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The Hon Justice Michael Kirby CMG

ABSTRACT

On 1 March 1989 the Australian Conciliation and Arbitration Commission was abolished. It was replaced by the Australian Industrial Relations Commission. All of the members of the old Commission were appointed to the same office in the new except one, Staples J, a Deputy President since 1975. By the legislation under which Staples J was commissioned, the position of Deputy President was made equivalent in many ways to that of a Judge of the Federal Court of Australia. It was protected against removal except for incapacity or misbehaviour proved to the satisfaction of both Houses of Federal Parliament. Legally qualified persons, such as Staples J, were to also have the same designation as a Federal Judge.

Staples J became controversial soon after his appointment. In a decision in 1975 and in a decision and speech in 1980, he expressed himself in a way considered by some as unconventional. In 1980 the President of the Arbitration Commission (Sir John Moore) withdrew his assignment to a panel of industries which was a normal incident of the office of Deputy President. After 1980 he was confined to Full Bench duties only. In 1985, the new President (Maddern J) excluded him from all duties as Deputy President. Despite requests, no reasons were given to Staples J for his nonappointment in 1989 to the new Commission. In Parliament, the Prime Minister (Mr R J Hawke) eventually explained it as based on the failure of successive Presidents to assign Staples J duties.

This essay places these events in the context of the history of the Arbitration Commission and its predecessors. It outlines their judicial features, even after the Boilermakers' case in 1956 led to the restructuring of Federal industrial tribunals. It outlines the controversy involving Staples J and how it first arose. It then traces the steps leading to his purported removal from office. The responses of the Australian legal profession, the judiciary, the media, the industrial relations community and of Parliamentarians are traced. A number of legal questions which arise are identified. The paper finishes with several conclusions about the suggested dangers of the use of the restructuring of courts or tribunals effectively to bypass statutory guarantees of tenure and independence given to judges and equivalent office holders. It refers to international principles on the independence of the judiciary. Although the Prime Minister has declared that the concerns expressed in the legal profession are "contrived nonsense", the author suggests that important conventions have been breached and that significant principles of universal application are involved in what occurred to Staples J.

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The Hon Justice Michael Kirby CMG**

A NEW PROVINCE OF THE LAW

On 13 October 1906 Henry Bournes Higgins KC was appointed one of the Justices of the High Court of Australia. In the course of his address, in reply to the speeches of welcome at the ceremonial sitting of the Court in Melbourne, he adverted to the then recently created Commonwealth Court of Conciliation and Arbitration. He said:

> "The creation of the Arbitration Court was a testimony to the confidence of the people in the courts of Australia. By bringing economic disputes within the ambit and control of law, a new province was added to the realms of law - widening the area of light, and making the bounds of darkness narrower."[1]

As originally created, the Arbitration Court was constituted of a President "appointed by the Governor-General from among the Justices of the High Court"[2]. He was to hold office during good behaviour for seven years. He was eligible for reappointment and, according to the Act:

> "Shall not be liable to removal except on addresses to the Governor-General from both Houses of the Parliament during one session thereof praying for his removal on the ground of

proved misbehaviour or incapacity."

In the office of President, Higgins J was to succeed O'Connor J and was the second Justice to hold the office. Higgins was described by his biographer as a "political maverick"[3]. But he was to dominate the Arbitration Court, establish its authority and influence its judicial character. When in October 1920 he announced his intention to resign at the end of his second term he gave as the reason the perceived lack of support for the Court's authority as a final arbiter of industrial disputes. He said it was "due to my opinion that the public usefulness of the court has been fatally injured." The Labor Call and The Worker expressed their regret at Higgins J's departure. The Worker described it as "the hounding down of Judge Higgins". The employers' Liberty and Progress applauded the emphasis placed by Higgins on the need for judge-like consistency in the operation of wage regulation. The biographer writes of other commentators on Higgins' departure:

> "Some wrote specifying their particular detestation of the Prime Minister: the Labor member, Maloney, boasted that he had opposed Hughes "ever since the last days of the Watson Ministry" while from England Ramsay MacDonald assured him that "you unfortunately have a Prime Minister of that type of small, vain, hustling personality with whom every man of decent task and self respect and dignity must in the end inevitably quarrel".[4]

The industrial relations body which Higgins took such a leading part to establish is now ingrained in the national

institutional arrangements of Australia. The establishment of such arrangements had been clearly foreshadowed before Federation. The adoption of placitum xxxv in s 51 of the Constitution probably ensured that the "new province" of law in the field of industrial relations would produce a court-like body, the decisions of which would have a profound effect upon the nation's economic life. The scope of the charter of that body's successors has been enormously expanded by decisions of the High Court of Australia, not least in recent times[5]. But their character was stamped from the earliest days of the Australian Federation.

On the way to enhancing the power of the national industrial relations tribunal, the High Court has delivered a number of unexpected and controversial decisions. These, in turn, have affected the constitution of that body. In Waterside Workers' Federation v J W Alexander Limited[6] the union objected to an employer's summons in the Arbitration Court for the enforcement of an award. It did so on the ground that it was beyond the powers of the Federal Parliament to provide for the enforcement of the award. This was so, because the President was appointed for seven years only. In a decision which might have gone either way, and with Higgins J dissenting, the High court held that the power to enforce awards was an exercise of judicial power. It could therefore not be conferred upon a body which was not properly constituted as a court. The Arbitration Court was not so constituted. This was because it could be inferred

from s 72 of the Constitution that Federal courts, created by the Parliament, would be constituted only by judges appointed as s 72 of the Constitution envisaged. The High Court held that this meant an appointment for life, subject only to the constitutional removal provisions. These envisage an address to the Governor-General in Council from both Houses of Federal Parliament praying for the removal of the judge on the ground of proved misbehaviour or incapacity. The principle in Alexander's case was confirmed in a number of later cases[7]. After the constitutional amendment of 1977 the requirement of the life appointment of Federal judges was abolished. Notably this amendment was not to affect "the continuance of a person in office as Justice of a Court under an appointment made before the commencement of those provisions"[8]. But after Alexander's Case and until 1977, Judges of Federal Courts, including the Arbitration Court, were commissioned to serve for life. They lost their commission only in the cases of death, resignation or removal.

The second important decision affecting the composition and character of the national industrial relations tribunal came in 1956 with the Boilermakers' case.[9] Before that decision a series of judicial observations had cast doubt on "whether and how far judicial and arbitral functions may be mixed up"[10]. In the Boilermakers' decision, by a majority, the High Court held that the Arbitration Court could not constitutionally combine with its dominant purpose

of industrial arbitration, the exercise of any part of the judicial power of the Commonwealth, strictly so defined. The consequence of the decision was the passage of the Conciliation and Arbitration Act 1956, amending the 1904 Act. The amended Act created a new Commonwealth Industrial Court consisting of a Chief Judge and not more than two other judges. The Court was to be a Superior Court of Record. The Chief Judge and Judges were to be appointed by the Governor-General by a commission. They were not to be removed except in the manner provided by s 72 of the Constitution[11]. At the same time as the Commonwealth Industrial Court was created, there was created the Commonwealth Conciliation and Arbitration Commission (Arbitration Commission). It was to be the receptacle of the arbitral and non-judicial powers formerly exercised by the Arbitration Court. The reconstitution was almost immediately challenged in so far as it provided for the Industrial Court. But the challenge was dismissed[12]. For 33 years the Arbitration Commission was the nation's chief industrial tribunal.

RECONSTITUTION OF FEDERAL COURTS

The decisions of the High Court in 1918 and 1956 presented the Federal authorities on each occasion with the urgent necessity to consider the reorganization of the arbitration tribunal. There was a similar necessity in 1926 when the connection between the Arbitration Court and the High Court was finally severed. In that year, by the

Conciliation and Arbitration Act 1926, s 12 of the principal Act was amended to delete the reference to the appointment of the President from among the Justices of the High Court. Instead, it was provided that the Chief Judge and other Judges should be appointed by the Governor-General in Council and should be a barrister or solicitor or not less than five years standing and should not be removed except in the manner provided by s 72 of the Constitution[13].

But the major problem of reconstitution occurred in 1956. It was then necessary, quite quickly because of the Boilermakers' decision and the pressing requirements of industrial relations, to constitute the two new bodies and to consider the assignment of the former Judges of the old "court" to one or other of them. What happened is conveniently described in Macrae v Attorney-General for New South Wales:[14]

> "Seniority as a member of the Commission was to be that of the seniority formerly enjoyed as a Judge of the old court. Members of the former Court held office as presidential members of the new commission until resignation or death. These provisions were enacted out of deference to the expectation raised by their original appointment to a Federal Court, even though it had been held that such court did not comply with the requirements of Chapter III of The Constitution and even though future appointees to the new Commission would not enjoy such tenure. All members of the old Commonwealth court were to be appointed either to the new Commonwealth Industrial Court or to the Commission. Indeed, the Commonwealth Court of Conciliation and Arbitration was not finally abolished until Act number 138 of 1973 (Conciliation and Arbitration Act (1973)(Cth)) (s 39). That act took effect after the last member of the Arbitration Court (Sir Richard Kirby) retired; see (1973) 149 CAR v; see also

Conciliation and Arbitration Act (1956) (Cth) ss 6, 7, 26, 27 and 28. See also (1956) 85 CAR v ; (1956) 86 CAR v and vii and (1956) 1 FLR iii."

It might arguably have been asserted that the judges of the old Arbitration Court were not "real judges". Their "court" had been held not to be a "real" Federal court. But this was not done. Instead, care was taken to provide for appointment of the Arbitration Court judges to one or other of the successor bodies and to preserve the seniority accruing from the former appointment as a judge of the Arbitration Court according to the date of each judge's original commission[15]. It was provided that a Presidential member of the new Commission should hold office until he resigned or attained the age of seventy years. But in the case of a member "who is a Judge of the Commonwealth Court of Conciliation and Arbitration" he was to hold office "until he resigns or dies"[16]. This provision was presumably included out of deference to the respect to be accorded to the previous appointment of the Judge even though such appointment had been to a "court" held to have been invalidly constituted.

As to the removal of Presidential members of the new Commission, the Act provided that:

> "A presidential member of the Commission shall not be removed from office except in the manner provided by this Act for the removal from office of Judge of the Court."[17]

In this way, Presidential Members of the Commission were

afforded the same seniority as Federal Judges. They were assimilated to the same protections against removal as exist under s 72 of the Australian Constitution in respect of Federal judges. A person appointed as a Presidential Member was to be appointed by the Governor-General by commission.[18] The commission passed under the Great Seal of Australia and was given under the Sign Manual of the Governor General. The commission was thereupon entered in the Australian Register of Patents. The form of commission was indistinguishable from the Letters Patent employed in the commissions given to the Justices of the High Court of Australia and of other Federal Courts. Appointment by Letters Patent have traditionally been reserved in English and Australian legal history to high offices of State. For example, in England peerages were traditionally credited in that way. The history of the use of Letters Patent, for peers and judges, suggests the grant of an office of a life estate or of a term conditional upon good behaviour by such use. It suggests the creation of a proprietorial interest in the office enjoyed by holders of the commission. It is reinforced by the limited use of the Great Seal and Patent Registration in Australian Federal practice. Most statutory offices are filled by Executive Council minutes or by Ministerial instrument and notified in the Commonwealth Gazette. But not Deputy Presidents of the Arbitration Commission. When so appointed a Deputy President was to "hold office as provided by this Act." The form of the

commission was extremely simple. After reciting the title and decorations of the Governor-General, it provided that the named person was appointed a Deputy President of the Commission. This was the commission which I received in December 1974 upon my appointment as a Deputy President of the Commission from 1 January 1975. It was the commission which was received by Mr J F Staples upon his appointment on 24 February 1975 following my appointment to the Law Reform Commission. A person receiving such an appointment would reasonably assume, as I did, that he or she would enjoy the tenure of a Federal Judge. Parliament had promised such tenure by s 7(4) of the Act. No instance existed of a person, afforded such tenure upon his appointment, losing it by the reconstitution of his court or tribunal.

OTHER CIRCUMSTANCES OF COURT RECONSTITUTION

The reconstitution of the Commonwealth Court of Conciliation and Arbitration, necessitated by the events just described, is not the only matter of background to be considered in connection with the subject of this essay. Both in Australia and in other common law countries a number of conventions have been followed, with a remarkably high degree of uniformity, upon the reconstitution of courts and court-like tribunals. Many of the instances are set out in the judgments of the New South Wales Court of Appeal in Macrae. For example, Priestley JA, in his judgment, described what happened on the historic reconstitution of the Royal Courts of Justice in England:

> "When the separate superior courts of England were in 1873 united and consolidated as "one Supreme Court of Judicature in England" (Supreme Court of Judicature Act 1873 (UK), s 3) that Court was constituted by the judges of the courts which were "united" into the one new court (s 5)."[19]

Many other instances are referred to including where District Courts, Compensation Courts and industrial tribunals have been re-constituted. On the reorganisation of the Supreme Court of New South Wales, a like provision was made.[20] The same convention has generally been followed in relation to Magistrates' Courts.[21]

The convention has also been followed in numerous instances in Canada.[22] A recent proposal of the Committee of Inquiry concerning the reconstitution of the Ontario courts which suggested a departure from the convention[23] caused such an outcry in the Province that the proposal has not been adopted. In New Zealand when the District Courts Amendment Act 1979 (NZ) reconstituted the former Magistrates' Courts into the District Court of New Zealand, all existing magistrates in New Zealand were appointed, by the statute, as Judges of the new District Court.[24] This legislative move followed a proposal contained in the Royal Commission on the Courts.[25]

New problems for Australian authorities arose in a number of instances after the Boilermakers' case in 1956. The first was upon the creation of the Federal Court of Australia in 1976. By that time the Commonwealth Industrial Court, established in 1956, had been renamed the Australian

Industrial Court. The Federal Court of Australia was to assume the jurisdiction formerly exercised by that Court and by the Federal Court of Bankruptcy. However the Federal Parliament was careful not simply to abolish the former courts. It enacted that the Australian Industrial Court would be abolished "upon a day to be fixed by proclamation being a day on which no person holds office as a judge of" that Court.[26] A like provision was made in respect of the Federal Bankruptcy Court.[27] All of the Judges of the Australian Industrial Court and of the Federal Court of Bankruptcy, save for Dunphy and Joske JJ, were appointed judges of the Federal Court of Australia. But Dunphy and Joske JJ retained Federal judicial office in the courts to which they had been appointed even though they were not appointed to the new Federal Court.[28] Later Joske J resigned and has since died. In 1983 Dunphy J resigned from the Australian Industrial Court but not from Territorial Courts to which he had also been appointed. He died on 26 January 1989.

By the Industrial Relations (Consequential Provisions) Act 1988 it was provided:

> "79. In spite of the repeal of the Conciliation and Arbitration Act 1904, the Australian Industrial Court continues in existence as if Part V of that Act had not been repealed."

No equivalent express saving provision was made in respect of the Australian Conciliation and Arbitration Commission. The

1988 industrial relations legislation made provisions facilitating the appointment to the offices of President, Deputy President and Commissioner of the Australian Industrial Relations Commission (AIRC) of persons holding such offices in the former Arbitration Commission.[29] It also provided against the possibility of the non-appointment of Presidential members of the Arbitration Commission to the new AIRC. In such an event, such a person was to be entitled to a judicial pension as if he or she had attained the qualifying age of 60 years and "had retired".[30] Attention was drawn to this provision at the time that it was introduced. Its relevance for the position of Staples J was immediately apparent. It was also widely remarked that it could apply to the only other Deputy President of the Arbitration Commission who was not actively engaged in the work of that Commission, (Elizabeth Evatt J, President of the Law Reform Commission). However she, along with the President, Deputy Presidents and all available Commissioners of the Arbitration Commission, was in due course appointed to the equivalent office in the AIRC. The only exception was Staples J.

Before burning to Staples J's position, it is appropriate to mention a number of other recent Australian instances which have concerned judicial officers or persons in a similar position following the reconstitution of their tribunals. Take first the federal case. It relates to what occurred when the Taxation Boards of Review, previously

constituted to hear and determine taxation appeals, were abolished and their jurisdiction transferred to the Administrative Appeals Tribunal. Federal legislation provided that all persons who, immediately before the amending legislation came into force, were members of the Boards were thereafter to hold office as full time Senior Members of the Administrative Appeals Tribunal "as if the person had been appointed to that office by the Governor-General under the Administrative Appeals Tribunal Act 1975.[31] There was no constitutional necessity for such a provision in the case of the Boards. Such tribunal members enjoyed none of the statutory provisions and history which equated the Deputy Presidents of the Arbitration Commission with Judges of the Federal Court. But they were independent decision-makers. They performed duties which were in some ways judicial in character. The provision made for their transfer to the Administrative Appeals Tribunal was doubtless also made in deference to the well established conventions followed where one body, judicial or quasi judicial in character, is replaced by another.

The other Australian instances occurred in the States. The Courts of Petty Sessions of New South Wales were abolished and replaced by the Local Court. Of the 105 Stipendiary magistrates of the old courts, all but five were appointed to the new. The five who were not appointed were the subject of internal departmental reports criticising them on various bases. But the five were never confronted with

these reports. Nor were they given the opportunity to answer them.[32] The Court of Appeal of New South Wales held that the magistrates had legitimate expectation, on the basis of the conventions just recorded and that they had held office as magistrates, to be considered for appointment to the new Court without reference to the prejudicial material about them circulating in secret memoranda never put to them. It is important to record one feature of the case which is not mentioned in the judgments. In the report of the Committee to Select Persons Recommended for Appointment as Magistrates under the Local Courts Act 1982 (NSW), that committee (constituted by the Chief Justice, the Chief Judge of the District Court, the State Solicitor-General (Ms M Gaudron) and the Electoral Commissioner) specifically adverted to the importance of judicial tenure for persons such as the magistrates of the old courts:

> "The committee has been mindful throughout that the existing magistrates are judicial officers. As such there has rested upon them the ordinary judicial duty of acting with independent integrity in the discharge of their judicial duties. Long established constitutional convention requires that, as with judges and other judicial officers, their independence from the Government should not be fettered by their being exposed to removal by the Government from office without due and proper cause being shown to justify such course. Security of judicial tenure has been an important constitutional protection of the independence of the judiciary since it was enshrined in the Act of Settlement in 1702. The convention has obliged Governments, when abolishing an existing court either with or without the establishing of another in its place, to ensure that those who have held judicial office in the old court are not, in practical terms, exposed in consequence to the penalty of dismissal without due or

proper cause being shown.[33]

The committee recommended that all applicant magistrates not compulsorily retired or charged and punished should be appointed as magistrates under the Local Courts Act. It was only thus, said the Committee, that "the government policy can be fairly and properly reconciled with the important constitutional convention of judicial independence".

Instead of so proceeding, the government afforded the magistrates an opportunity to apply afresh and to be considered with new applications for the position of magistrate of the Local Court. Only one of the former magistrates remained to bring proceedings challenging the necessity of such an application. In a second decision, the Court of Appeal held that the course adopted did not fulfil the requirement which the earlier orders necessitated. The remaining magistrate secured an order for the consideration according to law of his original application. This, the Court held, had never properly been considered.[34]

Other instances have occurred in Victoria. In 1987 the Planning Appeals Tribunal was abolished. Its functions were transferred by the Planning Appeals (Amendment) Act 1987 (Vic) to the Administrative Appeals Tribunal of that State. By that Act, all members of the former tribunal were appointed to the new. When, earlier, the Liquor Control Commission of Victoria was abolished, because certain members had the status of Judges of the County Court of Victoria, they were made Judges of that Court on the abolition. There

have been other instances. Enough have now been cited to make the point concerning the convention which has been followed in this country.

THE WITHDRAWAL OF WORK FROM STAPLES J

As I have said, Staples J was appointed a Deputy President of the Arbitration Commission in February 1975. By the abolition of that Commission at midnight on 28 February 1989, he was thus the fifth senior ranking presidential member of the Commission after the President (Maddern J) and Williams, Coldham and Ludeke JJ. Staples J's career as a barrister had not been substantially in the field of industrial relations. But other Deputy Presidents of the Commission had been appointed without such a background. Few so appointed remained members of the Commission for long, performing its highly specialised functions.

Staples J's background has become notorious in popular accounts of the events leading to the purported termination of his commission within the Arbitration Commission. This is not the occasion for a full history. At one time he was a member of the Communist Party of Australia. However, he was expelled from that Party in 1956 when he published the text of the secret speech by the then Secretary General of the Communist Party of the Soviet Union (Mr Nikita Kruschev) concerning the crimes of the Stalin era. This was a typical act of independence and honesty. Staples J has a colourful turn of phrase both in oral and written expression. It was this last tendency which was to contribute to the

difficulties of his relationship with the President and other Deputy Presidents of the Arbitration Commission.

Almost immediately after his appointment, as is now known, Staples J's unconventional approach to the resolution of industrial relations problems (and doubtless his colourful expression on the Bench and in written decisions) caused steps to be taken to provide him with other duties. Mr James McClelland who was in 1975 the Minister for Labour (and so the Federal Minister responsible for the Arbitration Commission) states that he received more than one telephone call from the then President of the Commission (Sir John Moore) asking him to "take some step to remove Staples sideways to some other judicial post, to maintain the harmony of the industrial club"[35].

The chief immediate cause for the initial pressure to find other duties for Staples J were remarks which he made in the course of a decision which he gave in a dispute between the Broken Hill Pty Company Limited and the Seamen's Union. In the course of giving the decision, Staples J used language which the company considered to be an insulting reference to it. He said, speaking of recommendations he had made but which were rejected:

> "Let them, then, twist slowly, slowly in the wind, dead and despised, as a warning to the Commission of the limits of the persuasion of a public authority upon those who zealously uphold the privileges of property and who exercise the prerogatives of the matter over those of our citizens whose lot falls to be their employees."

Because of the strength and colour of this prose and the anger which it caused amongst employers' organisations, it is sometimes overlooked that the dispute which it was Staples J's duty to endeavour to settle was in fact determined as a result of his award. It had been an intractable maritime dispute. In the outcome, the ships began moving again. A strike-bound port was cleared. Far from giving in to the demands of the union, Staples J upheld and awarded the amount which the company had offered to the employees. But the consequence of his decision and the reactions to it was that Staples J was removed from responsibility for the maritime panel of industries to which he had been assigned upon his appointment. The President told him that he had "destroyed" the confidence of the shipowners in his impartiality. There then followed further unsuccessful efforts to assign him to other duties.

Those efforts arose after the dismissal of the Whitlam government and following its replacement by the Fraser government. They fell to be effected by the then Attorney General (Mr R J Ellicott). He was unwilling, or felt unable, to do anything inconsistent with Staples J's commission as a Deputy President of the Arbitration Commission. For a time in 1977 and 1978 Staples J was sent on an overseas "study tour" concerning matters of human rights and civil liberties. These were subjects which had long been of keen interest to him. They led to his absence from his duties as a Deputy President for nearly 2 years. According to

Staples J he was given two airfares, expense allowance, a broad mandate and the opportunity to travel. He accepted the opportunity although it must have been plain to him at the time that one purpose was to remove him from performing his duties in the Commission.

In late 1979 Staples J returned to the normal duties of a Deputy President of the Arbitration Commission. The second crisis within the Commission concerning him occurred in that time. It was triggered by two events. The first occurred in the course of an arbitration of a dispute involving wool storemen and wool brokers There were four issues in dispute. The major one concerned a claim by wool storemen for an increase in wages. The general expectation was that there would be a flat increase for all classifications of $8 per week. But Staples J, upon the basis of the evidence which he heard, awarded storemen increases varying between $12.50 and $15.90 per week. The impact of the decision must be understood in the light of the industrial relations environment in which it appeared. But it was the language in which Staples J announced the decision which caused an outcry. He criticised the lack of assistance given to him by the parties. He identified a number of suggested contradictions in the then governing wage fixing Guidelines established by the Full Bench of the Commission. And he concluded his decision with an allusion to Joseph Furphy's book about the wool trade by declaring that he fixed the figures arrived at:

> "I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life."

The result was that the employers appealed from the award to the Full Bench of the Commission. It overturned the award. It provided instead an across the board increase of $8 per week, consistent with the Guidelines. The industrial disputation on the part of the disappointed wool storemen continued.

The second event concerned a speech which Staples J made at an industrial relations conference held in Adelaide. The speech immediately followed a hearing in the Arbitration Commission of a dispute involving Telecom Australia. Believing that the parties should invoke arbitration only when their discussions had exhausted any prospects of agreement, Staples J directed the parties to have discussions about the dispute. He cancelled an earlier finding he had made of the existence of a "dispute". The Government directed Telecom not to comply with the judge's direction. Instead, invoking legislation enacted in the previous year to overcome a similar stance by Staples J, Telecom approached the President, (Sir John Moore). He took the matter away from Staples J.

Staples J was informed that the Government had approached the President to ask him to resign from his office. He was offered an appointment to the Law Reform Commission. Staples J refused to accept this offer. According to Staples J, he asked the President to support him

and to protect him from this pressure from the Government. Instead, he was asked to leave the Commission. This is the background to Staples J's speech in Adelaide, although in it he made no mention of the pressure upon him to move to the Law Reform Commission.

In the speech, Staples J was critical of the steps taken by the President to deprive him of jurisdiction in the Telecom proceedings. The speech was widely publicised. Eight of the Deputy Presidents thereupon signed a letter to Sir John Moore dated 8 April 1980. It was in the following terms:

> "Some of us have personally expressed to you our concern over the speech given by Mr Justice Staples at Adelaide on 17 March 1980. But whatever may have been the reasons for the speech it was an unprecedented breach of a fundamental convention and threatens the appeal structure of the Commission and the standing of Full Bench decisions. We wish you to know that we are aware of the heavy burden that has been imposed on you and we wish to assure you of our support and loyalty."

Upon receipt of this letter Sir John Moore took a decision which was to have far reaching consequences.

On 1 May 1980, he summoned Staples J to his chambers. Staples J was told that, by reason of recent appointments, there would be a reallocation of industry panels. As a result he would have no panel of industries assigned to him. He was told, however, that he would be invited to sit on the Full Bench of the Arbitration Commission. The public record shows that this is what ensued. In the first year after

Sir John Moore's statement to Staples J, the latter sat on eighty-five days. In the second year, he sat on twenty-two days. In all, he sat on 50 appeals in the 5 years between 1980 and 1985. But the invitations to him from the President to participate in Full Benches of the Commission diminished. They terminated entirely when Maddern J became President in December 1985.

One of the signatories to the letter of 8 April, Gaudron J, disassociated herself from the way in which the letter had been used to isolate Staples J and to deprive him of normal duties as a Deputy President of the Commission. On 4 May 1980, she went to Sir John Moore indicating her intention to resign from the Commission forthwith:

> "With the benefit of hindsight I now suspect that some of my colleagues may have foreseen the use which would be made of our expression of disapproval (a use not intended by me), and accordingly I feel no longer able to maintain an association with you, them or the Commission."

Disputes between strong minded judges are not at all unusual. The depth of the acrimony which existed in the High Court of Australia in the 1920s has only recently been fully disclosed.[36] In England, before and following the dissenting speech of Lord Atkin in Liversidge v Anderson[37] there was a furious exchange of correspondence among the Law Lords.[38] Viscount Maugham, who had presided in the appeal, even wrote a letter to The Times.[39] He also made a personal statement in the Lords.[40] Lord Atkin declined to be drawn into public debate. Atkin's dissenting speech was

bitterly resented by Maugham. It was highly criticised by other Law Lords. Much of the resentment was directed at Atkin's citation of the "only authority which might justify the suggested method of construction", namely Humpty Dumpty's scornful assertion that "when I use a word it means just what I choose it to mean, neither more nor less".[41] This allusion to literature, heavy iron and implicit criticism of his colleagues' whole approach to their duties (not just their decision) resulted in the isolation of Atkin. Some of his colleagues would not speak to him thereafter.[42] Yet his dissenting speech, and even the expression of it, are now seen as protective of the integrity of the judiciary and the reputation of the Lords in testing times.[43]

CHALLENGES TO THE NON-ASSIGNMENT

Staples J did not challenge in the courts the failure or refusal of successive Presidents to assign him to all of the duties of his office. The decision has coincided with the appointment to the Commission of Marks J to whom Sir John Moore assigned no particular industry panel. It also coincided with Sir John's relinquishment of the panel which he had himself previously had. But each of these judges performed first instance work. Staples J did not accept the position. In 1980, he appealed to the New South Wales Bar Association, of which he was a member, to bring a legal challenge to the exercise of the President's discretion. Doubts about the standing of the Association to bring such a challenge were not the basis upon which it declined to do

so.[44] The Bar Council declined to support a challenge because of the suggested "exceptional circumstances" of the case. An Extraordinary General Meeting of members of the Association was thereupon called. It took place on 17 June 1980. It was well attended. Its purpose was to discuss the action of Sir John Moore, in "preventing Staples J from discharging the duties of his office". By a significant majority, the meeting decided that the Bar Association, as such, should take no action. The Bar Council followed this decision. Id did not thereafter speak up in support of Staples J. Nor did it address itself publicly to the principle that the President's discretion should not be exercised to deprive Staples J substantially of the duties of the office to which he was commissioned. The Bar declined the invitation to champion either Staples J or his cause.

The reasons for the meeting's decision and the majority against action, are now impossible to know. Some members may have been affected by the suggested distinction between Staples J and other Presidential Members of the Arbitration Commission (on the one hand) and "real" Federal judges (on the other). Others may have been affected by Staples J's express refusal to be the plaintiff or applicant in mandamus or other proceedings to challenge his exclusion from the performance of his duties. Others may have been affected by the belief that this was a private affair outside the real objectives of the Association. Others may have reacted unfavourably to Staples J's unconventional and sometimes

florid style. Whatever the reasons, the Bar Association declined not only to support Staples J in litigation but also to speak publicly for the principles which he was espousing. So far as the Bar was concerned, the internal arrangements within the Arbitration Commission were matters for the President and not legitimate matters for "external pressure".

Things then settled into an uneasy impasse. Individual commentators alluded from time to time to Staples J's virtual exclusion from duty in the Commission. For his own part, Staples J was unrepentant. The essential mischief of his Adelaide speech was said to be his stalwart defence of his own stance in a number of cases in which he had been critical of the wage indexation guidelines. His criticisms were directed principally to the alleged curiosities, anomalies, injustices and inflexibilities of the guidelines, as then formulated. Staples J later claimed that the criticisms which he had made became more widely accepted in industrial relations circles. Certainly, the recognition of the anomalies eventually led to the adoption of the "two-tier" structure later which was accepted by the Full Bench of the Commission. But this is beside the point. It would be wrong to ascribe the changing approach to wage fixation within the Arbitration Commission to the presence of Staples J, displayed either in his decisions or in his Adelaide speech. His offence, according to his colleagues' letter, was his breach of the convention of institutional loyalty, obedience to the Guidelines adopted by the Full Bench and public

criticism of, and a suggested challenge to, the appeal system within the Commission by resort to public debate.

The changing content of the guidelines and the changing leadership of the Commission in December 1985 did not result in a change in the status of Staples J. He has said publicly that he was waiting at that time for a change of Government in the expectation that the Fraser Government (which had been highly critical of his decisions and had repeatedly proposed his assignment to other duties) would do nothing to suggest to the President the unacceptability of his total exclusion from the performance of his duties. But with the election of the Hawke Government, nothing changed. Steps were not taken either informally or by legal action to terminate Staples J's exclusion from the duties of a Deputy President. Any hope that a change would accompany the appointment of a new President was soon dashed. The appointment of Maddern J as President entrenched more deeply Staples J's isolation. Even the occasional Full Bench assignments were terminated. Letters by Staples J to the new President were unanswered. The President simply ignored him and his correspondence. Whatever the Act provided and his commission said, Staples J was to all intents treated as if he were not a Deputy President of the Commission. According to some of his colleagues, he substantially ceased to attend at the offices of the Commission. He did not attend meetings of the Commission. He pursued private interests. This led a number of them to see his failure to challenge what had occurred or

to resign as a de facto acquiescence in his exclusion whilst continuing to draw his salary, effectively, for doing none of the duties of his office. As one of them put it to me in a comment on a draft of this essay: "There have been faults on all sides but" [it is essential not to disregard] "the failings of the persons at the centre of the issue".

LABOR LAWYERS - AND AN EXPLANATION

For others the issues were more straight-forward. At the 8th Annual conference of the Australian Society of Labor Lawyers held in Hobart on 19 October 1986, a resolution was passed concerning Staples J. In the context of "the independence of the judiciary and the administration of justice" and "the right and duty of persons holding such office to discharge their duties while holding that office" the conference noted that Staples J was "being denied the right to discharge the duties of his public office". It concluded that "his exclusion from the business of the Commission appears to be the result of an administrative act of the President of the Commission". It recorded that"no explanation of this action has been given, no allegations made, no charges laid and no inquiry conducted". A resolution was passed:

> "The conference regards this action as a totally unwarranted attack on the integrity of Mr Justice Staples and on the independence of the judiciary. It calls on the President to immediately reinstate Mr Justice Staples to the duties of a Deputy President."[45]

Copies of the resolution were sent to the Prime Minister (Mr R J Hawke), the Attorney General (Mr L F Bowen) and the Minister for Industrial Relations (Mr R Willis). The Attorney General responded to the resolution stating:

> "Your particular observations about Mr Justice Staples concern the organisation of the work of the Australian Conciliation and Arbitration Commission. This is reflected in the Conciliation and Arbitration Act 1904 which makes it primarily the responsibility of the President of the Commission. Where the President has established an industry panel pursuant to the Act, the Deputy President who is in charge of that panel organises and allocates work within the panel. Where Commission members are not assigned to an industry panel, their work is as directed by the President. As implicitly acknowledged by your Society in the motion ... independence of the judiciary and the administration of justice is of crucial importance. It would not be appropriate therefore for the government to seek to interfere in the processes of the Commission. The principle of non-interference has long been accepted in relation to courts and other independent tribunals in democratic countries which apply the constitutional principle of separation of powers."[46]

This letter came to the notice of Staples J. It propelled him into writing a letter to the Attorney General which was also widely distributed.[47] This invited his critics to "come out in the open" and to state the faults which were alleged to justify the deprival of his office.

> "Under Sir John Moore, I was at least paid the courtesy of recognition of my holding a commission of the Governor-General, however unsatisfactory and in a word wrong my whole situation was. But from the new President I cannot get even an acknowledgment of my correspondence. [Do you] defend this as a literal consequence of the Act to be recorded by him unmoved by its implications? ... Is this

> ... power duly exercised and properly upheld? Is the President greater than the Governor-General? Does he say this? Do I need to repeat the question for the hard of hearing? I invite you to put the problem to the President. What shall he say? That he is a strong man doing his duty as he sees it? Hardly. Some might say that he has simply abused his office, weakly. I can forgive him for that. Weak people are to be found everywhere in Government, but Australian lawyers will not respect the head of a tribunal who usurps the jurisdiction of the Parliament over the sacking of judges."[48]

Staples J invited the Attorney General to have Parliament pass upon the action of the President in effectively removing him from his office. No such step was taken by the Attorney General or anyone in the government.

In November 1987 in the issue of the industrial relations bulletin Workforce appeared an item entitled "Speculation Grows on Future of Justice Staples". It contained the following statement:

> "Commission President Maddern is said to have given up trying to contact Justice Staples after a lack of response to a number of enquiries. Justice Staples' position is now untenable."[49]

This prompted an immediate rebuttal from Staples J. It was addressed to the Minister for Industrial Relations.

> "Have you ever heard it said by anyone that I am hard to find except by a President who does not want to find me?"

The letter demanded that the Minister require the President to reinstate Staples J in his office:

> "And if the President will not give me the satisfaction of reinstatement in my lawful office, in my submission you should put him before Parliament on a charge of misbehaviour.

> You should put me before parliament also if you want to go on pretending that there must be merit on this charade ... You know that there is not a single blemish shown in my behaviour in my office that you can charge me with, but at least by moving for my removal from office you would be dealing with me openly according to law. It is the first duty of government to uphold the law."[50]

Nothing was done pursuant to these demands. Neither Staples J nor Maddern J were brought before Parliament. The status quo persisted. But then an important development occurred which was to bring the affair to its climax.

THE HANCOCK REVIEW OF INDUSTRIAL RELATIONS

In July 1983 the Minister for Industrial Relations established a Committee of Review of Australian Industrial Relations. The committee was chaired by Professor K J Hancock. It had extremely wide terms of reference. These required it to examine, amongst other topics, all aspects of Commonwealth law relating to the prevention and settlement of industrial disputes.[51]

The committee reported on 30 April 1985. Its report contained, in chapter 8, a review of the structure of Federal industrial institutions. That chapter began with a discussion of Alexander's case and the Boilermakers' case. The options for change set out included consideration of the hints which had been given in the High Court concerning the possibility of reviewing the Boilermakers' decision. That decision was thought in some quarters to have imposed unnecessary rigidities upon the industrial relations

institutions of Australia. However, the proposal was rejected by the Hancock Committee. Another proposal was considered for the appointment as presidential members of the reformed Commission of experienced judges of the Federal Court of Australia.[52] But, in the end, the Committee favoured the establishment of a separate Australian Labour court to which the present jurisdiction of the Federal Court of Australia in industrial relations would be transferred. The Labour Court would "comprise an appropriate number of legally qualified persons who would also hold office as Presidential Members of the arbitral body."[53]

The committee rejected the argument that such an overlap in the appointments of some presidential members of the new Commission would involve a diminution in the independence of the proposed Court. It also rejected the suggestion that, henceforth, Presidential Members of the arbitral body should be practitioners in industrial relations only and not lawyers. Legal qualifications were not necessary. But the committee concluded that persons with legal qualifications were "uniquely suited" to perform the judicial functions inherent in industrial relations - such as the interpretation of awards and their enforcement.[54]

In due course the government gave consideration to the Hancock report. It declined to establish the separate Australian Labour Court. But it accepted the recommendation that an Australian Industrial Relations Commission should be established to take over the "expanded functions" of the

Arbitration Commission.[55]

The Hancock Committee rejected a proposal that Presidential Members and Commissioners of the new Commission should be appointed only for fixed terms. It did so upon two bases. The first reason was that:

> "Term appointments would be inconsistent with the notions of impartiality and independence which are central to the effective operation of the Commission. Members of the Commission should be, and be seen to be, free from external influences in discharging their responsibilities. Mr Deputy President Isaac has put the position succinctly: "the security of tenure of arbitrators up to retiring age removes any concern about re-appointment being a factor in the arbitrator's decisions."[56]

The second reason was that such a provision would lead to two classes of Presidential Member because of the proposal that some such members should be Judges of the Labour Court. Indeed the committee stressed the importance of avoiding "distinctions within the Commission between those members who also hold judicial appointments and other Deputy Presidents".

No mention was made in the Hancock report concerning the transitional arrangements which should apply to the transfer of members of the Arbitration Commission to the AIRC. Specifically, no mention was made of the unique position of Staples J. It cannot be said that the Hancock report was initiated as a covert means of reorganising the industrial relations institutions of the Commonwealth to dispose of the embarrassment of Staples J. But, at least after the report was delivered, the prospect of utilising the

occasion of the restructuring to terminate the embarrassment was openly discussed both in the general media and in industrial relations circles.[57] Staples J referred to these rumours in his letter to the Minister of 26 November 1987.

The report of the Hancock Committee was welcomed by the Government as the "first comprehensive review of Australia's industrial relations system in eighty years". Professor Hancock was appointed a deputy President of the Arbitration Commission in 1987. Steps were set in train to draft legislation to effect its main proposals.

THE NEW COMMISSION

In due course the Government introduced legislation to enact a number of the proposals of the Hancock Committee. The legislation, known as the Industrial Relations Bill 1988, was described by the Minister as the "most substantial revision in Australia's Federal industrial relations system undertaken since the system was established in 1904".[58] Great emphasis was placed in the Second Reading speech upon the way in which the legislation would facilitate "the Accord", which was the cornerstone of the Government's industrial relations policy and a critical element in its general economic strategy. The new title of the AIRC was explained as reflecting the "expanded activities of the new Commission". It would place "less emphasis on a pro-active determinative role".[59] There was a general rationalisation to bring into the AIRC a number of specialist arbitral

bodies. Still further developments in that direction were foreshadowed.

A cognate Bill introduced with the foregoing legislation was the Industrial Relations (Consequential Provisions) Bill 1988. Its purpose was stated to be to repeal the Conciliation and Arbitration Act 1904; to effect certain technical amendments and to "ensure that the transition from the system established under the previous Act to the system established by the Industrial Relations Bill is as smooth as possible".[60] The Minister instanced the transfer of part-heard cases from the Arbitration Commission to the AIRC on the commencement of the new Act. No specific mention was made of the transfer of personnel.

The Opposition opposed the legislation describing it as "seriously flawed".[61] The suggestion that it amounted to a major revision of the industrial relations system was rejected. The cognate Bill was also opposed. There was no mention either by the Minister or the Opposition about its possible implications for Staples J.

In due course, the legislation was enacted. By repeal of the 1904 Act and its amending Acts the legislation provided for the abolition of the Arbitration Commission.[62] The transitional provisions plainly contemplated the appointment to the new Commission of the former members of the Arbitration Commission. This is what in due course occurred. On 27 January 1989, the new Minister for Industrial Relations (Mr Peter Morris) announced that the

Government would be recommending to the Governor General in Council the appointments to be made to the Australian Industrial Relations Commission. Maddern J was to be appointed President. The Deputy Presidents to be appointed were all of those who held office as deputy Presidents of the Arbitration Commission upon the creation of the AIRC. Only the name of Staples J was missing. Even Coldham J who had been appointed a Deputy President of the Arbitration Commission in 1972 and who was expected to retire in February 1989 was recommended for appointment, and in due course appointed, as a Deputy President of the new Commission until August 1989. This extension was explained as covering the absence on leave of the senior Deputy President, Williams J. The new Deputy Presidents of the AIRC took their order of seniority according to that which they had enjoyed within the Arbitration Commission, except for Coldham J who was then in a different category. The same was also true of the Commissioners of the Arbitration Commission. Thirty of them, in strict order of their former seniority, were appointed to the new Commission. The Government also announced the appointment of three new Deputy Presidents and a new Commissioner. One of the Deputy Presidents, Mr G C Polites is related to Mr G Polites, a member of the Hancock Committee. Another was Mr M F Moore, the son of Sir John Moore. The third was Mr J W MacBean, Secretary of the Labor Council of New South Wales. Each of them had a well established professional practice in industrial law and

arbitration or long experience before industrial tribunals.

The passage of the legislation and the announced appointments finally brought into the party and Parliamentary fora the question of the future of Staples J. It could no longer be ignored. At a meeting of the Parliamentary Labor Party on 8 November 1988 in Canberra, a question was asked of the Ministers whether Staples J would be appointed to the AIRC. According to newspaper reports, Mr Willis stated that the appointment of Staples J to the new Commission was not supported either by the Australian Council of Trade Unions or the Confederation of Australian Industry.[63] It was alleged that he would be a "danger to the Accord".

Prior to the public announcement of the new appointments, Mr Morris on 22 December 1988 wrote a letter to Staples J. After referring to the Industrial Relations Act 1988 and its foreshadowed proclamation to commence on 1 March 1988, the Minister wrote:

> "When this occurs the Conciliation and Arbitration Act 1904 will be repealed. A consequence will be the abolition of the Australian Conciliation and Arbitration Commission and the officers of all its members.
>
> The Industrial Relations Act will establish a new Federal Industrial Tribunal, the Australian Industrial Relations Commission. I am writing to advise you that the Government has decided not to recommend your appointment to the new Commission. Should you wish to contact me about this I suggest you telephone me ....
>
> Although your office will be abolished before you attain the age of sixty years, your entitlements under the Judges' Pensions Act 1968 will not thereby be jeopardised. Section 81 of the Consequential Provisions Act will operate to preserve these rights.

I wish you well in your future activities."

On 23 January 1989, Staples J wrote to the Minister. After complaining that the Minister would not come to the telephone as promised, he suggested that no decision had been made by the Cabinet to refuse his appointment but that his name had simply not been recommended. He asked:

> "Were you to take the matter formally to Cabinet on the merits, you would be at risk, of course, that the Cabinet would be advised to reject your submission and to include my name to save a principle. For no one has ever hinted at misbehaviour or incapacity (indeed, it has been disavowed).
>
> If I am wrong in my surmise, you must set the record straight. You should surely inform me and the public at large (a) when the matter was formally put before Cabinet (b) who was present and (c) what was submitted to the Cabinet and what was minuted. It would, I submit, be short-sighted for you to accept advice that a substantive reply would breach the conventions of privacy and privilege attaching to cabinet transactions. Such convention is not a rule of law and carries no civil or penal sanctions. Cabinet conventions will not be permitted to secrete an exercise that overthrows on purely political grounds for the convenience and pleasure of politicians and their supporters, the security from both punishment and removal from office of one who was appointed to judge honestly and without fear or favour and against whom no public complaint is made (as you well know).
>
> The security from punishment and from removal from office accorded to those appointed to judge is a guarantee that lies at the very root of our public life. It is formally secured by express provisions by law and can be negatived only by a procedure reserved in the law. ...You will tarnish this system at our peril. The result that you contend for would enter into the memory of the Australian judiciary. There can be no doubt that other judges in all areas of high public controversy (not only those in industrial relations) would become circumspect and cynical

> and litigants dissident, if your course is upheld."

Staples J declined to accept that the new Act had abolished his office. He announced that he would circulate the correspondence to members of all Australian courts "for the issue concerns them not least of all."[64]

One other letter must be mentioned in the present context. On 24 November 1988, Staples J wrote a letter to the Prime Minister after an answer given to the Senate by the Leader of the Government (Senator J Button). Responding to a question from the Leader of the Australian Democrats (Senator J Haines), the Minister said:

> "The Commission which deals with such vitally important and sensitive matters in the area of labour relations should have its independence protected ... Anything else would undermine its authority and effectiveness ... The Commission is responsible for the organisation of its work ... Neither the Parliament nor the Executive should interfere with this process unless there are clear grounds for questioning whether any basis exists for the removal of the holder of an office for proved misbehaviour or incapacity. These are the criteria. That is not the case here ... In regard to the further question ... as to what might be done about Mr Justice Staples's position, let me say that I believe it to be unique in the judiciary of Australia at present, and I have nothing to add to what I said in the earlier part of my answer."[65]

Again, Staples J appealed for an enquiry into the merits of the "unique position" which had been forced upon him. But he then drew attention to the precedent followed upon the establishment of the Federal Court of Australia.

Although two members of the Australian Industrial court were not appointed to the new Court, they were at least preserved in office by the maintenance in existence of the old Court. No attempt was made to use the reconstitution of their Court as a means to abolish their personal commissions without formal removal:

> "By reason of their age and the short career they would have in the new court it was deemed not practical to ask them to go over. That was the justification for the failure to appoint them to the new court. They suffered no material deprivation, no loss of their expectations, no loss of rights or privileges by reason of not being appointed in the new court. They remained in office. There was no question of any punishment having been visited upon them although the reputation of one of them, in some quarters at least, was 'controversial'. An important constitutional and public interest was served by the course taken. That precedent suggests a course which is exactly opposite to what is now on foot for me. That precedent denies the propriety of the present exercise."[66]

Apart from protesting at his impending "removal from office", Staples J appealed to the Prime Minister for an inquiry at which the reasons for such action would be brought out into the public. He asked this by reference to the obligations of "common justice".

> "I have to go on living in a community which will know that I was dismissed. An unexplained dismissal without justification will not reduce the defamation, but rather compound it, for some will sense that my offence was unspeakable."[67]

This letter did not elicit the action sought. Faced with the silence of the Prime Minister and the earlier

failure of the Attorney General to act as he asked, and of the Minister to elaborate the reasons behind his non-appointment to the AIRC, Staples J took three steps. First, he sought the assistance of the Australian Government Solicitor in order to retain the Solicitor General to act for him in the legal dispute arising from these events.[68] This application was refused by the Solicitor on the ground that, in any legal dispute, he would need to be available to represent the Government. Staples J then on 2 February 1989 again asked the Attorney General to intervene but once more without avail.[69]

Secondly, Staples J wrote to the Presiding Officers of the two Houses of Federal Parliament. They tabled a letter from him in Parliament. But they pointed out that this represented the limit of their authority. Thirdly, Staples J appealed once again to the New South Wales Bar Association seeking its support. His new application was discussed at a meeting of the Bar Council on 2 February 1989. It was proposed that the Council should convene a further special meeting of the Bar to consider the implications of the treatment of Staples J "and in particular the threat posed to courts not protected by the Constitution". After discussion, it was resolved that the Bar Council would take no such action. A letter was sent to Staples J by the President of the Bar (Mr K R Handley QC) stating:

> "The Council considered that it was effectively bound to take this view by the decision of the Extraordinary General Meeting of the Bar which some nine years ago resolved to take no action

> at that stage to support your claim to participate in the work of the Conciliation and Arbitration Commission."[70]

The letter finished with a "positive note" expressing the trust that Staples J would now "return to the Bar".

On 14 February 1989, Staples J appealed to the Bar to reconsider his later application. Time was, by now, of the essence. The Arbitration Commission was to be abolished on 1 March 1989. Federal Parliament would meet on 28 February 1989. Little time was therefore left for Parliament, or the Executive Government, to do anything to prevent the purported termination of Staples J's commission occurring in this way. The support of the Bar would be critical. In his letter, Staples J asserted that he did not claim "entitlement to an appointment under the Industrial Relations Act 1988". But he did ask the Bar Council to ponder the risks inherent in the purported abolition of his office, and his removal from it, without the Parliamentary inquiry and on the limited grounds stated in the Act under which he had originally been appointed.[71] There was no reconsideration by the Bar of its refusal to support his challenge before 1 March 1989 dawned.

THE LAWYERS' REACTION

The position of the Bar council in New South wales was thrown into sharp relief by the response of lawyers in other parts of Australia to the approaching "removal" of Staples J from his office.

The Australian Society of Labor Lawyers by 1988 had turned to public criticism of the Government, expressed in letters to the newspapers. In late December 1988 its letters were given prominence in the Age, the Australian Financial Review and the Canberra Times.

On 13 February 1989 on a radio broadcast for the Australian Broadcasting Corporation, I commented for the first time on the Staples affair. I did so in my capacity as a Commissioner of the International Commission of Jurists in Geneva. That body, comprising 40 jurists elected from every part of the world, had then recently concluded its triennial meeting in Caracas, Venezuela. At that meeting, consideration had been given to a number of reported challenges to the independence of the judiciary, notably in Bangladesh, the Philippines, Malaysia, Fiji and Chile. The meeting adopted the Caracas Action Plan on the independence of judges and lawyers. That Plan included support for the Basic Rules on Judicial Independence to which reference will be made below. Asked whether Australians could "rest assured that our present politicians ... respect the principle [of judicial independence] sufficiently not to breach it" I responded with reference to the applicability of the Basic Principles in the case of Staples J, to their universality and to the necessity that politicians should "keep their eyes steadfastly on the importance of institutions". The respect for the independence of the judicial institution, rather than respect for particular judges as such, was important whether

those judges were in Malaysia, Fiji "or Justice Staples in this country".[72]

On 17 February 1989 the council of the New South Wales Law Society adopted a resolution deploring "the means adopted" by the Federal Government "in its endeavour to remove Staples J from office". The Council's resolution specified three grounds of objection to such "removal". They were that it constituted:

> "(a) an attack on the independence of the judiciary;
>
> (b) a denial of natural justice; and
>
> (c) a violation of an established convention of Australian law that the replacement of one court by another should not be used as a vehicle for deposing a judge."[73]

On 23 February 1989, the Australian Section of the International Commission of Jurists issued a lengthy statement condemning the Government's action in the Staples case. The Secretary-General of the AICJ (Mr D Bitel) identified "three fundamental questions" arising out of the treatment of Staples J. These were:

> * The bypassing of proper legal procedures to remove a member of a court or tribunal by the expedient of establishing a new tribunal.
>
> * The misuse of the discretion to allot work to a member of a court or tribunal.
>
> * The denial of natural justice by the refusal to give any explanation or reasons or to give the person affected an opportunity to answer the allegations against him.[74]

This statement secured widespread publicity throughout Australia. It became a leading news item in the Australian media on 24 February 1989.

Subsequently, the Victorian Bar Council,[75] the Law Institute of Victoria,[76] and the Law Council of Australia[77] issued statements expressing their concern about the apparent departure, in the case of Staples J, from the conventions which had previously been followed on the reconstitution of courts or of arbitral tribunals with features similar to courts. The New South Wales Bar Council only changed its stand on 5 March 1989 after the Arbitration Commission had been abolished.[78]

REACTIONS OF THE JUDICIARY

The judicial voice about the approaching "removal" of Staples J was at first even more muted. Clearly, this was because of the conventions which are observed by the judiciary in Australia in refraining from public comments in matters of controversy. It has always been recognised that judges may make statements in matters concerned with an issue such as judicial independence and they have done so in the past.[79] But on the Staples affair there were, at first, few judicial voices of protest.

The first judge to act on the perceived threat to judicial independence in the treatment of Staples J was Judge P T Allan, a Deputy President of the Industrial Court of South Australia. On 25 November 1988 he wrote to

Maddern J to raise for his consideration "certain matters pertaining to well-recognised principles of judicial independence".[80] Reciting that it was "axiomatic that the power to allocate work should not be used in such a way so as to impinge on the independence of the judges who are subject thereto", Judge Allan expressed concern that the by then notorious allocation of the work of the Arbitration Commission to Staples J "on a basis different to that which applies in respect of the allocation of work to other members thereof might be, or be seen to be, an erosion of the independence of the judiciary".

> "I mention that the de facto removal of a judge from office by the failure to allocate to that judge any work would seem to be a usurpation of the power of removal vested in the Governor-General and Parliament."[81]

Judge D F Bright of the same Court, Commissioner G M Stevens and Mr R M Hardie, Industrial Magistrate, authorized Judge Allan to say that they agreed in the views expressed by him. There was no response from Maddern J.

With the public announcement that Staples J would not be appointed to the AIRC, Judge Allan acted again. On 2 February 1989 he addressed a letter to the Prime Minister. This expressed the view that the failure of the government to appoint Staples J to the new Commission "in the absence of consent on the part of Justice Staples or any other lawful reason" was, and would be seen to be, "an attack on the independence of the judiciary in this country."[82]

Also in February 1989 a letter was addressed to the Prime Minister by six judges of the New South Wales District Court. In that letter four additional judges, making ten in all, later joined. The letter called attention to the danger of providing an example to any government that "by the simple expedient of reconstituting a bench and refusing to appoint one of its previous membership" a government might "rid itself of a Judge it cannot master."[63]

On 27 February, 1989, on the eve of the meeting of Federal Parliament, five judges of the Court of Appeal of the Supreme Court of New South Wales took the "exceptional course" of publicly expressing their concern. The signatories were Hope, Samuels, Priestley and Clarke JJA and myself. The statement said:

> "Mr Justice Staples has the same rank, status, precedence and title as a Judge of the Federal Court of Australia. He was appointed as a Deputy President of the Conciliation and Arbitration Commission under an Act of Parliament which provided him with the immunities and protections of a Judge and with the guarantee against removal from his office unless misbehaviour or incapacity on his part was proved and accepted by both Houses of Federal Parliament.
>
> To bring Mr Justice Staples' appointment as a Deputy President of the Australian Conciliation and Arbitration Commission to an end in the manner proposed is a departure from a very important convention.
>
> We are making this statement because of the importance to the community of the independence of Judges and persons of equivalent status. Their security of tenure is, and is seen as, an essential part of their independence and an important support to the impartial performance of their duties.

> Although Mr Justice Staples' case concerns a Federal and not a State tribunal, if the precedent set in this instance is not reversed it will remain available to be copied in the future in respect of State courts. For this reason we have taken the exceptional course of expressing our concern."[84]

The judges' statement was followed immediately by a further statement by all members of the Industrial Court and Commission of South Australia expressed in virtually identical terms.[85] Like statements in support were communicated by the State Attorney General to the federal authorities on behalf of the judges of the Compensation Court of New South Wales and individual judges in other State jurisdictions. The Magistrates Institute of New South Wales aligned itself with the judges' expression of concern.

REACTIONS OF THE MEDIA

As 1 March 1989 approached, the Australian media, both print and broadcast, gave increasing attention to the issues of the Staples affair. Different suggestions were made about the critical questions raised by the case. Michelle Grattan of the Age argued that the judicial status of Deputy Presidents of the Arbitration Commission was the "central issue".[86]

Milton Cockburn observed that the "standing and respect" of the AIRC would be damaged "not by Justice Staples but by those who had bowed to outside pressure. It can hardly complain if others, having observed just how farcical is its supposed judicial independence, also decide to treat

its rulings and decisions as a joke".[87] A similar conclusion was reached in the same journal by the legal commentator, John Slee:

> "The virtue of Jim Staples is this. By standing firm against the attempt to remove him without due process he has forced a closer scrutiny of the system to which he once belonged. That could lead not just to its being given new clothes, as occurred this week, but to its thorough reform."[88]

Newspaper editorialists were generally critical of the government's stance. In the Melbourne Herald it was stated:

> "While there is little doubt that the judge's record is eccentric, his removal challenges traditional notions about the role of the commission and judicial independence ...
>
> It remains to be seen whether the Judge's removal is in breach of the constitution. What must be protected is the independence of the commission and the rights of its members to hold their own views."[89]

The Sydney Morning Herald declared:

> "Federal Governments of both colours have long desired the highest Federal industrial relations tribunal to appear judicial. But they have also expected the tribunal to play by certain rules. The resulting system - however pleasing it may be to the Government, the ACTU and most employers - has developed at the expense of the judicial independence of the presidential members of the commission. Justice Staples's view of his proper function may be condemned by his detractors as eccentric, but that does not make it wrong. Nor is the contradiction that is now embarrassing the Government again simply the judge's fault; the fault is inherent in the present system."[90]

Ignoring (or forgetful of) recent circumstances involving the

five magistrate judicial offices in New South Wales, the Sydney Morning Herald later doubted that there was any danger to State judges in the precedent set in the Staples case. The editor declared that there would be "an almighty uproar, and not only from the legal profession", if any attempt were made to remove 'real judges'.

> "But the problem of Governments' hypocrisy remains. Governments want industrial relations and wage determinations to be dealt with by people with the status and authority of judges, but they cannot abide them behaving with the independence characteristic of judges."[91]

On the same day the editorial in The Australian declared:

> "It is right for the five NSW judges to have expressed themselves in the way they have. It is also right for the Law Council of Australia to have written to the Prime Minister to express concern. There is a need for further concerted action by the legal profession. The Federal Government has erred seriously. Style isn't the issue. The fundamental concept of judicial independence is."[92]

Only the Melbourne Age took an antagonistic stand. Describing Staples J as "the ostracized maverick", its editorial concluded:

> "Far from infringing the independence of the commission by excluding Mr Justice Staples, the Government is meeting its wishes. Mr Justice Staples has already been effectively excluded from hearing any cases, alone or as part of a full bench, since Mr Justice Maddern became president in 1985. ... His isolation stemmed from two unorthodox decisions of his in the late 1970s that resulted in widespread industrial disputation. ...
>
> The so-called industrial-relations club's consensual nature has often been criticised, but the reality is that Mr Justice Staples has lost the confidence of his colleagues. The

> commission itself, not the Government, has effectively deprived him of useful work. It is ludicrous that he should continue to draw a salary of more than $95,000 and other privileges at public expense for this enforced idleness. ... [T]he Government is neither morally nor, it seems, legally obliged to appoint him to the new commission."[93]

The facts upon which this editorial opinion was based were incorrect. The decisions of Staples J did not result in "widespread industrial disputation". Moreover, each member of the Arbitration Commission held an independent commission. He or he was responsible to the Constitution, the law and conscience, not to the consensus of fellow members of the Commission. That was so, whether such members were "real" judges or simply persons required by law to act judicially. Furthermore, as the Minister's letter to Staples J pointed out, he would by statute receive a substantial judicial pension by the unprecedented provision deeming him, before time, to have reached his sixtieth birthday.

REACTION OF INDUSTRIAL RELATIONS "CLUB"

The silence of the industrial relations community during the events leading to the "removal" of Staples J was deafening. Not only did the President refuse to respond to letters, whether from Staples J or others, no Presidential Member made any statement in or out of a hearing, concerning the matter. Even when it was publicly suggested that Staples J's "removal" would demonstrate the lack of independence of the members of the new AIRC, none spoke out

in challenge of that accusation. None deplored or publicly demurred from the effective removal of a colleague from the duties attaching to his commission partially from 1980 and totally from December 1985.

Nor did the non-appointment of Staples J to the new Commission or the removal of the benefits attracting to his (and their) office of Deputy President of the former Commission, elicit from the Presidential members any public or other form of complaint, effective in generating a response from those responsible. Of course there were reasons which might explain the apparent silence. Many had been appointed to the Commission after the Staples saga had begun. Some were doubtless unclear as to the circumstances which had given rise to the virtual exclusion of Staples J from the performance of his duties. Others might have been subject to institutional pressures, not overt or expressed but real nonetheless, to remain silent. Others have privately explained their silence as arising from a concern to avoid involvement in public, and possibly political, disputation. Others had little time for Staples J personally and could not disentangle the person from the principles at stake. One thought he was "featherbedding". Another resented his failure to do what he had promised at his Welcome, namely to "hang up [his] boxing gloves" and conform to the conventions of the system.

The only public exception to this silence before 1 March 1989 was a letter by Commissioner Jim Sheather

written to The Age newspaper. Published on 8 February 1989, the letter responded to The Age editorial just recounted. It said that it was "outrageous" to imply that the Commission had wished the Government to take the action it did against Staples J. Commissioner Sheather disagreed with the conclusion that the Government's action had not infringed the independence of the Commission.

> "Judge Staples was the casualty this time but what of the future opportunity for, and the impact of, pressure if a member or the Commission and potentially other tribunals, annoys those in power? ... The Government has used devious means to circumvent open procedures in a way which removes safeguards against those seeking to settle old scores."[94]

Commissioner Sheather urged that Australia would be the poorer if Staples J were not given a "fair hearing" over why the Government had decided not to appoint him to the AIRC. In this he was echoing the advice given by the Privy Council 150 years earlier in John Walpole Willis' challenge to his removal from office by Governor Sir George Gipps. Their Lordships held that the judge should have been afforded the opportunity of answering the charges brought against him. The removal was held illegal and was reversed. Did it matter that in one case there was a removal; and in the other a mere failure to reappoint?[95]

Within the State industrial tribunals, only the South Australian Industrial Court and Commission made any comment about the fate befalling their Federal colleague. Despite suggestions that a similar restructuring of State industrial

bodies might be under contemplation, the precedent in the Staples case was met by them (other than the South Australians) with silence.[96]

Two commentators with experience in industrial relations gave different perspectives in newspaper columns. Dr G Henderson, Director of the NSW Institute of Public Affairs urged that Staples J was entitled, as a basic issue of civil liberties, to be told "precisely why he is the only member of the [Arbitration] Commission who is not to be appointed to the new Industrial Tribunal". He suggested that Staples J was "but the latest victim" of the industrial relations "club's" "obsession with uniformity and its authoritarian intolerance of dissenters, heretics and mavericks". He referred to the earlier isolation of Justice Charles Sweeney, Nimmo and Gallagher following their majority Basic Wage decision in 1965 that there should be no increase in the basic wage. According to Henderson, Sweeney and Nimmo JJ were then "literally sent to Coventry. Neither was invited to sit on the Full Bench again. In 1969 both left the Commission to take up positions in other areas of the judiciary". According to Henderson, Staples J, like Sweeney and Nimmo JJ before him, was heavily penalised not for private political views. They were "effectively black-balled merely because they chose to bring down judgments that flew in the face of the perceived wisdom of the IR Club". Dr Henderson criticised the academic or journalistic members of the IR Club who failed to "speak up

against the quite scandalous treatment of these three judges."[97]

Kenneth Davidson in The Age, on the other hand, denied that judicial independence was at stake in the treatment of Staples J. The decisions of the AIRC were at least as great in their impact as decisions of the High Court. But the members of these Commissions were not judges "in the sense that members of the Federal or High Courts are judges". They "can't send people to gaol or enforce fines on individuals, let alone interfere in the judicial sense with the lives of parliamentarians".

> "A closer analogy to the status of Presidential Members of the AIRC is not the judiciary but other statutory officers appointed by the Crown such as the Chairman of the Trade Practices Commission or the Broadcasting Tribunal to whom powers are delegated under an Act of Parliament."[98]

Justifying the decision of the President of the Arbitration Commission ("Mr Maddern") in following "the example set by his predecessor" and the likelihood that he would continue the exclusion of Staples J, Mr Davidson concluded:

> "The brutal fact is that Mr Staples, through his judgments, when he was given independent work in the Arbitration Commission, lost the confidence of employers and the ACTU along with the confidence of the Government. ... In Australia's current sorry economic state the Accord and the wage discipline and industrial relations harmony that it has helped create, is one of the few things that we have going for us in the restructuring process."[99]

These are comments from the perspective of a person concerned

with economic and financial matters. The analogy with other Federal bodies breaks down in the fact that, unlike the Arbitration Commission, the members of such bodies are not called judges. They do not enjoy the normal incidents of judicial office. They are appointed for relatively short terms. To secure that independence about which Isaac DP wrote to the Hancock Committee, the members of the national industrial tribunal enjoy appointment to age sixty-five. That is why they have the guarantee against removal in terms derived from s 72 of the Constitution. In this sense the title and the designation of the office holders in the Arbitration Commission - and even their constitutional status - is a diversion from the real issue which is at stake. This is the independence that should be employed by such office holders in order that they may perform their difficult and sensitive duties without fear or favour. And it is also the respect to be accorded to those who have accepted appointment upon the basis of the promise that they would be accorded such tenure as a guarantee for the fearless performance of their functions.

A PARLIAMENTARY COMMITTEE

On 27 February 1989, on the eve of the meeting of Federal Parliament, the Parliamentary Labor Party met again in Canberra. The Prime Minister was asked a question concerning Staples J. As reported, he conceded that the resolution of the issue was "unsatisfactory" and the treatment of Staples J "inelegant".[100] However, he was

adamant that Staples J would not be appointed to the AIRC. Nor would the Government agree to an inquiry into the matter.

Within the Opposition parties, there were divisions about the way in which the matter should be handled. Mr N A Brown QC, a former Federal Minister, and a barrister with experience in industrial relations, was reported to have stated publicly that the "central issue was not the behaviour of Mr Justice Staples but the independence of courts and tribunals".[101] The leader of the Australian Democrats, Senator Haines, said that it was the intention of her party to force a stay of Government action against Staples J "until after a proper inquiry". In response to the charge that Staples J was a maverick, she reported "the world needs mavericks".[102]

In the event, however, the Joint Party meeting of the Liberal and National Parties decided not to support the Democrats' motion. Instead they decided to propose a Joint Parliamentary Inquiry into the principles which should govern the tenure of office of quasi judicial and other appointees to Commonwealth tribunals. The Government ultimately agreed to this proposal, although reluctantly.[103] Outside Parliament, Mr Brown suggested that the inquiry's terms of reference would permit it to look into the circumstances surrounding Staples J's "removal".

In the light of the reported support of the Confederation of Australian Industry for the decision not to appoint Staples J to the AIRC, together with the earlier

strong criticism of his decisions by employers' organisations and the attempt by the Fraser government in 1980 to have him resign from the Commission, the irritation of the Government at the stance of the Opposition may be understandable. That irritation emerged in the comments of the Prime Minister during Question Time on 1 March 1989. The substance of his comment was similar to the points made in the letter of the Attorney-General to the Society of Labor Lawyers referred to above. "Mr Staples" had "little useful work for nearly a decade". It was "successive Presidents of the [Arbitration] Commission who had difficulties with Mr Staples and who declined to allocate first, the usual duties to Mr Staples and then any duties at all."[104]

After critical commentary about the alleged "hypocrisy" of the Opposition from whose period in office his Government had inherited the problem, Mr Hawke criticised as "contrived nonsense" the suggestion from "some members of the legal fraternity" that the failure of the Government to appoint Staples J to the AIRC "constitutes some sinister threat to the independence of the judiciary."

> "While various objections have been raised on the assumption that Mr Staples was a member of the judiciary, the reality is that, although he was entitled to be referred to as "Justice" by virtue of his legal qualifications, he was a member of a non-judicial body. ... In considering appointments to the new commission, it was incumbent upon the Government to take account of the unsatisfactory and, I suggest, the increasingly intolerable situation regarding Mr Staples.
>
> He was being paid almost $100,000 a year to do nothing."[105]

The Prime Minister's statement raised as many questions as it sought to answer. It made no mention of the Parliamentary promise to Staples J when he accepted his commission that he would not be removed from office except by Parliamentary procedure following proof of misconduct or incapacity. It overlooked the fact that the Arbitration Commission was not an ordinary "non-judicial body" but one in which, by statute and by history, the Presidential members had the same rank, status, designation, title, immunity, salary, pension and protection from removal as a Judge of the Federal Court.[106] It failed to mention the conventions which had been followed in the past on the restructuring of Federal arbitral tribunals and other courts. So far as the "unearned" salary was concerned, it failed to mention the continuing obligation, at the least, to pay Staples J a judicial pension in a substantial sum. Only by implication did it seek to bring responsibility for the exclusion of Staples J from his duties to the door of the successive Presidents of the Commission. It failed to question the lawfulness and propriety of their actions directed as they were at a person who held a lawful commission given under an Act of the Parliament.

Only one matter which was inherent in the answer of the Prime Minister has been followed up. If, as has now been repeatedly asserted, judges of the Arbitration Commission (and of the AIRC) are not "real" judges of a "real court" and are given the title "Justice" only because of their "legal

qualifications", a question arises as to whether they should continue to hold that title with the tendency it has in the public's mind to suggest that the holders are judges in reality as well as name. The Minister for Industrial Relations, Mr Morris, stated that Staples J's title of Justice had no bearing "except in title and style." He stated that in future appointees would not be known as "Justice".[107] Subsequently, the then Leader of the Opposition (Mr Howard) declared that a Coalition Government would propose legislation to remove the title of Justice from the Deputy Presidents of the AIRC.[108]

INDEPENDENCE OF THE JUDICIARY : PRINCIPLES

As a result of numerous attacks on the independence of the judiciary in many lands, international agencies and conferences of jurists have busied themselves in attempts to state the basic principles necessary to ensure judicial independence. It was to these principles that Judge Allan called attention in his letters to Maddern J and to the Prime Minister.

The International Commission of Jurists, in particular, has taken a leading part in the formulation of the basic principles on the independence of the judiciary. A draft was adopted at the Seventh United Nations' Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy in 1985.[109] The Congress requested the Secretary-General of the United Nations to take appropriate steps to ensure the widest possible dissemination of the

Basic Principles and to procure reports on their implementation in the member countries of the United Nations.

On 13 December 1985, the General Assembly of the United Nations welcomed the Basic Principles and invited Governments to take them into account within the framework of their national legislation and practice.[110]

Principles 1, 12 and 18 of the Basic Principles are relevant to the Staples case:

> " 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
>
> 12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
>
> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."

There is no definition of the judges to whom the Basic Principles apply. But in the Preamble it is stated:

> "The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist".

Having regard to their content and to this comment, it seems most unlikely that the principles would be inapplicable to a person such as Staples J on the ground of the highly technical constitutional distinction laid down in Australia

in the Boilermakers' case. It is notable that Australia co-sponsored and voted in favour of the foregoing resolution the United Nations' General Assembly.

The Basic Principles just mentioned represent the briefest international exposition of the fundamental principles of judicial and legal independence. They have been elaborated in a number of other international instruments. Thus, the Minimum Standards of Judicial Independence adopted by the International Bar Association in October 1982 includes the following clause:

> "20(a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of services.
>
> (b) In the case of legislation reorganizing courts, judges serving in those courts shall not be affected, except for their transfer to another court of the same status."

Similar in effect to clause 20(b) is clause 2.39 of the Universal Declaration on the Independence of Justice. This declaration was adopted at the World Conference on the Independence of Justice in Montréal, Canada on 10 June 1983. It provides (relevantly):

> "2.39 In the event that a court is abolished, judges serving on that court shall not be affected, except for their transfer to another court of the same status."

The Basic Principles adopted by the General Assembly also include principles relevant to the assignment of work to judges. Thus, clause 14 provides:

> "14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."

But a power of "administration" must obviously be used for administrative purposes and not to nullify a lawful commission held by a judge.

The explanatory note to the equivalent clause in the Montréal Universal Declaration (clause 2.16) is in the following terms:

> "Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body."

The failure of successive Presidents to assign Staples J to the normal duties of a Deputy President of the Arbitration Commission between 1980 and 1989 would appear to be serious departures from compliance with these principles. In the unlikely circumstances that Staples J was not a "judge" for the purpose of the Principles just stated, the ideas contained in them are clearly applicable in any case to his office for that office, by it nature, attracted the same

requirements as were stated in the Principles to apply to "Judges".

THE EMERGING LEGAL ISSUES

A number of legal issues are raised by what has occurred to Staples J. These (or some of them) may yet come before courts. But they may not. It is therefore appropriate that I should note some of them at this time.

Exclusion from sitting: The first is the lawfulness of the exclusion of Staples J for 9 years from the normal duties of Deputy President of the Arbitration Commission. It is obvious that a power given to a person by Parliament must be exercised only for the purpose for which that power is afforded. Any attempt to use the power for an extraneous purpose, or by reference to irrelevant considerations, will be a fraud on the power. It will be an unlawful exercise of it. It will attract prerogative relief because then there has been no lawful exercise of the power.[111] In the present case the relevant powers are those which were provided to the President of the Arbitration Commission to constitute a Full Bench of the Commission[112] and to assign an industry or group of industries to a panel of members of the Commission consisting inter alia of a Presidential member[113]. It would seem beyond argument that such powers existed in the President for the efficient disposal of the business of the Commission and the equitable distribution of the burden amongst its members. Having regard to their

context and to the guarantee of removal from office identical to that of Judges of the Federal Court,[114] it appears unlikely that the power was intended to authorise the President effectively to deny the commission of a Presidential member or to exclude him or her entirely from exercising all or some of the normal functions of the office. Consequential questions arise as to whether persistent refusal by a President to recognise a lawful commission and to use the discretion as Parliament provided would itself amount to "misconduct" at least in the face of the protests of the office holder.

Waiver of complaint: But did Staples J, by failing during the currency of the Arbitration Commission himself to challenge the President's exercise of the discretion, waive his right to complain about it? At least did he do so in the circumstances that the body involved was abolished by Parliament and the only person still in office the subject of such complaint now holds office in a new and different tribunal? Is compliance with laws so fundamental, a matter which one citizen - even one most closely affected - is entitled to waive on behalf of the public generally, which has its own interest in seeing that such laws are complied with by high office holders.

Survival of commission: Another question is whether the abolition of the Arbitration Commission, without more, has the additional consequence of abolishing the commissions of

the members, particularly the Presidential members, of that Commission. There is a great deal of law on commissions from the Crown. Staples J's commission was from the Governor-General. It is not expressly extinguished either by the Industrial Relations Act 1988 or by the Consequential Provisions Act. It may be argued that express extinguishment, particularly in the case of persons with the status of a judge, is required by law to terminate the authority of the commission once lawfully given. Otherwise the commission holder continues to derive his authority from the commission which has not been terminated as the law provided. At least one Presidential member in February 1989, drew to the attention of the Minister the undesirability of leaving the extinguishment of the former commissions to legislative implication. Any other interpretation renders futile the legislative guarantee against removal by the simple expedient adopted in this case. It is noteworthy that the Minister's explanatory memorandum accompanying the Industrial Relations Act 1988 says of cl 34 that it was "in line with the constitutional requirements for the removal of a judge of a court created by the Federal Parliament". Support for the foregoing view may be found in the fact that the commission-holder was promised that he would not be removed from the office, to which he was commissioned, except by the procedure applicable to a judge of the Federal Court of Australia. No such procedure has been invoked in the case of Staples J. He therefore claims to hold office pursuant to

a commission which has never been revoked and from the office of which he has never been lawfully removed. Certain provisions of the new legislation appear to assume the continued relevance of the commission for some purposes (eg judicial pension).

Judicial protection: There is the obverse side of the same question. Subject to for the Constitution, Parliament may undo that which it has earlier done. If it acts clearly enough, it may abolish the office of a person who is not, constitutionally speaking, a judge of a Federal court. It can also, by clear enactment, terminate that person's commission. Staples J asserts that the constitutional protection of Federal judges was imported into the case of his office by the express provision of the Conciliation and Arbitration Act that "a Presidential member of the Commission shall not be removed from office except in the manner provided by this Act for the removal from office of a Judge of the Court." As the "Court" there mentioned has been maintained in existence, and as there are judges of the Court still liable to removal by the constitutional procedure, the argument exists that the procedure for their removal survives the repeal of the old Act equally for Staples J as for those Judges.

Fairness of decision-making: There is finally the natural justice question suggested by the decision long ago in Willis v Gibbs and the more recent decisions of the Court of Appeal

in Macrae and Quin. Despite numerous requests, Staples J was never given the reasons for the failure or refusal of Maddern J to assign him to normal duties. Nor was he given the reasons for the decision of the Government not to appoint him to the AIRC. The only publicly stated reasons for the latter decision are those stated by the Prime Minister in Parliament. These refer to the failure of Maddern J to assign him to work for several years. If this refusal was itself unlawful, it can scarcely amount to a proper reason for the exercise of the decision not to appoint Staples J to the AIRC. Similarly, the reference to his drawing the salary of his office is irrelevant so long as he holds that office. It is possible that other documents may exist which reveal, as they did in the case of the New South Wales magistrates, the true reasons advanced for the decision not to appoint Staples J to the new Commission. Perhaps those reasons were only ever expressed in oral conversations amongst the principal actors in this drama. The decision in Macrae, in which special leave to appeal was refused by the High Court of Australia, stands for the proposition that although the Crown's discretion in judicial and quasi-judicial appointments is very large, if it miscarries by unfair procedures (such as the reference to extraneous or irrelevant matters) the appropriate court will require the decision to be made, freed from such considerations.[115]

DENOUEMENT - DRAMATIS PERSONAE

How do the participants in these events emerge from

them at this stage? The impression is, of course, in the eye of the beholder. However, some general comments may be ventured.

The legal profession emerges with a heightened awareness of the fragile conventions upon which the fundamental principle of judicial independence exists. At least in the case of bodies other than the High Court and possibly other Federal courts, there is no express provision in the Australian Constitution to guarantee security of tenure of such office holders against the loss of office on the reconstitution of their court or tribunal. The Staples case, displays that fragility for all to see.

At first the New South Wales Bar Association (to which Staples J twice appealed for support) showed itself unduly blinkered by the personality of Staples J or the technical distinction laid down in the Boilermakers' case. In the end, whether Staples J was a "real" judge or not, it was as important that he should be supported by practitioners of the law in a challenge to his removal from an independent office with the status and title of a judge and the need to uphold the legal guarantee of tenure and independence just as much as had he been a judge in law as well as title. The other legal bodies in Australia which spoke out are deserving of praise: particularly the Law Society of New South Wales which resisted a suggestion that it should not do so out of deference to the then views of the Bar. The weakest response (other than by the NSW Bar Association) was on the part of

the Law Council of Australia. Its request to the Prime Minister for an assurance that the restructuring of the industrial tribunals was not an improper action designed to remove Justice Staples from office was disappointing. Whether so designed or not, if the occasion of the re-structuring was taken to achieve such an end, it would be equally objectionable in principle.

The response of the media generally was praiseworthy. It repeatedly drew attention to the important principles which were involved in the case. On the other hand, the response of the industrial relations community was disheartening. With a few notable exceptions in South Australia and in the Federal Commission, that community, supposedly dedicated to fairness and sensitivity in human relationships, acquiesced in what occurred to remove a supposed "maverick". It thereby participated in the ultimate demise of the proud hope of Higgins J for a new province of law in the field of industrial relations. It also ratified, unless it is reversed, the precedent that the President of such a body can effectively override even the commission of a person with a title of a judge, without Parliamentary inquiry, proof of misconduct or incapacity and removal from office by the Governor-General. This is the most disturbing precedent of all. That it has been apparently acquiesced in by most of the office holders who are themselves now the subject of the exercise of an even larger discretions,[116] is a source for concern. A question is raised as to whether

the silence of the members of the former Arbitration Commission in what happened to Staples J is explained by traditional "judicial" silence or by concern that speaking out could attract a similar sanction as that which occurred in the case of Staples J. If there is concurrence in what has occurred, that is most disturbing of all. It suggests a refusal to support the basic idea of judge-like independence in the national industrial tribunal. If this is the case, the reason which Isaac DP gave to the Hancock Committee for tenure until sixty-five of such office holders disappears. They should certainly not in future have the title of judge, whatever their professional qualifications. Nor need they be appointed for the term of, and be subject to the removal provisions akin to those provided in the case of, judges. The AIRC begins its life and important national responsibilities with a clear message from what has occurred in the case of Staples J. His instance may be described as "exceptional" or "unique". But the fact remains that it stands as a warning to "industrial judges" and indeed all judges in Australia (save for the Justices of the High Court and possibly Federal Judges protected by the Constitution). The convention hitherto followed on the reconstitution of a court or court-like tribunal will not necessarily be followed in the future. This is also a very bad outcome.

As to the politicians, their response was a case of too little too late. The Joint Committee established by Parliament, may become a vehicle, indirectly, of

consideration of the case of Staples J. But if the Commonwealth's legal advice is correct, Staples J has been "removed" from office without the slightest proof of incapacity or misbehaviour and without any reasons stated for this action. This fact must give pause to other office-holders in Australia who are promised that they will not be removed except on the Parliamentary acceptance of proved misbehaviour or incapacity. There have been other derogations from judicial tenure and independence in Australia, in recent years. But this is far the most serious. How could any member of the AIRC henceforth perform his or her duties without the knowledge that he or she acts under the implied threat established by the Staples case? The guarantee against removal except in the case of misconduct or incapacity proved to Parliament is there in the statute.[117] But what Parliament gives it may seemingly take away. And that renders the promise defeasible, effectively, at the behest of powerful interests in the Commission, the Government or the marketplace - the very interests with which a member of the national industrial tribunal must daily deal and sometimes discipline. In this way, by failing to attend to long-standing conventions, an important pillar of the independence of a vital national tribunal has been knocked away. The Parliamentary guarantee of independence, hitherto thought to be a strong protection for such independence, has been shown, when tested in the case of Staples J, to be a chimera.

The establishment of the Joint Parliamentary Inquiry rescues something from this sorry record. But it depends upon what Parliament makes of it and whether it will defend or modify the promise of safe independence to office-holders of bodies such as the members of the Arbitration Commission. There are other such bodies performing quasi judicial functions of great importance in the Commonwealth. They include the Administrative Appeals Tribunal whose Presidential Members include Judges and many of whose members have tenure similar to that of the Presidential members of the Arbitration Commission.

The proper time for the consideration of the position of Staples J by Parliament was not on the very eve of the abolition of the Commission of which he was a member. It was when the transitional provisions in the consequential legislation were under discussion. The issue and its significance was either overlooked or ignored including by those who later protested at the Government's action. Perhaps they thought that, in the end, the Government would draw back from the breach of convention as it was, apparently persuaded to do in the case of Elizabeth Evatt J. But it was in this way that Parliament's promise to Staples J was purportedly withdrawn and his "removal" effected not following a Parliamentary hearing into misbehaviour or incapacity but by the expedient of abolishing the Arbitration Commission.

And what of Staples J himself? He remains now, as he

has always been, an individualist, given to colourful language and high flown prose. Commenting on his 1980 decision in the wool dispute, the Canberra Times said:

> "Anyone familiar with the history of the ... dispute could be forgiven for thinking that Australians are mad, that the inmates are running the asylum. It takes a certain kind of genius to develop a national conciliation and arbitration authority, to make it the centrepiece of an elaborate industrial-relations system, and then appoint an individualist like Mr Justice Staples to it."[118]

In a review of the lessons to be derived from his exclusion from the new Commission, Staples J, on the day of its establishment, made this prediction:

> "[T]he rules that were supposed to secure my appointment free of unjustified interference and improper subversion by governments and litigants have been repeated word for word in the new legislation for the nominal protection of those reappointed. They are given the very same protection which was supposed to be accorded to me.
>
> It is meaningless. As I was, they are given the form, but, as we now know, not the substance of independence from the government of the day. We enter the era of the carrot and the lash."[119]

In Staples J's opinion everyone involved has been diminished by this dismal affair. I agree with that assessment. But I consider that Staples J is diminished less than others. His chief errors lay in his extra curial appeal against the Wage Indexation Guidelines in the manner in which he challenged them and his failure earlier to challenge his effective exclusion from the exercise of the duties of the office to

which he was commissioned. These errors are not fatal. They do not affect the fresh development in 1989, namely his purported removal from office by the abolition of his tribunal. It is impossible at this stage to judge what may happen in this affair. Battles, including legal battles, may lie ahead. In May 1989 Staples J wrote to the Minister of Finance demanding payment of his salary as a Deputy President of the Arbitration Commission. He received no reply. Perhaps Staples J should never have been appointed to such an important and sensitive post with such large implications for the national economy. Perhaps, as one of his colleagues states he was a divisive "luxury" which the Australian industrial relations scene could not afford. Perhaps his skills lay in other more lawyerly fields. Perhaps as his colleagues at the Bar found, and his colleagues in the Commission felt, he erred in the expression of some of his decisions and in his energetic criticism of the system at a public conference.[120] But these errors may be seen in the eye of history to have been less damaging to Australia's institutions than the responses to the crises which he presented on the part of the Presidents of the Commission, successive Governments and Ministers, the conciliation and arbitration system, the Federal Parliament itself, his colleagues in the judiciary and the legal profession and the silent forces in the industrial relations establishment who finally brought about his demise. Even the Australian community, which allowed the issue to slip from its attention

is not blameless. Staples J on the eve of his abolition of the Australian Commission said:

> "The hypocrisy, the shallowness that remains in this society is the biggest disappointment that I suffer over this ... My estimation of public reaction shakes my confidence in people's concern for either legal institutions or for political values which I thought lay at the root of our community."[121]

It is also necessary to reflect on the institutional significance of the Staples case especially for the new Commission's function in conciliating, compromising and mediating industrial disputes in Australia. The movement away from judicial forms within industrial tribunals in Australia is now well established. It is not a matter of partisan political differences. The major political groupings support it. The direction of this evolution has been away from the extension of judicial processes to deal with what are often non-justiciable issues. The form of reasoning, the manner of approach and the functions and qualifications of tribunal members, Federal and State, have all shown, over time, a steady departure from the original judicial models laid down at the beginning of the century. Higgins J anticipated the tensions which have been the dynamic for this development when he observed in the circumstances of his own resignation: "A tribunal of reason cannot do its work side by side with executive tribunals of panic".[122] Despite this, there remain substantial areas within the jurisdiction of such tribunals which must be dealt

with in a manner closely analogous to a judicial body conducting an adversary hearing. There is a substantial body of work sufficiently quasi-judicial in character to make it unrealistic and inappropriate for industrial tribunals not to follow general judicial models of approach and behaviour. Indeed, the constitutional head of power, as interpreted, probably requires this. It is unusually in the determination of matters involving the broad assessment of national economic, social and political considerations that the departure from a judicial model is most pronounced. It is there most readily justified. The active participants at that level expect, and to some extent can compel, departure from judicial models of conduct and decision-making. Nonetheless the usefulness of industrial tribunals in that function too probably depends upon community acceptance that a measure of independence will be brought to bear in the attempt to compromise the differences between the governmental, employer and employee interests which are involved. In the industrial relations arena, there has long been a degree of cynicism about the reality and extent of the Commission's independence of the position of the major parties in such matters. Indeed, it is a political science and public administration commonplace that a government will not long tolerate what it considers to be an excess of independence in advice or action from an advisory body or statutory tribunal especially in matters close to party political debates and electoral returns. In this context,

the Staples case and the impact of Staples J's quietus upon the new Industrial Relations Commission echo old dilemmas. How can community demands for the appearance of independence be reconciled with the Realpolitik of national economic management? Once industrial tribunals are given a rôle in the processes of industrial regulation, there must follow questions of degree about the limits and forms of judicialisation of such processes. The transparent assault upon the "judicial" pretensions and apparent independence of office-holders of the national industrial relations tribunal which occurred in the Staples case highlight - and underline - these dilemmas.

This is not a proud tale. But it should be told. It is a warning and a reminder. Perhaps it is a tale about a maverick "judge" in an arcane institution, itself shackled by its history. But if it is a tale about judges or persons of their rank and title needing independence and tenure for the proper discharge of their office, it is a sorry one.

SYMBOLISM AND JUDICIAL INDEPENDENCE

Thomas à Becket, Archbishop of Canterbury was a flawed character as historians now generally agree.[123] His ultimate error, in the eyes of King Henry II and his supporters lay in his fierce adherence to a higher rule (which he thought to be God's law) instead of meekly submitting as the other subjects in the kingdom did to the rule of the King, supported as it was by force. After many years in exile Thomas returned to his See in Canterbury. On

29 December 1170 some angry words of Henry were taken literally by four leading knights. They hastened to Canterbury. They entered the Cathedral. Thomas was urged by his priestly colleagues, and later by the knights, to withdraw from his position. He refused. T S Eliot put these words in his mouth:

> "You think me reckless, desperate and mad.
> You argue by results, as this world does,
> To settle if an act be good or bad.
> You defer to the fact. For every life and every act
> Consequence of good and evil can be shown.
> And as in time results of many deeds are blended
> So good and evil in the end becomes confounded.[124]

Facing his end, à Becket says:

> I give my life
> To the Law of God above the Law of Man.
> Unbar the door! Unbar the door!
> We are not here to triumph by fighting, by stratagem or by resistance,
> We have fought ... and conquered.

A Becket's martyrdom almost instantly assumed an importance beyond its immediate causes. His shortcomings, his old fashioned ideas and his truculence were soon forgotten. He was canonised in 1173. The King did his famous penance in 1174. For four centuries, until the

Reformation, his tomb was revered. The events of his destruction are still to be seen in the glass windows of churches throughout England and France.

There are substantial arguments about the merits of the respective causes of the Archbishop and the King. The Archbishop's adherence to old notions was thought to be unsuitable to the political and economic needs of England of the time. The King and the four knights undoubtedly had their notions of the best interests of the realm in mind. But everyone, including ultimately the King, came to recognise the folly of terminating the Archbishop in the way that was chosen.

The lesson of this famous tale is that acts with symbolic potential sometimes take on a life and significance of their own. It seems unlikely that Staples J, an agnostic, will aspire to martyrdom; still less canonisation. No glass windows will celebrate his removal. But in a real sense his appeal to important institutional conventions in Australia is an appeal to fundamentals. Compliance by high office holders with the law. Adherence by Parliament to conventions long established. Fairness to persons who are effectively removed from high office. The perception by lawyers of the importance of the tenure of judges and persons of equivalent rank as an assurance of their true independence. Courage amongst colleagues when many stand quietly by. Responses by Parliament when the Executive breaks a time-honoured rule.

This is therefore a tale worthy of an Eliot. It is a

tale of many ironies. A "radical" judge fights to uphold the ancient principle of judicial independence. An industrial tribunal member is himself the victim of insensitivity and alleged injustice in his "dismissal". A combative fighter for the civil liberties of others ends up fighting for fairness for himself. An ex communist, who exposed Stalin, is for years banished to a judicial Siberia and virtually made a "non person" by his colleagues. A Government of the party which complained bitterly of the breach of conventions of 11 November 1975 itself breaches a convention long established and hitherto faithfully observed. In laid-back Australia another "maverick" is condemned for unorthodoxy. The drama still unfolds. The events recorded here will be overtaken before the ink is dry on this page. But whilst the central happenings are fresh, they should be recorded. Who knows how many ages hence this less than lofty scene may be acted o'er?

FOOTNOTES

* Before publication this essay was circulated to the persons principally involved. It takes into account such comment as well received, most of them upon an assurance of non-attribution.

** President of the Court of Appeal, Supreme Court of New South Wales; Commissioner, International Commission of Jurists, Geneva; formerly Deputy President of the Australian Conciliation and Arbitration Commission. Personal views.

1. See J Rickard, H B Higgins, the rebel as judge, George Allen and Unwin, Sydney, 1984, 171. See also H B Higgins A New Province for Law and Order, Sydney, 1922; 29 Harvard Law Review 13 (1915); 32 Harvard Law Review 189 (1919); 34 Harvard Law Review 105 (1920).
2. Conciliation and Arbitration Act 1904 (Cth) (hereafter CCA) s 12(1).
3. Rickard, 266.
4. Ibid, 254. Higgins J resigned on 15 June 1921. His second term expired in September 1921.
5. See eg A Stewart, "The Federated Clerks Case: Managerial Prerogative in Retreat?" (1985) 59 ALJ 717. See also M D Kirby "Industrial Regulation in the "Frozen Continent", Third Foenander Lecture, Melbourne University (1989) 2 Australian Journal of Labour Law 1.
6. (1918) 25 CLR 434.
7. See eg Waterside Workers' Federation v Gilchrist Watt

and Sanderson Limited (1924) 34 CLR 482, 515, 543; Shell Co of Australia Limited v Federal Commissioner of Taxation [1931] AC 275, 280; Silk Bros Pty Limited v State Electricity Commission of Victoria (1943) 67 CLR 1; Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Limited (1943) 67 CLR 25.

8. Australian Constitution, s 72.

9. R v Kirby; ex parte Boilermakers' Society of Australia (1956) 94 CLR 254. (Dixon CJ, McTiernan, Fullagar and Kitto JJ; Williams, Webb and Taylor JJ dissenting).

10. See eg R v Foster; ex parte The Commonwealth Life (Amalgamated) Assurances Limited (1952) 85 CLR 138, 155; R v Wright; ex parte Waterside Workers' Federation of Australia (1955) 93 CLR 528, 542 and Collins v Charles Marshall Pty Limited (1955) 92 CLR 529. The decision was implicitly later criticised in R v Joske and Ors; ex parte Australian Building Construction Employees and Builders' Labourers' Federation (1972-3) 130 CLR 87 at 90 (Barwick CJ) and 102 (Mason J).

11. Conciliation and Arbitration Act 1956 (Cth) s 10, inserting ss 26 and 27 in the CAA.

12. The Seamens' Union v Matthews (1956) 96 CLR 529.

13. CAA, ss 12, 13.

14. (1987) 9 NSWLR 268 at 278-9.

15. Conciliation and Arbitration Act 1956 (Cth) s 7(2).

16. Ibid, s 7(3)(b).

17. CAA s 7(4). See also s 14 for a similar provision in relation to Commissioners.

18. CAA s 6.

19. (1987) 9 NSWLR 268 at 287.

20. See eg Supreme Court Act 1970 (NSW) s 13, 23. See also other references in Macrae (above) 278f.

21. Macrae, 279f.

22. Ibid, 280.

23. Canada, Ontario, Report of the Ontario Courts Inquiry (Mr Justice T G Zuber, Chairman) 110f.

24. District Courts Amendment Act 1979 (NZ), s 19(2).

25. New Zealand, Royal Commission on the Courts, Report, (Mr Justice Beattie, Chairman) 1978.

26. Conciliation and Arbitration Amendment Act (No 3), 1976 (Cth) s 4.

27. Bankruptcy Amendment Act 1976 (Cth), s 8.

28. (1976) 30 FLR iii.

29. Industrial Relations Act 1988, (Cth) ss 9, 10 and 22. See also Industrial Relations (Consequential Provisions Act 1988 (Cth) s 80.

30. Industrial Relations (Consequential Provisions Act (1988) (Cth) s 81.

31. See Taxation Boards of Review (Transfer of Jurisdiction Act (1986) (Cth) s 214(1).

32. See (1987) 9 NSWLR 268, 292.

33. New South Wales, Committee to Select Persons

Recommended for Appointment as Magistrates under the Local Courts Act 1982, Report, Parliament of New South Wales, 1984, 3 (para 7). See also Law Reform Commission (NSW), Interim Report on First Appointments as Magistrates under the Local Courts Act 1982 (LRC 38), 1983 paras 4.28, 5.30.

34. Quin v Attorney General, Court of Appeal (NSW), unreported, 23 December 1988. Special leave to appeal granted by the High Court of Australia.

35. J R McClelland, "Labour's Blackest Hour", Sydney Morning Herald, 24 February 1989, 11.

36. C Lloyd, "Not Peace but a Sword! - The High Court under J G Latham" (1987) 11 Adel L Rev 175, 178ff.

37. [1942] AC 206, 225ff.

38. G Lewis, Lord Atkin, Butterworths, London, 1983, 138ff.

39. The Times (London), 6 November 1942 reproduced in Lewis, 143.

40. Ibid, 145.

41. Liversidge v Anderson, above at 245.

42. R Stevens, The Law and Politics: The House of Lords as a Judicial Body 1800-1976, 1979, 287.

43. See, for example, comments by Lewis, above, 176.

44. J F Staples, "Uniformity and Diversity in Industrial Relations" (1980) 22 Journal of Industrial Relations 353.

45. Australian Society of Labor Lawyers, Resolution, 27 October 1986, mimeo.

46. Letter L F Bowen to Labor Lawyers, 19 November 1986.

47. Letter J F Staples to L F Bowen, 6 February 1987.

48. Ibid.

49. Workforce, 665, 20 November 1987.

50. Letter J F Staples to R Willis, 26 November 1987, 2.

51. The terms of reference are set out in Australia, Report of the Committee of Review, Australian Industrial Relations Law and Systems, 1985, AGPS, Canberra, vol 2, 2. ("Hancock" Report).

52. Hancock report, above n51, vol 2, 390. Plus see n10 above.

53. Ibid n51, 393.

54. Ibid, 395.

55. Statement, R Willis, "Hancock: A Thorough Examination of Arbitration System", 20 May 1985, press release 121/85.

56. Ibid, 401-2.

57. See eg Workforce n48 above.

58. R Willis, Commonwealth Parliamentary Debates (House of Representatives), 28 April 1988, 2329.

59. Ibid, 2332.

60. Ibid, 2335.

61. P D Shack, Commonwealth Parliamentary Debates (House of Representatives), 23 May 1988, 2798.

62. Industrial Relations (Consequential Provisions) Act 1988 (Cth) s 3, 11, sch 3.

63. See R Willis quoted in The Age 25 January 1989, 6.

64. The letters were published by The Age 25 January 1989, 6.

65. Senator J Button, Commonwealth Parliamentary Debates (Senate) 8 November 1988.

66. Letter J F Staples to R J Hawke, 24 November 1988, 3.

67. Ibid, 4.

68. See P Malloy, "Judge moves to prevent government axing him" in The Australian, 25 January 1989, 1.

69. The Age, 3 February 1989, 14.

70. Letter K R Handley to J F Staples, 8 February 1989.

71. Letter J F Staples to K R Handley, 14 February 1989.

72. M D Kirby, Interview by Mr M Peacock, Australian Broadcasting Corporation, 13 February 1989, transcript. For the record of the Caracas meeting, see Centre for the Independence of Judges and Lawyers, Bulletin No 23, April 1989.

73. See Press Release by President of the NSW Law Society (Mr Brian Thornton) 17 February 1989.

74. See International Commission of Jurists, Australian Section, News Release, 23 February 1989.

75. See E W Gillard, "Judges' Role Under Threat", The Age, 21 February 1989, 11.

76. Law Institute of Victoria, Press release, 27 February 1989.

77. Law Council of Australia, reported, Sydney Morning Herald, 28 February 1989, 1.

78. New South Wales Bar Association, Press release, 5 March

1989.

79. S Shetreet, Judges on Trial, North Holland, 1976, 319f, 314ff.

80. Letter P T Allan to B J Maddern, 25 November 1988, 1.

81. Ibid, 2.

82. Letter P T Allan to Prime Minister R J Hawke, 2 February 1989. This was disclosed by The Age, 8 February 1989, 3.

83. Letter K P Shadbolt and Ors to Prime Minister R J Hawke, February 1989, unpublished.

84. Statement by the Judges of Appeal, 27 February 1989, reported Sydney Morning Herald, 28 February 1989, 1. See commentary The Australian 1 March 1989, 8.

85. Statement by the Judges and Members of the Industrial Court and Industrial Commission of South Australia, 1 March 1989.

86. M Grattan, The Age, 25 November 1989, 1.

87. M Cockburn, "Arbitrator Who Failed to Follow the Script", Sydney Morning Herald, 27 February 1989, 13.

88. J Slee, "The Virtue of Jim Staples", Sydney Morning Herald, 3 March 1989, 12.

89. [Melbourne] Herald, 25 January 1989, 10.

90. Sydney Morning Herald, 25 January 1989, Editorial.

91. Sydney Morning Herald, 1 March 1989, 14.

92. The Australian, 1 March 1989.

93. The Age, 26 January 1989, 1.

94. Letter by Commissioner J Sheather, The Age, 8 February

1989. 12. Staples J later said that three of the forty-three members of the Arbitration Commission had contacted him about his "removal". See The Age, 23 February 1989, 1. On 1 March 1989 the officers of the Industrial Registry in the AIRC in Sydney unanimously resolved not to support the "purported dismissal" of Staples J as a "duly appointed deputy President of the Arbitration Commission".

95. See Willis v Gipps (1846) V Moore 739; 13 ER 536 (PC). Cf Reilly v The King [1934] AC 176, 180.

96. As to suggested restructuring of the NSW Industrial Commission see M Moore, "Judge Not Lest Ye Be Sacked", Sydney Morning Herald, 4 March 1989, 14.

97. G Henderson, "Staples Blackballed but is it Justice?", Australian, 30 January 1989, 9. After 1 March 1989 a number of industrial organisations spoke up against what had occurred, notably the Trades and Labor Council of Western Australia and the Seamen's Union of Australia.

98. K Davidson, "The Issue is Not Independence But Loss of Confidence", The Age, 1 March 1989, 11. See also R Manne, "Hidden risk in axing Staples", Melbourne Herald, 3 march 1989. 10.

99. Ibid.

100. R J Hawke reported Sydney Morning Herald, 28 February 1989. 1.

101. As reported in The Age, 23 February 1989, 1.

102. Ibid.

103. The Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals has been established. At the time of writing it is collecting submissions. Its terms of reference require it to enquire into "the principles which should govern the tenure of office of quasi-judicial and other appointees to Commonwealth tribunals and in particular whether the provisions of sections 24 and 28 of the Industrial Relations Act provide proper and adequate provision for the tenure of [members of the AIRC]". The Chairman of the Committee is Dr R Klugman MP. The Deputy Chairman is Senator Peter Durack.

104. As reported Sydney Morning Herald, 2 March 1989, 3.

105. Ibid.

106. See CAA, ss 7(4), 7(5), 11A.

107. See P Morris reported Sydney Morning Herald 2 March 1989.

108. As reported Sydney Morning Herald 2 March 1989.

109. United Nations, Basic Principles on the Independence of the Judiciary, GA 40/146, 1985. The principles are an annex to Centre for the Independence of Judges and Lawyers, ICJ Conference on the Independence of Judges and Lawyers, Bulletin No. 23, April 1989, 109.

110. GA Resolution 40/146, 13 December 1985. See also resolution 41/149 of 4 December 1986.

111. See eg S A de Smith, Judicial Review of Administrative

Action (3rd ed), London, 1983, 268ff.

112. CAA, s 17(3).

113. Ibid, s 12.

114. Ibid, s 7(4).

115. See Macrae (above n 14).

116. See Industrial Relations Act (1988) (Cth) ss 36, 37, 38 and 40. By s 36 the President "shall direct the business of the Commission".

117. Ibid, ss 24, 28.

118. Canberra Times, 11 March 1980, 2.

119. J F Staples, "Judges Will Face Carrot and the Lash", The Age, 1 March, 1989, 11.

120. See Discussion J D Noseda, "Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence", 36 Depaul L Rev 519, 527 (1987).

121. Quoted L Crisp, "Neither dead nor despised". Interview with Staples J, The Bulletin, 21 February 1989, 141, 142-3.

122. See Higgins J quoted in N Palmer "Henry Bournes Higgin, A Memoir", George Harrap, London, 1931, 226f. Cited by Staples J in Northern Territory Teaching Service Award 1981, (1983) 288 CAR 517, 585.

123. D Knowles, Archbishop Thomas Becket: A Character Study, 1949.

124. T S Eliot, Murder in the Cathedral, London, Faber & Faber, 1935, 73f.