverse. Our international debt has risen unacceptably. Our dollar has declined dramatically in value. And our economic outlook is, at best, uncertain. All of this is happening in a world whose engine is science and technology. We are hectored by the indefatigable Barry Jones about the need to lift our game in entering the age of the microchip, biotechnology and nuclear physics.¹ We are now, all of us, or should become, the children of Erwin Schrodinger, the father of quantum physics. Yet it is difficult, for this purpose, rapidly to change our education system, inherited from Britain. It still favours a small educated elite, whereas our competitors stimulate and encourage a more general educational retention. The work practices of labour and management in Australia have developed in the world of tariff barriers and enforceable general industrial awards. So everywhere we look there is a clash between our current predicament and institutional rigidities:

- * Our predicament is that of a post colonial, multi cultural society in the south seas. Our governmental institutions are those of the apogee of the British Empire. Our constitution is one of the oldest in the world. It is one of the most difficult frankly to amend. We are still largely locked in a constitutional harness designed in the 1890's.
- * Our predicament is that of a country mainly content to rely for its export earnings upon things it grows or digs out of the ground, generally leaving it to others, overseas, to process them. Rigidities of the mind have dampened the entrepreneurial spirit necessary to mobilise what was, until recently, our comparative advantage in education and training to allow us to develop and export new products, produced by intellectual endeavour and now so much in demand.

- * Our predicament is that of a society which under-educates its young people and boasts an educational retention which, at 17 years, is half that of Japan and the United States. The rigidities of changing our centralised and bureaucratised educational system are obvious to anyone having any connection with it.
 - * Our predicament is that of a country with unprecedented levels of youth unemployment, youth despair and drug addiction. Our rigidities are those of institutions which will not adapt, including unions generally concerned only for the interest of their members (and not, by definition, the unemployed and never employed). They include business leaders, many of the best whom are content with occupying their talents in speculative take over battles instead of in the productive new investment the country cries out for.² And there is also the rigidity of our industrial relations machinery itself.
- But we are at the cross roads. At least the national disease has been diagnosed. At least, after decades of complacency, we are now facing up to the bracing reality of our real place in the world. At least steps are now being taken to address our institutional rigidities:
- * A constitutional commission has been established to turn the bread and circuses of the Bicentennial into a serious reflection about the institutions of government which should take this country into the 21st Century.
 - * Important government initiatives, supported by the Opposition, have been enacted to encourage and promote new investment in high technology. The CSIRO has shifted its thrust towards stimulating informatics and biotechnology. We are beginning to prime the pump of a new economy as it becomes clear that a failure to do so will, with declining terms of trade, promise a serious spiral of decline in our standards of living. The places in tertiary education have begun steadily to rise. There is a growing alert to the importance of science and technology. A Commission for the Future has been established to stimulate our politicians to think

occasionally beyond the two or three years time frame which repeated elections tend to impose, with consequent limitations on their imagination.

- * The floating of the Australian dollar has brought the bracing realisation that the world market, looking at our economic position and prospects, does not value us nearly so highly as we valued ourselves. Yesterday, as I paid a credit card account for a recent visit to Europe, the stark reality was brought home to me that our exchange rate for the French franc is precisely half what it was but one year ago. This awful news will put restraints on the Australian Big Spenders. It is to be hoped that it will also attract the tourists and investors. At least the institutional rigidities of Reserve Bank control and artificial over valuation have now been replaced by the cold stimulus of the international market place.
- * And as if these remarkable changes were not enough, we also stand on the threshold of institutional changes in the most uniquely Australian institutions of them all - our industrial relations machinery.

THE HANCOCK REPORT FOR MODEST REFORM

It is not my purpose to provide a potted guide to and evaluation of the Hancock Report.³ Inevitably, much of this Convention will be devoted to that task. The precise shape of the legislation which the Government will propose to Parliament will not be known until the Budget Sitzings, at the earliest. The key provisions in the report were eight in number:

- * First and foremost, the recommendations that a central institution for conciliation and arbitration should remain the mechanism for regulating industrial relations in Australia. This recommendation, which amounted to a rejection of a more radical and novel approach, reflects the provisions of s 51(xxxv) of the Constitution. But it was accompanied with proposals designed to improve the practical working of the Federal Commission and to promote a closer relationship and better cooperation between the bodies administering the system both at the Federal and State levels.

- * Secondly, the 1904 Act which first established the progenitor to the Commission should be amended to give the Federal tribunal the widest possible jurisdiction to hear and determine industrial disputes, taking advantage of the recent High Court decisions which have favoured the expansion of Federal powers in this regard.
- * Thirdly, to amend Part X of the 1904 Act to give parties an option to make their own arrangements for the prevention and settlement of disputes by conciliation and arbitration.⁴
- * Fourthly, replacement of the present Commission by an Australian Industrial Relations Commission, to include members with legal qualifications and others with skills appropriate to industrial relations.
- * Fifthly, to establish a new court, called the Australian Labour Court, to exercise Federal judicial power in respect of industrial relations. The Chief Judge of the Court should be the President of the Industrial Relations Commission. Other judges of the Labour Court should be Deputy Presidents of the Commission.
- * Sixthly, empowering the new court to order compensation and/or reinstatement in employment where the unfair dismissal provision of a Federal award had been contravened.
- * Seventhly, whilst "integration" between State and Federal industrial tribunals was contemplated, it was not envisaged that the State bodies should be abolished, absorbed or merged with the Federal tribunal to the extent that this would be possible. Instead, there would be an improvement in the moves, now under way for several years, for closer contact between the personnel.
- * Eighthly, the new Act should contain a strengthening of the "public interest" provisions. The Industrial Relations Commission should be directed to have regard to the economic impact of its decisions and public interest is to be made a specific object of the legislation.⁵ Of course, such provisions would simply formalise what has long been a focus of this most important organ of national economic policy.

BRICKBATS FOR LOST OPPORTUNITIES

This package of reform is obviously relatively modest. It has attracted bouquets and brickbats. Without pretending to an extensive review, some of the principal criticism can be catalogued as follows.

First, the report has been taken to task for its methodology. Some of the critics have acknowledged the thorough research⁶ and the marshalling of a tremendous amount of material. But the essentially conservative starting point and the embrace of the "heavy weight" submission of the ACTU, the Confederation of Australian Industry, the President of the Arbitration Commission and the Department of Employment and Industrial Relations clearly put a dampener on any imaginative radicalism in the institutional reforms proposed.⁷ The estimation of the realities of achievable reform, the perceived restraints in the realistic use of the Constitution and the debates delineated by the various submissions received, all appear substantially to have locked the Hancock Committee into the continuance of the present regime, give or take a few reforms at the margin. Other countries, such as Sweden in the 1930's and the Federal Republic of Germany after the War have radically changed their industrial relations systems.⁸ But Australia, it seems, will not do so, at least it will not do so now.

This realisation has led to a wave of criticism based on the lament of "lost opportunities". Geoff Allen of the Business Council of Australia has taken to task the "Lucky Country" approach⁹ and the too ready assumption of certain "practical realities"¹⁰ resulting in a fatalistic attitude to more fundamental reform. He has suggested that the Committee adopted an essentially "backward" looking approach and lacked a long term perspective for Australia's industrial relations machinery.¹¹ He and other writers have suggested a basic structural flaw in the industrial relations machinery of Australia, inherited as it is from the turn of the century. This is, so it is claimed, its fundamental centralism. Whereas economic needs and opportunities require management decentralisation, our institutions, envisaged by the Constitution and now sustained by the Hancock Report, favour central and standardised determination of industrial

conditions.¹² Whereas our serious economic predicament requires flexible approaches and imaginative and local solutions and initiatives, the weight of our industrial relations machinery favours solutions from the centre, handed down from on high and rippling with their effects throughout the nation from Annandale to Albany.¹³ It is this feature which caused Richard Blandy to call the Hancock proposals, "the last hurrah of the past"¹⁴, and to take its authors to task for their alleged lack of vision and imagination.¹⁵ Indeed, Blandy's fear is that the report, and the legislation which is promised to follow it, will set the current system (first dreamed of as a solution to Australia's industrial needs in the 1870's), in legislative concrete designed to take it into the next century.¹⁶

The lack of flexibility and opportunities for local experimentation and variation are also remarked by Brian Noakes, although he generally supports the Hancock proposals.¹⁷ Specific disappointment is expressed at the refusal of the Committee to forbid retrospective awards, its proposal for reinstatement orders by the Labour Court and its rejection of the submission that State tribunals should participate in decisions under s 41(1)(d) of the Act.

Braham Dabscheck castigates the failure of the Committee adequately to explore the new and expanded corporations power of the Commonwealth as a means of providing an entirely novel approach to industrial relations legislation, unreliant on the structural rigidities of conciliation and arbitration.¹⁸

Certainly it is true, in an oft quoted passage, that Justice Lionel Murphy predicted such a development and dismissed the suggested constitutional restraints:

"The future course of Federal law will, I think, show a much greater reliance on the corporations and commerce powers than hitherto. The use of those legislative powers in addition to the conciliation and arbitration powers would enable a much simpler system of Federal industrial law than we now have. If the present beneficial approach of the courts continues there are no real constitutional barriers to the national Parliament evolving a sensible system of industrial law. Most of the supposed constitutional barriers do not exist."¹⁹

Yet such proposals for a completely "fresh look" based upon other heads of federal power were swept away by the Hancock Committee as "exotic".²⁰ Dabcheck asks "what is so strange and bizarre about powers that have always been available ... and part of the Australian Constitution"?²¹ What is so "exotic" about using such powers?

A number of writers have castigated the Committee for failing to deal with what they allege is excessive trade union power and the excessive influence of trade unions in Australia.²² Still other writers have criticised the "horrible" patch work of legislation which will survive the Hancock Report, described by one as "terrible in form" - like a "ruined giant".²³ But the most strident criticism of all has concerned the alleged failure of the committee to look sufficiently and imaginatively at the new problem which will confront industrial relations tribunals and the employment scene in Australia in the early decades of the 21st Century: raising productivity, confronting unemployment and under employment, reducing work injuries, illnesses and disabilities and above all adapting the work place to a time of massive technological change.²⁴ To such commentators, the retitling of the Arbitration Commission and the creation of a special Labour Court in lieu of the Industrial Division of the Federal Court, amount to no more than tinkering at the edges. Indeed, so far as the new Court is concerned, it already has its critics.²⁵ Why create a new Court, if no new sanctions are proposed? Why create an integrated Commission and Court at the very time when proposals are abroad to break up the integration which has been such a feature of the New South Wales Industrial Commission?²⁶ And if courts are there to give completely neutral application of the law, why is a special court required which will somehow be more "sensitive" to industrial relations concerns? Is the President of the Victorian Industrial Relations Commission right in suggesting that it is positively undesirable to combine court like functions with those of conciliation and arbitration?

BOUQUETS FOR PRAGMATIC REALISM

Against the critics can be heard the voice of the "realists" and "pragmatists" in the land. For them the life of industrial

relations, and of the law, is one of constant experimentation. For them, the experiment continues. The Hancock Report, and the proposed legislation are simply the latest step in a long development.

Anyone in doubt about the history behind our current laws should read the excellent paper by Chris Fisher on the English origins of Australian Federal arbitration.²⁸ This splendid monograph calls attention to the fact that the debates we are having here today in Australia, were not all that different, in genus, from the debates over which they agonised in England in the reign of Edward II. At the heart of these debates is a conception of legislation to intervene enacting paternalistic provisions designed to secure equitable and common standards, bearing in mind the variety of employers and the economic pressures upon them to cut corners. Against those who urge this paternalist model are the proponents who believe that, in the long run, and across the board, inventiveness and the policy of letting well alone is in everybody's interests, including the workers. This policy permits flexibility, discourages feudalism ancient and modern and would confine economic legislation and institutional interference to extreme cases.

The debates between these two schools raged in the 14th and 15th centuries. It came to a head in the Statute of Artificers passed in the fifth year of the reign of the first Queen Elizabeth.²⁹ That statute established a comprehensive code of 48 sections. It was the principal device for the control of the workforce by the state for three and a half centuries until its repeal in 1813. At this pace, after a mere century of the Conciliation and Arbitration Act 1904, we in Australia must perhaps await the 23rd century for a truly fresh look at our industrial relations law and institutions! But we can take heart from the fact that the debates we are having today can be traced, through our legal history, back 600 years and more. This reflection puts our present concerns in their proper perspective. The law and politics have always been closely entwined with employment conditions.³⁰ Nowhere is this more so than in Australia. Therefore, when we see reforms which look modest, we should compare them to the steps that have been

taken over the centuries. It is rare indeed that a great leap takes place. It happened in the Statute of Artificers. It happened again, after the Industrial Revolution and the establishment of the capitalist system produced legislation to forbid and later control combinations of workmen.³¹ It happened, yet again, with the first introduction of arbitration legislation in England, based upon laws previously enacted for commercial arbitration. And it happened, in Australia, with the proposal, so narrowly passed into the Federal Constitution, for a "new province" of law and order which would submit industrial disputes to curial resolution and establish a form of Industrial Rule of Law.

It cannot, I think, be said that the Hancock proposals amount to a further leap of imagination in this class. Indeed they do not profess to do so. This is, in fact, the main complaint of their critics. Whether it would have been realistic to propose - or even explore - solutions which were more radical is a matter for debate. There is always a tendency in law reforming agencies to curb their imagination in the hope of saving a wastage of their labours. There is an inevitable inclination to second-guess the politicians. Especially is this so when the repeat players affected by change come forward virtually with a united front urging that the boat should not be rocked. But the real question remains nagging at our minds. It is whether, in our present national economic predicament, (which has become much more obvious since the Hancock Committee conducted its investigation and delivered its report) such a cautious approach to institutional reform was necessary and desirable. To answer that question, one needs to have a conception of the seriousness of the predicament, the institutional inhibitions to reform, the political likelihood of the acceptance of a more radical change in the short and long run and the extent to which established institutions, and the Constitution itself, demand, in practice, a continuance of business [almost] as usual.

In favour of the modest approach of the Hancock Report can be said a number of things. First, it does envisage a number of potentially useful changes. The creation of the Labour Court is said to be its major contribution. By all accounts such integrated machinery works well in the Australian States where

it exists.³³ The bifurcation of any institution can produce artificialities. After all, it took centuries to bring the courts of England together in the Judicature Act. The notion of developing a more integrated machinery for Federal industrial relations is probably, on balance, a good one that will produce efficiency, realism and coordination.

Secondly, in its proposals for new approaches to the expressions "industry", "industrial dispute", and "industrial matters", the Hancock Report has plainly picked up a number of very important hints which have been given to the Parliament and the community by a series of recent decisions of the High Court of Australia. With one possible exception, relating to the Queensland Electricity legislation and a possible complication for the notion of dual commissions arising from the Hilton case³⁵, the whole trend of authority in the High Court in recent years has been in one direction: favourable to Federal power on industrial relations.

Despite the inflexibility of the Australian Constitution and its resistance to textual reform, the way has been made clear for new Federal legislation, by a series of court decisions. These decisions warrant an entirely fresh approach, if there is a political will in that direction. Alternatively, they would appear to support significant expansion of the Arbitration Commission's role and powers, if it is decided to press on with the current model.

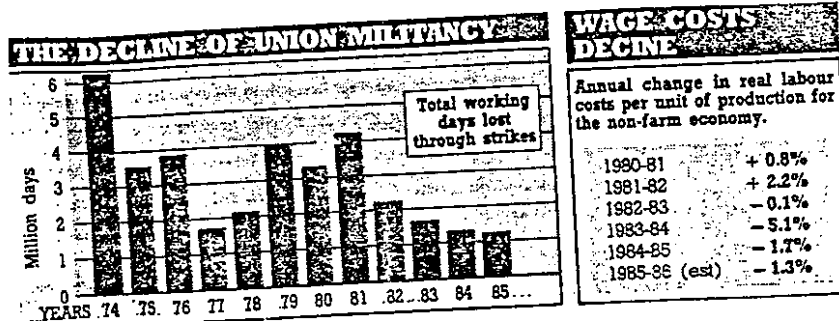
The majority of the High Court in the Tasmanian Dams Case³⁶ expressed the view that the corporations power enabled the Federal Parliament to legislate to prevent a trading or financial corporation from building a dam. By parity of reasoning, it would appear that Federal legislation could also determine directly conditions under which workers for such a corporation might be employed.³⁷ In the long run, this part of the Dams decision may prove even more important than the application of the external affairs power.³⁸ But even on the latter, the Editor of the Australian Law Journal has already referred to the possible significance, for future Federal law, of conventions of the International Labour Organisation and Australian adherence to them.³⁹

The clearest illustration of the High Court's realistic definition of the powers of the Federal Commission can be read in the Social Welfare Union Case.⁴⁰ By this decision, the Court removed the troublesome requirement that an "industrial dispute" could occur only within "industries" which had been somewhat arbitrarily defined. Also in 1983 came the decision in the Coal Industry Case.⁴¹ The High Court found no difficulty in deciding that Federal and State Parliaments could establish a tribunal sitting jointly which could exercise powers derived from both sources. This decision confirmed that Federal power was not received by a tribunal to the exclusion of State power. In August 1984 by its decision in the Federated Clerks' Union Case⁴², the High Court overturned a judgment of the Supreme Court of Victoria. This concerned the power of the Victorian Industrial Relations Commission to bring down an award requiring employers to notify and consult with the Union on proposed technological change. This legislative requirement was upheld. In terms, the decision of the High Court suggests that Federal as well as State awards could validly contain such provisions.⁴³ In 1985 the Court "struck down" the validity of Federal legislation designed to facilitate the transfer by statute of members in Queensland of the Electrical Trades Union from State to Federal industrial awards, and thereby to stultify any proposed action taken against them by the Queensland Government⁴⁴. But this decision immediately follows in the books another, handed down on the very same day, supportive of Federal power. By the latter decision it is made plain that a so called "paper dispute", evidenced by the delivery and acceptance of a log of claims, is sufficient to create an industrial dispute within the Constitution, provided the dispute is "real and genuine", that is to say, provided the demands are genuinely advanced. It was held to be no objection to the genuineness of the dispute that the purpose of the delivery of the log was to create an industrial dispute, thereby giving the Federal Commission jurisdiction to make an award.⁴⁵

I do not pause to reflect either on the esoteric artificiality of this system of "paper disputes", nor the irony that

jurisdiction to deal with industrial relations matters must normally require the engendering, however artificially, of a "dispute". Nor do I pause to remark on the inbuilt tendency to inflate demands in order to bring claims within the "ambit" of the paper dispute. These are structural maladies which would appear likely to remain, so long as the present approach to Federal industrial law persists in Australia. Only when the nettle is grasped, the corporations and other constitutional powers are used and the government of the day takes responsibility, directly, for industrial decisions, will we be able to avoid the 19th century artificialities forced on us by the conciliation and arbitration model. My present point is that this stream of High Court authority, to which may now be added the latest decision concerning the legislation on the Builders' Labourers' Federation⁴⁶, demonstrates it to be true as Justice Murphy put it. The inhibitions upon a fresh and different approach to industrial relations law and machinery in Australia can no longer be blamed on the lawyers and the "old gentlemen of the High Court". Those "gentlemen" - for there are no gentle ladies there - have, in a remarkable series of recent decisions, armed the Federal law maker with the power to tackle industrial relations law reform, unencumbered by much of the baggage collected around the conciliation and arbitration power over the last century. Indeed, so long as that power is still used, there may well be limits upon Parliamentary endeavours to harness and control the exercise of the power and to inhibit the limits of "arbitration". My present point is a simple one. The limits on adventure, novelty and imagination in industrial relations reform are blinkers which we impose upon ourselves. They can no longer be blamed on the Constitution. It should not be assumed that recognition of this obvious development is confined to the traditional centralists of the Labor Party. Mr. Michael MacKellar, for example, has referred to the power of the Federal Parliament to adopt greatly expanded Federal functions in industrial relations, inter alia to facilitate industry based unions and to limit the suggested excess of power on the part of unions.⁴⁷

This last comment brings me to the apparently low public image which unions enjoy in this country. According to last week-end's news reports, an opinion poll showed growing public antagonism to the unions. A "thumping" 77% said that union leaders over stepped their role. Of union members and Labor voters in the poll sample, 73% of union members and 62% of Labor voters agreed with that proposition.⁴⁸ These statistics are remarkable given the very high levels of union membership in Australia when compared to other countries. But they do not appear to tally with the impression of informed observers about the standards of union leadership today, when compared with the past. More importantly, they do not match up with the actual pattern of union militancy, at least so far as this is reflected in days lost through strikes or in the annual change in real labour costs per unit of production for the non farm economy in Australia. Strikes have dramatically declined in this country since 1981 and particularly since the first negotiation of the Accord, as shown in the Tables.



These changes are doubtless to be laid principally at the door of the economic difficulties facing the country. However, it is hard to dispel mythology once it is abroad. Demons and ogres are so much more interesting, as an object of frustration about hard times, than articulate union leaders, with their post graduate degrees and persuasive talk of macro economics and m³.

Some commentators in the Australian media, not noted for its radicalism, have even suggested that there has been a significant change in union behaviour, that the Accord has been a success and that the major problem we now have in this country is with incompetent or uninterested managers. Managers who lack entrepreneurial flair, technological know-how and interests beyond take-over manoeuvres.⁴⁹ I do not say that these are necessarily my views. But it is reassuring to see that the Hancock Report avoided simplistic union bashing. Mind you, given the Committee's membership, I imagine that this surprised no one. For once I believe we could all agree with Mrs. Thatcher who declared recently that she regarded an imaginative entrepreneur as "pure gold". Sadly, in Australia, there are not enough of them. And our institutions including industry assistance and general industrial settlements, appear to have contributed to the decline of the breed. They are now a sort of economic Tasmanian tiger - though not quite extinct. Yet against these sobering remarks must be balanced the reminder that institutions take on a life of their own. They tend to reflect the community they serve. This point was brought home to me by last Saturday's Adelaide Advertiser. It contained a vivid article on the return to the United States of a person who grew up there but who had made his home in Australia. He described the vigour and vulgarity, the power and the poverty, the dynamism and the drugs of that most remarkable Republic. He compared his leave entitlements and work conditions in Australia which were so much better than those of his American counterparts. Perhaps they are better because they have been secured by our unique industrial relations system. Perhaps they are better than our economy can actually afford to pay. But the main point of his reflection was that we in Australia opt - consciously or unconsciously - for a somewhat slower lifestyle; for a rather more compassionate society; for a more egalitarian class structure and for more time on the beach or at the footy and less time at school or at work. Perhaps these features of our national psyche are the product of the weather. Perhaps they derive from the offhand way our predecessors settled this hostile and empty continent. Whatever

the reasons, it is inevitable that our industrial relations machinery - and other institutions - will reflect these features of our community. The result may be a certain inefficiency. It may even conspire with forces for economic decline. But we may tolerate these facts - for a while at least - because the institutions are in tune with our history, our social traditions and our egalitarian ideals.

CONFOUND THEIR KNAVISH TRICKS

So the Hancock Report brings good news and bad news. True it is, important opportunities may have been lost. There are few radical reforms here. The suggestion that we should use the corporations power to shift responsibility for national economic decisions to the elected Government and Parliament has been rejected as "exotic". The experiment with the old "new province" continues. Of course, it is now supplemented by summits and accords. And we appear at last to be addressing frankly the realisation of serious structural economic difficulties. Whether the Hancock reforms (together with the Accord and the Summits) are a sufficient response to the economic and industrial needs of the moment (or whether they represent yet a further lost opportunity) is a question for the judgment of history. It is also for the judgment of this Convention.

The points I have made are simple. First, there is a natural tendency for institutions to outlive the conditions that gave rise to them. Whether it is the Ooty Club or the Australian Industrial Relations Club, it is vital to move with the times. Otherwise society will move on. The institution will become an encumbrance and, ultimately, irrelevant. The very need for Summits and Accords shows the limitations of the established industrial relations machinery in Australia.⁵⁰

Secondly, changes in the world economy, stimulated by scientific and technological changes, have not favoured Australia. On the contrary, we now face serious long term economic difficulties. These are, for the most part, caused by forces beyond our control. Fortunately, there is now a growing and general realisation of our serious economic predicament. This will increasingly stimulate and sustain courageous

governmental and Parliamentary responses to provide both long term and short term remedies.

Thirdly, amongst the long term cures must be attention to our institutional inefficiencies. In part, this attention has already begun in a series of bold and concerted moves for deregulation and decentralisation of decision making to help promote better managerial decisions. Amongst the institutions which must be reviewed in this regard is the machinery for conciliation and arbitration. Though venerable, it is yet powerful. Though the product of a dream of nineteenth century idealists, and though apparently in tune with Australia's egalitarian social ideals, its adaptation to hard economic times, to unprecedented youth unemployment and to changing social, employment and technological needs, is a major challenge which the country must urgently face.

Fourthly, the Hancock Report, and the legislation which is, promised, represent one response to this challenge. Whether it amounts to a lost opportunity to tackle industrial relations afresh, providing machinery apt for the 21st century or whether it is a sensible, achievable, interstitial reform, pointing in the right direction, I must leave it to you to judge. And now, having insulted just about every member of the Club, spoken too loudly in the Club common room and expressed opinions that will doubtless be regarded as both vulgar and ill informed, I depart - returning to the new club I have joined. The one sobering thought is that, as in Ooty, so in this Club. There will be a buzz of conversation. Some will call for an extra drink. Others will begin reading the newspaper. And life will go on as if there had been no disturbance at all. A few will complain about the number of non members entering the hallowed precinct nowadays. But soon this brazen intrusion will be forgotten. And old timers will talk of "the good old days", of battles long ago and victories which become more glorious with the passing of the years.

Nice places clubs. Reassuring places. Not places for long and serious speeches. Change, if it really must come, should be imperceptible. Rude people, these reformers! Confound their knavish tricks! A pox on their lost opportunities!

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