COMMONWEALTH LAW BULLETIN

"CONTROVERSY OVER THE "TERMINATION" OF A "JUDGE" IN AUSTRALIA

COMMONWEALTH LAW BULLETIN

CONTROVERSY OVER THE "TERMINATION" OF A "JUDGE" IN AUSTRALIA

M D Kirby*

A number of judges and lawyers in Australia have joined in criticising a perceived breach of a convention protecting judicial independence hitherto observed in Australia.

Recently, the Australian Parliament abolished the Australian Conciliation and Arbitration Commission[1]. This Commission, established in 1956, is a national industrial tribunal. It was set up in 1956 when Australia's highest Court held that the old Arbitration Court[2] (which had preceded it and which had existed from 1904 was invalidly constituted under the Australian Constitution[3]. Because the "Court" was performing functions held not to be strictly "judicial" in character (such as devising compulsory awards for the settlement of industrial disputes), it was held that it could not be a "court" strictly so called.

Nevertheless, many of the judges of the old Arbitration Court were appointed to the new Conciliation and Arbitration Commission.[4] Those who were not were appointed to a new Industrial Court by the Act of Parliament establishing the Arbitration Commission, its Presidential members continuing to have the same rank, status, precedence, salary, immunities and title as judges of the Court.[5]

Following a national inquiry in 1987, new legislation was passed by the Australian Federal Parliament in 1988. This, apart from abolishing the Conciliation and Arbitration Commission, established a new Industrial Relations Commission. The President of the old Commission was appointed the President of the new. All of the Deputy Presidents of the old Commission (except one) and all of the Commissioners of the old Commission were appointed to the new. The one exception was the Honourable Justice J F Staples. He was originally appointed to the Australian Conciliation and Arbitration Commission in 1975. He was thus one of the most senior Presidential members before the reconstruction of the tribunal.

Following a speech which Justice Staples made in 1980 to an industrial relations conference and remarks he made in the course of giving decisions in the Conciliation and Arbitration Commission, the then President of the Commission (Sir John Moore) limited the assignment of work to Justice Staples within the old Commission. At first he was excluded only from sitting at first instance. Later, when the current President of the Commission (Justice B J Maddern) was appointed in 1985, Justice Staples was excluded totally from all duties as a Deputy President of the Commission. Although no public reason was ever given, privately, this exclusion of a person with the rank of a judge from performance of his duties was explained by various commentators as based on Justice Staples' tendency to be a "maverick" and to express

his opinions in colourful and unorthodox language. It was also pointed out that industrial relations, including the settlement of large national strikes, required sensitivity and the concurrence of both parties to the arbitration. It was reported that neither the employers' nor the employees' organisations supported the reappointment of Justice Staples to the new national Industrial Relations Commission.

A question has now arisen concerning whether the abolition of the Arbitration Commission has had the effect, in law, of abolishing Justice Staples' personal commission. Under the former Act, he could only be removed in the same way as Federal judges in Australia were removed, namely by an address to the Governor General by both Houses of Parliament asking for his removal on the ground of proved misbehaviour of incapacity.[6] Although the Australian Constitution protects judges of Federal Courts from removal in this manner,[7] the constitutional provision would not appear to apply to protect persons such as Justice Staples whose tribunal has been declared not to be a court strictly so called.

Nevertheless there are a number of aspects of the Staples affair which have caused concern to the Australian Section of the ICJ, the Law Council of Australia, the Victorian Law Institute, the Victorian Bar Council, individual judges and other citizens in Australia. These include:

* The refusal or failure of the President of the old

Commission to assign any duties at all to Justice Staples over more than three years although he was still a member of the Commission, had the rank of a judge and had not been removed by the Parliamentary procedure as the statute provided;

* The failure of the government, the Minister or any other Federal official to state the reasons for the decision not to appoint Justice Staples, alone, to the new Industrial Relations Commission.[8] Ordinary rules of natural justice would require that he should know and be given an opportunity to respond to alleged criticisms of him; and

* The failure of the government to initiate any steps for his removal on the grounds of misconduct or incapacity as was provided under the statute pursuant to which he had been appointed.

Although some lawyers in Australia have raised a technical point about the suggested distinction between "real judges" and Deputy Presidents of the Arbitration Commission, this was not the view adopted by the Australian Section of the ICJ nor by members of the Australian judiciary and the legal profession who expressed their concern. If the Act gives a person the title of Federal judge; provides that he or she should have the same "rank, status and precedence" as a Federal judge; provides for the same immunities, protections and mode of removal as a judge and for the same salary and other rights, they concluded that that person is,

for the purpose of the UN Basic Principles of the Independence of the Judiciary, to be dealt with as a judge. This was the point made by me early in February 1988 in an interview with the Australian Broadcasting Corporation. The Basic Principles in the development of which the ICJ took such a leading part, are to be observed as much in the case of Justice Staples as in the case of other judges upon whose removal the Australian legal profession has recently been most vocal. (e.g. in Fiji, Bangladesh and Malaysia).

On the eve of the purported abolition of Justice Staples's commission, a great outcry occurred in many quarters throughout Australia concerning the treatment of Justice Staples and the breach of conventions involved in it. On 29 February 1989 the senior judges of the Court of Appeal of New South Wales took the "unusual course" of issuing a public statement expressing their concern about the precedent set in the Staples case. This secured widespread publicity throughout Australia. The Australian Prime Minister (Mr R J Hawke) dismissed the expressed concern by "members of the legal fraternity" as "contrived nonsense"[9]. The Government and main Opposition parties in the Australian Parliament defeated a proposal for a Parliamentary investigation of the treatment of Justice Staples. Nevertheless, a Joint Parliamentary Inquiry was set up to investigate "the principles that should govern the tenure of office of quasi judicial and other appointees to Commonwealth tribunals". This was itself a compromise on the

call for an investigation into Justice Staples' "removal" from office. The Joint Committee may permit exploration of related questions. The significant outcry itself over this affair may inhibit similar procedures in Australia in the future to remove "mavericks" by the reconstitution of their courts or tribunals.

Meanwhile, Justice Staples is contemplating other defensive measures. At the time of writing he has declined to leave his office. He is reported to be considering legal proceedings in the High Court of Australia to require the recognition of his commission until he is removed from office following a Parliamentary inquiry, which is the tenure which he was promised on his appointment. Another avenue may be a challenge to the failure of the Federal authorities to accord him natural justice and to confront him with the accusations which were thought sufficient to justify his "removal" from an office with the statutes and title of a Federal Judge and non appointment to the new Commission.[10]

The public controversy about the affair continues.

- President of the Court of Appeal of New South Wales 1984-; Commissioner of the International Commission of Jurists 1985-; former Deputy President of the Australian Conciliation and Arbitration Commission 1974-1983.

1. Industrial Relations Act 1988 (Cth), s9.
2. Conciliation and Arbitration Act 1904 (Cth) s 12(1).

3. R v Kirby; ex parte the Boilermakers' Society (1956) 94 CLR 254.

4. Conciliation and Arbitration Act 1904, s 7(2).

5. Ibid s 7(5).

6. Ibid s 7(4).

7. Australian Constitution s 72.

8. In answer to a question in the Australian Parliament on 1 March 1989 reported in Sydney Morning Herald, 2 March 1989, 3. The Australian Prime Minister (Mr R J Hawke) said that the reasons included the non assignment of work to Staples J for many years, the fact that the Commission was not a "court" and the fact that Staples J was continuing to draw full salary.

9. Ibid.

10. See Macrae v Attorney General for New South Wales (1987) 9 NSWLR 268, 287.