THE UNIVERSITY OF MELBOURNE

LABOUR STUDIES PROGRAMME

THE THIRD FOENANDER LECTURE IN INDUSTRIAL RELATIONS

MELBOURNE 18 OCTOBER 1988

"INDUSTRIAL REGULATION IN THE "FROZEN" CONTINENT"

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INDUSTRIAL REGULATION IN THE "FROZEN" CONTINENT

The Hon Justice Michael Kirby CMG*

LIFE WITH THE DOWAGER

But for the hand of fate, I might have been sitting in the audience, as one of you mounted the stage to deliver this third Foenander lecture. Think, as you listen to my remarks, how much better you would have done it. How much better informed and pertinent your analysis of industrial relations in Australia today would have been. For as I have previously remarked, I have strayed from the industrial relations "club" - as it has been described[1] - I have ventured into new fields. Perhaps this disqualifies me from insightful comments on the industrial relations scene in Australia in 1988. The organizers did not think so. Perhaps, in the contra-suggestible way of a university, they thought it timely to invite an intruder.

The first two lecturers in this series were definitely members of the "club". The first lecture was given by Professor Keith Hancock. He was then fresh from completing the report of the Committee of Review of Australian Industrial Relations Law and Systems[2]. Soon after delivering the lecture, Professor Hancock was elevated to be a Deputy President of the Australian Conciliation and Arbitration Commission. It is a post he still holds. In the view of some critics, his support ensured the survival of that body - although under a different name - against the cold winds which urged a more radical reform.

The second lecture on "Industrial Regulation After Hancock" was delivered by my colleague Professor Di Yerbury, now Vice Chancellor of Macquarie University. When she was invited to deliver the lecture, she was General Manager of the Australia Council. Within weeks of the invitation, she was appointed Vice Chancellor of Macquarie University. The doyens of industrial relations - if not the system itself - tend to be mobile people. Heaven only knows what prize lies in store for me as my reward for labouring over these remarks.

The credentials of Professor Hancock were undoubted, as I have indicated. The credentials of Professor Yerbury were equally unmistakable. She had mapped out an authentic career in industrial relations. She commenced her academic life under the guidance and leadership of Professor Joe Isaac. I first

met her when she came to address the first annual meeting of the presidential members of the Australian Conciliation and Arbitration Commission which I attended, in 1975.

So what are my qualifications? They began on a hot February day twenty years ago. I had newly arrived at the Bar. I was sitting in my chambers when a telephone call told me that a solicitor, Mr (now Justice) Michael Sweeney was coming to see me. He wanted me for a compulsory conference. He had to tell me what it was. Indeed, he had to tell me where the Industrial Commission of New South Wales sat. I could think of so many excuses for not accompanying him into this strange world. Many were the names of qualified barristers that I urged upon his consideration. But he was immovable. And so, in that most accidental way, I entered the club.

From the first, I found the experience intellectually stimulating. Should I also be ashamed to say, that it was financially rewarding as well?. True, it called on skills additional to those used in an ordinary court room battle. Skills in tactics, timing and human relationships were at a premium. But legal skills were also mobilized. Indeed, in many ways the technicalities of industrial law required reasoning of which a Dickensian Chancery practitioner would have been greatly proud.

I remember that my first case was heard before Justice Ian Sheppard, later to grace the Supreme Court and now a Judge of the Federal Court of Australia. The Judge showed then, as he did in many later cases, his independence of mind, courage and resolution. I lost my fear of industrial tribunals. I began a journey that took me into daily contact with a number of very talented lawyers and industrial relations practitioners. The lawyers were, in a sense, the "Sydney Succession". The only equivalent to membership of this inner sanctum is the process by which the Princes of the Church are selected and in gratitude throw themselves at the feet of the Holy Father. The late Jack Sweeney chose Lionel Murphy, Neville Wran and Bill Fisher. Jack Sweeney, the father of Michael, went on to become a Judge of the Federal Court of Australia. Lionel Murphy became a Federal Senator and Minister and High Court Justice. Bill Fisher went on to be a Judge of the Supreme Court and later President of the Industrial Commission of New South Wales. Neville Wran became the Premier of New South Wales. They were interesting, powerful, original people.

Wran was an early worker. His average day at the Bar began at 5.30 a m. It is a habit which, once learned, I have not been able to shake off. The discipline of the Industrial Bar - and the demand to absorb and master enormous amounts of material - were surely the reasons for Wran's later political success. Like Jack Sweeney, he left little to chance.

My practice in the industrial field grew. I became part of the succession. Industrial tribunals became an absorbing concern. Upon the election of the Whitlam government,

Elizabeth Evatt and later Mary Gaudron were offered positions as Deputy Presidents of the Commission. And then one November day in 1974, Jack Sweeney sounded me out whether I would take the same vow. I was thirty-five. I was in the middle of an important case before the Full Bench of the Arbitration Commission concerned with one of those disputes involving the unions working for the SECV in the Latrobe Valley. I could see unrolling before me a judicial lifetime in industrial relations and industrial law. It was a fascinating prospect. It was one worthy of a lifetime's devotion. I accepted, unhesitatingly. But for the later insistence by Lionel Murphy that I should accept appointment as Chairman of the Australian Law Reform Commission, I should almost certainly have remained in the industrial relations system. But Murphy's appointment took me to other fields. Nominally I remained a Deputy President of the Arbitration Commission until 1983. Only then was I appointed to the Federal Court of Australia.

The operations of the Arbitration Commission are in some ways fragile. They are not a place to absorb the errors of a part time operator. For this reason, I did not exercise my commission as a Deputy President, save for those first few weeks before Lionel Murphy approached me and secured my appointment to the Law Reform Commission in February 1975. I retained contact with my colleagues on the Commission. I attended annual meetings and dinners. I sat in the ceremonial sessions. I even attended, and addressed, meetings of the Industrial Relations Societies. My comparatively short involvement in the national industrial relations scene was effectively finished. Once or twice in the Federal Court and occasionally, since 1984, in the Court of Appeal of New South Wales, questions have arisen with implications for industrial relations and industrial law[3]. But our paths had parted.

I can therefore look at the industrial relations scene in much the same way as a lover, many years on, greets the object of a long lost infatuation. Some of the ardour may have been dimmed by the passing of the years and by supervening relationships. Yet there is nostalgia for the happy times past. There are memories, tinged with regret at the termination of the association. There is reflection upon what might have been. The object of the early affection does not (it is true) look quite so attractive, twenty years on, as it did in the more vigorous days of youth. Now I am locked in matrimony with an elegant if somewhat imperious spouse of the Law. Life with her over the past fifteen years has, I suppose, coloured my thinking. You cannot live so long together with a black robed dowager and not take on something of her habits. I must admit to you that she quite frequently refers to industrial relations. She rather looks down her nose at this somewhat unpredictable creature. But in the privacy of my own thoughts I know the value of my former association. I suspect that, had it continued, I might even have been happier than I am with the dowager.

FOENANDER REMEMBERED

It is a privilege to be the third speaker in this series. It commemorates Associate Professor Orwell Foenander. He it was who pioneered the scholarly examination of industrial relations in the university context. He was a prodigious writer claiming no fewer than eleven books on industrial regulation to his name. He wrote unnumbered essays. He published countless articles on the topic. He realised what was obvious to the best of lawyers - but missed by many practitioners - that industrial relations as practised in Australia, is a lawyer's minefield. Its fine distinctions and constitutional and statutory problems demand a good grasp of legal principle; as well as a sensitive application of power and human relationships. I never met him. But, inevitably, I had a number of his books. They were on the shelf of every lawyer who ventured into this field. Working day by day in the study of system as it operated in Australia, Orwell Foenander became a staunch advocate of it.

Professor Hancock, at the beginning of this series, called attention to Foenander's almost idealistic view about the merits of compulsory conciliation and arbitration in industrial relations. In 1952 he had written

> "For a society, capitalistic or otherwise, the regulation of industry through the agencies of compulsory conciliation and arbitration offers, of all devices that have been tried, the greatest prospect of success and satisfaction in the solution of labour problems[4] and the ensuring of a continuity of production[4]".

He was to point to the need to see the system as a venue for conciliation. The resort to compulsory arbitration was a last measure. But he had no doubt that:-

> "In the present circumstances of Australian development...some measure of regulation in industrial relations is imperative and indispensible. There is no ground for believing that the public would not be victimized if industrial issues were permitted to be contested without rules and requirements, so to speak, and left to the mercy of alternating industrial pressures".[5]

One can detect in Foenander's view the last flowering of the optimism which originally propelled Australia, in the last days of the nineteenth century, into a "new province for law and order" in the field of industrial relations. The idea caught fire after the enormous disaster of industrial disputation in the 1890s. It was adapted from New Zealand and New South Wales colonial models. The necessity to provide for it was accepted by the Founding Fathers. The idea found its way into the famous language of placitum (xxxv) of section 51 of the Constitution. By that provision, the new Federal

Parliament was given the power to make laws "subject to this Constitution" with respect to:

> "(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

There were various other powers conferred on the Parliament. The collection of powers appeared to be even greater than those conferred on the central legislature in the United States. They were certainly greater than those conferred on the Dominion Parliament in Canada.

It was possibly this fact which led to the restrictive views taken in the early days of the High Court of Australia to the other powers conferred on Federal Parliament which might, on the face of things, have afforded a direct entitlement to regulate aspects of industrial relations. Thus, the trade and commerce power in s 51(i) was read down because its conferral was "subject to this constitution". That provision imported, so it was held, the restrictions contained in the promise of free trade in s 92 of the Constitution.[6] There was a similarly narrow construction of other placita of the Constitution. The powers with respect to banking and insurance were likewise controlled by s 92. So was the power with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.[7] This provision was, at first, given a narrow construction. No one in those far away days even dimly imagined the great potential of the external affairs power[8] to enhance the legislative capacity of the Australian Federal Parliament.

It was in this way that, historically, the conciliation and arbitration power came to be the pivot of national legislation for industrial relations. It was in part, out of conviction that the court analogy could provide a just solution to the disputes between employer and employee which had plagued earlier colonial times. It was in part, out of the perceived incapacity of the other heads of power to provide a more direct means for Federal regulation. It was in part, the result of the view that here was a provision specifically enacted as the charter for Federal legislation in industrial relations - not by direct legislative control but through a tribunal intermediary set up to discharge the functions of conciliation and arbitration. It was in part, out of the necessity to find a national instrument to provide basic uniformity in a growing economy to offer solutions to national problems. But it was also in the hope that those solutions would assure a fair degree of uniformity of result in the industrial conditions of what was, in those days, a remarkably homogeneous if sparsely populated continent.

Over the years, the system attracted its critics. Orwell Foenander was not one of them. On the contrary, he was an apostle of the system. He saw clearly its justification in the Australia of his day. Various attempts were made to provide a more direct means for the Federal regulation of

industrial relations as an aspect of national life vital to the economy. In the wake of the Second World War, and with the great issues of national reconstruction and development before the Chifley government, an attempt was made to achieve directly, and with the imprimatur of the people, an enhanced Federal power over industrial relations. In conjunction with the 1946 elections which returned the Chifley government, a majority of the electors in Australia voted in favour of a constitutional amendment. If enacted, as s 128 of the Constitution provided, the amendment would have given the Federal Parliament direct power over industrial laws. However, the referendum was not carried. It secured a majority in three only of the States, instead of a majority of them, as the Constitution requires. Had the referendum been passed, the scene of industrial relations might well have been very different. The motivation was there, immediately after the War, to establish a very different system. It might well have been a system of more, and not less, control of the marketplace. But it would probably have been one in which the elected government - and not unelected judges and tribunal members - took decisions in (and responsibility for) major economic decisions of critical importance to the whole national economy.

It was not to be. Instead, Australia persisted with the curial model. And around that model there developed what has been described as a "club" - and certainly many repeat players. I used to be one of them.

In 1956, the Court was bifurcated. The judicial and the arbitral powers were given to separate institutions. But the model of the tribunal basically persisted. It also survived the analysis of the Hancock Inquiry. It is embalmed in the new Industrial Relations Bill 1988 and the Industrial Relations (Consequential Revisions) Bill 1988 which passed all stages in the Senate last week. In my view it has been rightly said that the "new system is not enormously different from the old as a matter of substance". This lecture is timely. The new Acts will shortly be in force.

In May 1988 the then Industrial Relations Minister, Mr Ralph Willis issued a statement to coincide with the review of Australia's wage fixing system which commenced on 12 May 1988 in the Arbitration Commission. He outlined the submissions which the Federal Government would make to the Commission. He concluded his statement thus:

> "There is...a heavy onus on both the unions and employers to remain committed to continuing the adjustment task that remains before us, to maintain international competitiveness, to restructure the economy and to further promote reform at the workplace. This requires that any discussions at industry level be conducted responsibly without recourse to industrial action in the leadup to the review of the wages system. ...Whilst pursuing common approaches to

> the issues involved, discussions at industry level should not pre-empt the outcome of the review which properly is the responsibility of the Arbitration Commission to determine. Until revised wage principles are announced by the Commission the current system continues to operate including the commitments entered into by unions to abide by its provisions".[10]

To Orwell Feonander such a statement would represent the pinnacle of Ministerial rationality. It would meet the proper recognition of the need for an independent arbitrator to lay down broad principles to be accepted by employer and union alike on behalf of their respective interests. Order and rationality, fairness and neatness are important features of an institutional system of conciliation and arbitration. The marketplace is too often brutish and unfair. Industrial muscle can secure short term gains. But it may simply split the cake in an inequitable way. It may disadvantage vital workers with little industrial muscle, or no tradition of using it. Furthermore, it may damage the economy by forcing up wage levels to a point which cannot be met. It may accelerate the pace of structural and technological change which causes painful unemployment and even the destruction of whole communities struggling on the edge of viability in this vast continent. Such consequences of industrial disorder were so antithetical to Orwell Foenander that he saw the centralized system, led by the national Arbitration Commission, as the only alternative. Moreover, it was an alternative which was specially Australian. The compulsory system was the Australian way. It had grown up with the Federal nation and compulsory voting. It fitted comfortably into a nation with a High Court which determined highly controversial questions concerning the distribution of political power. There was, as well, a High Court of industrial arbitration which determined the distribution of economic power in a similarly rational and seemingly neutral way. Leave to politicians the tumultuous business of politics. Leave to courts and court-like bodies the resolution of disputes - however stylized and dress rehearsed such disputes might sometimes be.

THAW IN THE FROZEN CONTINENT

Geoffrey Sawer once said that Australia was, constitutionally speaking, a "frozen continent". Anyone who reflects upon the result of the recent referendums must conclude that, at least formally, this aphorism is still applicable. Never has there been such a uniform and devastating defeat of proposals for constitutional change. That it should occur in the year of the Bicentenary when everything seemed set for new beginnings, is itself an object lesson on the disinclination of the Australian people to change the letter of the 1901 Constitution. It is one of the oldest Constitutions still in continuous use anywhere in the world. The formal changes to it have been few. Most of them have been comparatively unimportant. The numerous attempts at formal change in important fields, including industrial relations,

have gone down to defeat.

It is interesting to reflect upon the shape of the Australian Constitution had it, like New Zealand's, been settled ten or fifteen years later. By that time, as the Governor General has recently remarked, the Australian Labor Party would certainly have had a more organised input into its design.[11] How that might have affected the industrial relations power can remain for speculation. It seems likely that it would have encouraged or facilitated a greater grant of power than that which placitum(xxxv) provided.

Instead, we have a constitution which reflects many of the mercantile values and political controversies of the 1870s. This was the time when Australian leaders first began to work upon the language of the Constitution for a Federation of the Australian Colonies. The various drafts which went to the Constitutional Conventions in the last years of the nineteenth century did not see many significant changes. Such was the extent of the fascination of the Founding Fathers with the United States model from which they worked. But placitum xxxv was new. It was first proposed in 1891 by Mr C C Kingston. The principal objections to it then were that it would involve interference with private property and civil rights, matters which, it was agreed, should be left to legislation by the States.[12] The provision ultimately found its way in the Constitution on a division which was adopted by 22 votes to 19. In such a way was the legal, economic and political history of our country shaped. By this means a stamp of formalism was fixed indelibly onto the Australian economy.

The provision had, perhaps, the advantage of a degree of decentralization and flexibility which arose from the very system of conciliation and arbitration itself. And it must be acknowledged, at once, that the system has proved incredibly robust. Enormous burdens have been cast upon it over the decades since it was put to work in 1904. The institutions and the statutes have changed at the margins. But the social circumstances, the economic needs and the expectations of the institution have undergone nothing less than a revolution - especially in recent times. That revolution continues.

It is understandable that the leading actors in the Arbitration Commission frequently react with impatience and even anger, at the criticisms mounted from outside. In May 1988, for example, Justice Russell Peterson, a Deputy President told a Victorian Employers' Federation Conference that some of the critics of the Arbitration Commission "lacked balance, indulged in hyperbole and tended to blame the Commission for all the nation's economic and social problems".[13] He even said that some criticisms "bordered on slander". He pointed out that the economic consequences of decisions, particularly National Wage decisions, were one only of the several considerations which the Commission was required by the Conciliation and Arbitration Act to take into account in resolving industrial disputes.

> "Other questions arise. There are social and industrial considerations, the effect on the wage earner, the industrial consequences which may flow from a decision...There is a need to balance the matters economic in a case with the industrial equity of the case".[14]

Justice Peterson also sprang to the defence of the centralized nature of the Arbitration Commission's wage fixing powers in language which would have warmed Foenander. He leapt to the defence of the system against those who called for a greater measure of deregulation. He asserted that it was "quite inconceivable" that a decentralized wage-fixing system could have achieved a real award cut of about 10 to 11 percent during the past three years. Yet this is what the centralized system had delivered. Decentralized wage-fixing carried "inherent risks". They stemmed from the deep-seated pressure for comparative wage justice in a country such as Australia:

> "Were wages to be assessed to reflect industry or establishment productivity or profitability, the result over a number of industries or establishments would be widely disparate rates of pay for the same work. This situation is not one sustainable industrially in most unionised countries".[15]

It is true that the Arbitration Commission deserves bouquets. At the very least, the members of the Commission deserve the understanding of their fellow citizens. They must work by the rule of law. Their duty is to the Constitution and to their statute. They must perform the functions which the Constitution and the statute, as interpreted, have placed upon them. If Parliament cares to change the statute - particularly in some radical way - then a new ball game will be started. Meanwhile, it is unfair to criticise the Commission for complying with the present law. In doing so, it has undoubtedly scored some important successes, particularly in recent times.

During Sir John Moore's time as President, the earlier formalism of the Commission was reduced markedly. Its leadership of the Australian industrial relations scene was established indisputably. It became acknowledged by all of the State bodies engaged in industrial relations. What is more, the Commission has played an important part in the achievement of wage restraint at a time when this appears to have been in the interests of the Australian economy and thus, indirectly, of working people and those who depend on them. Mr. Ian Macphee upset his colleagues in the Opposition by acknowledging this achievement. He credited some of it to the Arbitration Commission and even some to his political opponents.[16]

Now, even as its last days approach, the Commission has become concerned in other developments which show a robust inventiveness and a willingness to do new things. As you will realize, this is not always typical of institutions on the

brink of statutory death.

One of the initiatives which has most caught the imagination of observers of the industrial relations scene, is the consideration of the restructuring of certain awards. The new Minister for Industrial Relations, Mr. Peter Morris, has described the restructuring of awards as "the kernel of the nut" of change in industrial relations. He has said that he considers that the change will accelerate in the next twelve months. He believes that the magnitude of the change will be "dramatic", so long as the Commission can sustain co-operation and involvement of all of the parties:

> "Certainly the task is tough...The greatest contrast you can find these days is to listen to the views expressed by the trade union movement...and contrast that with yesteryear when their only immediate concern, their horizons, were limited to simply what was happening on the shop floor".[17]

I must confess that such was the impression I had when recently I heard Mr Bill Kelty tell a conference in Queensland of the radical reform being contemplated in reducing the award classifications provided in key Federal awards. Mr Morris again:

> "What award restructuring really means is reducing the multiplicity of job classifications. And then broadening out those job classifications so that they can embrace a range of tasks that previously were finite and separate from each other. The stories are legion of the variety of mechanical-electrical tasks which could be done by one tradesman but which are presently undertaken by a fitter and two electricians".[18]

The need to proceed with caution here is clear. Plainly it is recognized by the Minister. Job demarcations have developed over decades. They have been accepted by unions and management and by the Arbitration Commission too. To some extent the Commission has been the vehicle for institutionalizing and perpetuating these distinctions. They affect individuals. They affect industrial organisations and the employer's operations. But now the Commission may become the vehicle for removing the distinctions and providing greater flexibility to employment. That which can be done on a national basis can equally be undone on a national basis. Centralized direction it is at once the burden and the advantage of the national system.

Another area in which the Arbitration Commission is entering a new field is in the consideration of the effects of taxation on the wage rises which it awards. Nearly forty years ago Kelly CJ in the Arbitration Court declared that the tribunal should not be influenced in fixing the basic wage

"by the incidence or burden upon different sections of the community of taxation, direct or indirect. For this is a matter for which the legislatures of the country must alone be responsible. The Court must refrain from frustrating in this respect their will. Taxation is a matter between the citizen and the State; its incidence should not be allowed to affect a tribunal constituted to determine rights and duties attaching to the particular relationships of employer to employee".[19]

Now, the Arbitration Commission is beginning to question that stance. It is beginning to look more realistically at the impact of taxation which obviously has a bearing on wage claims. Likewise, Commissioner Smith has recently raised the question of whether the collective negotiation of wages is itself a breach of the law enacted by the Trade Practices Act, particularly where the resulting agreements have an impact on employers which were not involved in the negotiations. This question has plain relevance to the position of some industries, particularly the building industry. There, for years, certain employers have negotiated wage rises which have effectively been imposed on other employees with whom they have contractual arrangements. Clearly this distorts, to some extent, the operation of a free market.

The new questioning of assumptions long held is an indication of the flexibility of the Arbitration Commission and of the value of its independence. Perhaps an independent tribunal made up of talented people from different backgrounds is more likely to be questioning of generally held assumptions than the kind of bureaucracy which would have advised successive Ministers had the 1946 referendum imposed the responsibility for industrial regulation directly upon the Federal Parliament. Certainly, it is difficult to dispute the conclusion of Peter Stephens in an article in The Age in August:

"The prominence of these two issues - income tax and trade practices law - indicates how fluid is the whole subject of industrial relations in the late 1980s. The increasing involvement of the unions in government economic policy, the great openness of the economy through financial deregulation and the tougher attitude adopted by the Commission have combined to change the face of industrial relations. History indicates that the Commission is highly responsive to changes in social and political values and to prevailing economic circumstances. It is highly likely that the question asked of the Federal government signals the start of an effort by the Commission to clean up some of the more disreputable practises which have been allowed to flourish...It may lead to a wider assessment of the fundamental position of organizations in the labour market".[20]

In addition to these moves, the Commission has also shown its willingness to move into areas of concern to the re-employment relationship which have tended in the past to be neglected. I refer particularly to occupational health and safety. In earlier times, the Commission was disinclined to enter this field. Its given ground was that it was not an industrial matter but something touching the prerogatives of the employer. Stimulated by recent decisions of the High Court of Australia enlarging the meaning of "industrial matters", the Commission in AMI Toyota Limited and ADSTE re Vehicle Industry Occupational Health and Safety Award 1986[21] provided a detailed code regulating the health and safety of persons working under awards in the vehicle manufacturing industry.

In so providing, the Commission also rejected the argument of restraint, that health and safety had, until now, traditionally been the province of State regulation. It asserted that it could take into account such factors as the special circumstances of the vehicle industry. It summed up its reasons in these words:

> "[T]he interdependence of its employers, the intradependence as between establishments of individual employers and the unique production policies which prevail throughout the industry are all relevant considerations. Established mechanisms within the industry which have engendered and maintained grass roots awareness of safety at the workplace are also germane to this central issue. In addition the Federal award orientation of the industry, its policies toward union membership and the common desire for a Federal prescription of employers and the industry union, of which all employees are eligible for membership, are vital factors which tip the balance towards an occupational health and safety award".[22]

There have been other such innovative steps within the Commission. They have unsurprisingly been stimulated by other recent decisions of the High Court enlarging the understanding of the Commission's powers. In 1968 the High Court had held that the Commission did not have jurisdiction to settle an industrial dispute about whether employers should be prevented from engaging outworkers. It held that the dispute was not about an "industrial matter". As a result, many outworkers fell outside the protection of Federal industrial awards.[23]

In April 1987, Deputy President Riordan made an important decision affecting outworkers in the clothing industry[24]. In doing so he described the situation of outworkers in vivid terms as:

> "a very distressing situation which has no place in a society which embraces the concepts of social justice".

The moral of these and other developments, which will be better known to this audience than to me, is clear. To its last moments, the Arbitration Commission is proving an energetic tribunal, in many ways innovative. It provides a venue for conciliation and agreement. It provides a mechanism for determination of the hard cases. Tom Dooley used to say of the United States Supreme Court that in its interpretations of the constitution it followed the election results. Whilst I would not say that of the Arbitration Commission, it is clear that like the courts themselves, it is, and remains, an important national institution which has responded with remarkable flexibility to changing times. As with people, so with institutions. A primary, even if often unconscious motivation, is survival. If the Arbitration Commission is the great survivor of Australia's industrial relations history, it is so despite the several institutional adjustments which have been made at the margins. It is so precisely because of the high talent of its lead members and their capacity to adjust and adapt deftly to changing social and economic circumstances.

THE CONSTITUTIONAL REVOLUTION

In my earlier foray into this topic, I reviewed the quite notable series of decisions of the High Court of Australia which concerned industrial relations at that time. I suggested that the whole trend of authority of the High Court in recent years had been in one direction. It was favourable to Federal power in matters of industrial relations. The decision in the Tasmanian Dams case[25] opened up the way for still more future Federal laws, reliant upon conventions of the International Labour Organization to which Australia has adhered[26]. The decision of the High Court in the Social Welfare Union case[27] removed the troublesome impediment that an "industrial dispute" could occur only within "industries" which had been rather arbitrarily defined. In 1983, came the decision in the Coal Industry case[28]. In that case, 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. In August 1984, came the decision of the High Court in the Federated Clerks' Union case[29]. By that decision, the award of the Victorian Industrial Relations Commission requiring employers to notify and consult a union on proposed technological change was upheld.

There have been many other relevant cases since that review. Perhaps the most interesting are those in which the High Court showed its attitude to "industrial matters" previously thought outside the scope of industrial regulation and as being within the reserved rights of management[30]. In a joint judgment in the Colliery Proprietors' case, Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ signalled a change in attitude to the notion of what was a prerogative of management to decide:

> "No doubt our traditional system of industrial conciliation and arbitration has itself

> contributed to a growing recognition that management and labour have a mutual interest in many aspects of the operation of a business enterprise. Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an "industrial matter"[31].

But of all these decisions, none approaches the importance of the recent decision of the High Court on the meaning of section 92 of the Constitution. In Cole v Whitfield[32] on 2 May 1988, the High Court wrought nothing less than a legal revolution. It did so in a unanimous single judgment in which it candidly acknowledged the unsatisfactory nature of the various earlier attempts by the Court to give coherent meaning and practical operation to s 92,with its troublesome and opaque language. In a rare touch of ironical humour the Justices cited Sir Robert Garran's Prosper the Commonwealth[33]. He had suggested that a student of the first fifty years of case law on s 92 might understandably:

> "Close his notebook, sell his law books and resolve to take up some easy study, like nuclear physics or higher mathematics".[34]

The basic problem before the Court in Cole v Whitfield was stated thus:

> "The task which has confronted the Court is to construe the unexpressed; to formulate in legal propositions, so far as the text of s 92 admits, the criteria for distinguishing between the burdens (including restrictions, controls and standards) to which inter-State trade and commerce may be subjected by the exercise of legislative or executive power and the burdens from which inter-State trade and commerce is immune. The history of s 92 points to the elimination of protection as the object of s 92 in its application to trade and commerce. The means by which that object is achieved is the prohibition of measures which burden inter-State trade and commerce and which also have the effect of conferring protection on intra-State trade and commerce of the same kind. The general hallmark of measures which contravene s 92 in this way is their effect as discriminatory against inter-State trade and commerce in that protectionist sense".

So expressed the High Court, in the words of a thoughtful commentator, "effectively rewrote section 92 of the Constitution".[35] Had only the Constitution been so interpreted in 1947, it is likely that the Chifley government would have succeeded in nationalising the banks. The result of the new interpretation is the conclusion by the same

commentator:

> "The Court's decision changes future political prospects and broadens horizons. Federal Parliament can now make laws about inter-State trade and commerce, virtually without limit. It can make laws to give it power to intervene in almost every aspect of the national economy And the States too are freed to make laws setting standards for products or services or commercial conduct. Together (and in some instances separately) the Commonwealth and the States can establish marketing schemes covering the whole range of primary products. It may be, of course, that the days when politicians wanted to intervene in the "free market" have passed. But if there are politicians still so inclined, they now have their chance. And all this without changing a word of the Constitution".[36]

The result of this decision is to reinforce the conclusion which I have previously stated[37]. If there was previously any doubt, there is none now. Federal Parliament undoubtedly has powers to enact laws which have a much more general operation in the field of industrial relations than was even dreamt of until recent times. It may do so under the external affairs power. It may do so under the corporations power. It may do so under the trade and commerce power. And it may now do so, effectively, very little limited by the now narrowly construed restraints of s 92.

If we in Australia persist with the new province of law and order in the field of industrial relations, we should do so deliberately. We should do so by choice. We should do so because we consider that the "balance" (to use Justice Peterson's words) between efficiency and industrial equity are better achieved through a national body such as the Arbitration Commission (or its cloned successor the Industrial Relations Commission) than otherwise.

Of course, a Federal Parliament which has power by the Constitution to enact laws for the centralized direct regulation of industrial relations - otherwise than through the Conciliation and Arbitration tribunal - also has power to remove or limit such regulation. This is the major lesson, in my view, of the recent decision of the High Court on the scope of the trade and commerce power. The Federal Parliament now has a much greater armory. Indeed it is one which now approaches that which the Congress of the United States of America has long enjoyed. It is an armory which in 1947 might well, had it been so understood, have empowered the regulation of the "commanding heights" of the economy directly by Federal Parliament enacting quite detailed and specific laws with respect to many matters, including industrial relations. But, equally, a Federal Parliament responding to a government with a policy of deregulation could take the responsibility for

removing or restructuring the laws as they affect industrial regulation. And this includes both the Conciliation and Arbitration Act 1904 and its shining new successor, the Industrial Relations Bill 1988. That Bill was, as Professor Hancock intended it, a step in the process of reform. It will shortly be in force. It was a step taken in a country where the way of the reformer is hard and where reform tends to come in a piecemeal and very cautious manner.

But the needs of our economy may hasten the pace of reform. Already in New South Wales, the Greiner government has commissioned Professor John Niland to prepare a green paper on a complete legislative review of industrial relations in that State. The government was elected with a mandate to

> "create a system which places the onus on the willingness and ability of managers and workers to make their own arrangements, resolve their own differences at an enterprise level, where there is as little interference as possible from outside forces, be they tribunals, unions or employer organizations"[38].

Achieving that objective in the previously understood operation of industrial law might have been difficult or impossible. But with the new mandate from the High Court, the possibilities which open up are quite remarkable. The present Federal government has introduced many notable changes in laws and practises concerned with the regulation of the economy. The government has embraced a commitment to turning the Australian economy around. It has adopted the goal of achieving an export/import competitive and service oriented economy. But to secure that goal it will be necessary to terminate a number of inefficiencies and restrictive practices which have grown up under the umbrella of present legislation and sometimes nurtured by the present industrial relations system.

During an address to the National Press Club in Canberra and later at the National Conference of the Australian Labor Party in Hobart, the Federal Treasurer Mr Paul Keating returned to the most delicate topic of all in the government's economic strategy. He declared that the "last great area of change to be overcome" is in the field of labour market reform[39]. Obviously, it is difficult to achieve reform in that field. This is so because of the long standing institutional commitments, the political sensitivity of tampering with the regulation of wages, and the great unknown which exists beyond the Arbitration Commission with whose ways we are all so familiar.

CHOOSING THE WAY AHEAD, NOT DRIFTING

Australia may be the "frozen" continent so far as formal amendment of the Constitution is concerned. But the price of the unwillingness of the Australian people to accept and shoulder the burden of direct constitutional change has not

been constitutional stagnation. Just as the arbitration tribunal has not stood still during nearly a century of its existence, so too the High Court of Australia has marched forward. It has adapted the language of the 1901 Constitution, chiselled in stone, to different times and different perceived needs. It would have been better for democracy if our country could have adapted readily and frequently to proved cases for constitutional change. A court which can expand the words of the Constitution can get it right. But it can also get it wrong. For all that the people have remained remarkably impervious to the recurring clarion calls for formal constitutional change. It has thus fallen on the High Court to find in the language a coherent and principled response which will ensure that the Constitution does not impede the legitimate necessities and expectations of a time very different to the turn of the last century and an Australia much changed since colonial days.

The point to be made again is that industrial relations is now, more than ever, within the power of Federal legislation - be it for regulation or withdrawal of regulation. If we chose to remain with our present system, we should do so consciously. We should not do so out of apathy to change things long settled. Still less should we do so because political leaders do not want to accept the responsibility of critical economic decisions and prefer to leave these to an unelected tribunal which is not responsible to the people. The whole point of the recent decisions of the High Court of Australia for industrial relations is that they challenge the mind to new and original ways of looking at the role of the law in relation to this vital activity of the economy.

I am not sure that Orwell Foenander would have liked the new developments. They naggingly question things long unquestioned. They require justification of things long assumed. They introduce an element of disorder. They raise the potentiality of the chaos of market forces where, until now, there has been the comfortable equity of social justice and homogeneous treatment.

This much is clear. The comfortable days of the old industrial relations club are drawing to a close. The economy and constitutional interpretation promise the need and opportunity for radical change ahead. In that change, the new, proposed Federal legislation may be seen as a small and very cautious step. Bolder adventures lie in the future. In the 1890s Federation was a bold idea. The inclusion of the conciliation and arbitration power in the new constitution was very bold indeed. I cannot believe that Australians have lost the capacity and the will to do brave new things. As we enter the twenty-first century and as new horizons dawn for the practitioners of industrial relations, life in industrial relations will be even more exciting than usual.

By contrast, a monogamous life with the Dowager of the Law will, I fear, prove safe and predictable. But, I suspect, somewhat less exciting.

END NOTES

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1. See M D Kirby, "At the Crossroads or the Club Revisited", address to the 1986 National Convention of the Industrial Relations Society of Australia, Adelaide, 26 September 1986, mimeo. See also "Industrial Relations Reform : Impediments and Imperatives" in Alternatives to Arbitration Richard Blandy and John Nyland, (eds) Allen & Umwin, Sydney, 1985.

2. Australia, The Committee of Review of Australian Industrial Relations Law and Systems, Report (3 vols), 1986 ("The Hancock Report").

3. See eg the position of Crown employees discussed in Director General of Education v Suttling [1985] 3 NSWLR 425; (1985) 17 IR 447 affirmed on different grounds (1987) 61 ALJR 117.

4. O Foenander, Studies in Australian Labour Law and Relations, MUP, 1952, 192.

5. O Foenander, "Industrial Conciliation and Arbitration in Australia", Law Book Co, 1959, 75. Cited K Hancock, "Industrial Regulation in Australia", Inaugural Foenander Lecture, Uni of Melbourne, 1986.

6. Gratwick v Johnson (1945) 70 CLR 1, 17. See also Duncan v Queensland (1916) 22 CLR 556, 573; Freightlines and Construction Holding Limited v NSW (1967) 116 CLR 1, 4-5.

7. s 55(xx) Constitution.

8. s 51(xxi) Constitution.

9. See editorial comment, CCH Australian Labour Law Reporter No 155, 10 August 1988.

10. R Willis, "Review of Wage System", news release, 12 May 1988 (No 10/88).

11. D Solomon, "Revolution on the High Court" in Australian Society, June 1988, 19.

12. J Quick and R R Garran, "The Annotated Constitution of the Australian Commonwealth", Angus and Robertson, 1901, 646.

13. As reported The Age, 25 May 1988, 12.

14. Ibid.

15. Id.

16. The comments of Mr Ian Macphee are reported in the Sydney Morning Herald, 28 April 1988, 2.

17. See M Metherell, "Different Roads to Revolution", quoting Mr P Morris, The Age, 23 September 1988, 13.

18. Ibid.

19. Kelly CJ in Basic Wage Inquiry 1949-50 (1950) 68 CAR 698 at 760.

20. P Stephens, "Commission Enters Unchartered Waters" in The Age, 2 August 1988, 12. See also M Davis, "Unions Face the Future" in The Age, 17 May 1988, 11.

21. (1986) 29 AILR para 18.

22. Ibid.

23. R v Judges of the Commonwealth Industrial Court; ex parte Cocks (1968) 121 CLR 313.

24. In the matter of an application by the Clothing and Allied Trades Union of Australia to vary the Clothing Trades Award 1982, Riordan DP, 7 April 1987 noted, C McCallum and M J Pittard, "Industrial Law" in R Baxt (ed) An Annual Survey of Australian Law 1987, Law Book Co, 1988, 278-291.

25. Tasmania v The Commonwealth; Tasmanian Dams Case (1983) 158 CLR 1.

26. (1985) 59 ALJ 517, 519.

27. Re Coldham; ex parte The Australian Social Welfare Union (1983) 153 CLR 297.

28. R v Duncan; ex parte Australia Iron and Steel Pty Limited (1983) 158 CLR 535.

29. Federated Clerks' Union of Australia v Victorian Employers' Federation (1984) 154 CLR 472.

30. Re Cram; ex parte New South Wales Colliery Proprietors' Association Limited (1987) 61 ALJR 401.

31. At 405.

32. (1988) 62 ALJR 303.

33. Ibid, 415.

34. (1988) 62 ALJR 303, 310.

35. Solomon (above) 39.

36. Loc cit.

37. M D Kirby "At the Crossroads", above. n 1.

38. Cited in G Henderson, "A Chink of Light in the Industrial Relations Darkness" in The Australian 27 June 1988, 9. See by the same author "Wrong Blueprint for Bliss", The Australian 2 May 1988, 11.

39. Quoted, p9.

40. Notably in the fields of worker participation; educational retraining and industrial safety as well as concern for the unemployed who are not members of industrial organisations.