THE JOURNAL OF INDUSTRIAL RELATIONS

SEPTEMBER 1989

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The Removal of Justice Staples and the Silent Forces of Industrial Relations

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On 1 March 1989 the Australian Conciliation and Arbitration Commission was abolished and 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, Justice Staples, a deputy president since 1975. Despite requests, no reasons were given to Justice Staples for his non-appointment in 1989 to the new commission. In Parliament, Prime Minister R. J. Hawke eventually explained it as based on the failure of successive presidents to assign Justice Staples duties. This paper places the events of Justice Staples's career in the Arbitration Commission in the context of the history of the commission and its predecessors. It outlines the controversy involving Justice Staples and how it first arose, and 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 parliamentarians are traced. 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 happened to Justice Staples.

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

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1. See J. Rickard, *H. B. Higgins*, Allen & Unwin, Sydney, 1984, 171.
2. Conciliation and Arbitration Act 1904 (Cth) [illegible]

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, Justice Higgins was to succeed Justice O'Connor; he 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 from 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 Judge Higgins'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's 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 that Higgins took such a leading part in establishing 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 section 51 of the Constitution probably ensured that the 'new province' of law in the field of industrial relations would produce a court-like body whose decisions 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

3. Rickard, 266.
4. ibid., 254. Justice Higgins resigned on 15 June 1921. His second term expired in September 1921.
5. See, for example, 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*

was so, because the president was appointed for seven years only. In a decision that might have gone either way, and with Justice Higgins 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 that was not properly constituted as a court. The Arbitration Court was not so constituted. This was because it could be inferred from section 72 of the Constitution that federal courts, created by the Parliament, would be constituted only by judges appointed as section 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 a 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, their tenure being shorter only in the event 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. 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,[9] 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 section 72 of the Constitution.[11]

7. See, for example, *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, section 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, for example, *R. v. Foster; ex parte 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 criticized 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).

At the same time as the Commonwealth Industrial Court was created, the Commonwealth Conciliation and Arbitration Commission (Arbitration Commission) was created. It was to be the receptacle of the arbitral and non-judicial powers formerly exercised by the Australian Court. The reconstitution was almost immediately challenged in so far as it provided for the Industrial Court. But the challenge was dismissed.[12] For thirty-three 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, section 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 of not less than five years standing and should not be removed except in the manner provided by section 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 requirement 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 perhaps 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

12. *The Seamen's Union v. Matthews* (1956) 96 CLR 529.
13. CAA, sections 12, 13.

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 section 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] When so appointed, he or she 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 that I received in December 1974 upon my appointment as a deputy president from 1 January 1975. It was the commission that was received by 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 section 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 instances of court reconstitutions

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 paper. 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, Justice Priestley, 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*

15. Conciliation and Arbitration Act 1956 (Cth) section 7(2).
16. ibid., section 7(3)(b).

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 cited, including where District Courts, Compensation Courts and industrial tribunals have been constituted. On the reorganization of the Supreme Court of New South Wales, a like provision was made.[20] The same convention has generally been followed for 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 that suggested a departure from the convention[23] caused such an outcry in that province that the proposal has not been adopted. In New Zealand, when the District Courts Amendment Act 1979 (NZ) re-constituted the former Magistrates Courts into the District Courts 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 on at least three 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 Justices Dunphy and Joske, were appointed judges of the Federal Court of Australia. But Justices Dunphy and Joske 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 Justice Joske resigned and has since died. In 1983 Justice Dunphy resigned from the Australian Industrial Court but not from the Territorial Courts to which he had also been appointed. He died on 29 January 1989.

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

19. (1987) 9 NSWLR 268 at 287.
20. See, for example, Supreme Court Act 1970 (NSW) sections 13, 23. See also other references in *Macrae* (above) 278f.
21. *Macrae*, 279f.
22. ibid., 280.
23. Canada, *Report of the Ontario Courts Enquiry* (Mr Justice T.G. Zuber, Chair) 110f.
24. District Courts Amendment Act 1979 (NZ), section 19(2).
25. New Zealand, Royal Commission on the Courts, *Report* (Mr Justice Beattie, Chairman) 1978.
26. Conciliation and Arbitration Amendment Act (No. 2) 1976 (Cth) [illegible]

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 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 Australian Industrial Relations Commission. 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 Justice Staples 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 (Justice Elizabeth Evatt, 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 Industrial Relations Commission. The only exception was Justice Staples.

Before turning to Justice Staples's position, it is appropriate to mention two other recent Australian instances which have concerned judicial officers or persons in a similar position following the reconstitution of their tribunals. The first 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 that equated the deputy presidents of the Arbitration Commission with judges of the Federal Court. But they were independent decision makers and performed duties that 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 instance occurred in New South Wales. It followed the abolition of the Courts of Petty Sessions of that state and their replacement by the Local Court of New South Wales. 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 criticizing

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

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 a 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 Appointments 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, 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 and 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 necessitated by the earlier orders. 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]

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 [illegible]

The withdrawal of work from Justice Staples

Justice Staples was appointed a deputy president of the Arbitration Commission in February 1985. 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 (Justice Maddern) and Justices Williams, Coldham, and Ludeke. Justice Staples'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.

Justice Staples'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. He was, however, 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 (Nikita Kruschev) concerning the crimes of the Stalin era. This was a typical act of independence and honesty. Justice Staples also has a colourful turn of phrases both in oral and written expression, and it was this last tendency that was to precipitate 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, Justice Staples'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 steps to move Staples sideways to some other judicial post, to maintain the harmony of the industrial club'.[35]

The chief immediate cause for the pressure to find other duties for Justice Staples were remarks he made in the course of a decision he gave in a dispute between the Broken Hill Pty Company Limited and the Seamen's Union. In the course of giving the decision, Justice Staples used language that 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 master over those of our citizens whose lot falls to be their employees.

Because of the strength and colour of this prose and the anger it caused amongst employer organizations, it is sometimes overlooked that the dispute, which it was Justice Staples's duty to endeavour to settle, was in fact determined as a result of his award. It had been an intractable maritime dispute.

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

In the outcome, the ships began moving again. A strike-bound port was cleared. Far from giving in to the demands of the union, Justice Staples upheld and awarded the amount that the company had offered to the employees. But the consequence was that Justice Staples 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. Further unsuccessful efforts to assign him to other duties followed.

Those efforts arose after the fall 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 Justice Staples's commission as a deputy president of the Arbitration Commission. For a time in 1977 and 1978 Justice Staples was sent on an overseas 'study tour' concerning matters of human rights and civil liberties, subjects that had long been of keen interest to him. They led to his absence from his duties as a deputy president for nearly two years.

Between 1979 and 1980 Justice Staples 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, in which four issues were 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 Justice Staples, on the basis of the evidence that 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 Justice Staples announced the decision that caused an outcry. He criticized the lack of assistance given to him by the parties. He identified a number of 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 had fixed the figures arrived at in this way: '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, which overturned the award. It provided instead an across-the-board increase of $8 a week, consistent with the wage-fixing guidelines. The industrial disputation on the part of the disappointed wool storemen continued.

The second event concerned a speech made by Justice Staples at an industrial relations conference in Adelaide. The speech immediately followed a hearing in the Arbitration Commission of a dispute involving Telecom Australia. Believing that the parties should only invoke arbitration when their discussions had exhausted any prospects of agreement, Justice Staples directed the parties to have discussions about the dispute. He cancelled an earlier finding he had made of a 'dispute'. The government directed Telecom not to comply with the direction. Instead, invoking legislation enacted in the previous year to overcome a similar stance by Justice Staples, Tele...

approached the president, who took the matter away from Justice Staples.

Justice Staples was informed that the government had approached the president to ask him to resign from his office. He was offered appointment to the Law Reform Commission. Justice Staples refused to accept this offer. 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 Justice Staples'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, Justice Staples was critical of the steps taken by the president to deprive him of jurisdiction in the proceedings. The speech was widely publicized. Eight of the deputy presidents thereupon signed a letter to Sir John Moore, dated 8 April 1980, 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 the receipt of this letter the president of the commission, Sir John Moore, took a decision which was to have far-reaching consequences.

On 1 May 1980, he summoned Justice Staples to his chambers. Justice Staples 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 Justice Staples, the latter sat on eighty-five days. In the second year, he sat on twenty-two days. In all, he sat on fifty appeals in the five years between 1980 and 1985. But the invitations to him from the president to participate in full benches of the commission diminished. They ceased entirely when Justice Maddern became president in December 1985.

One of the signatories to the letter of 8 April, Justice Gaudron, disassociated herself from the way in which the letter had been used to isolate Justice Staples 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 in the High Court of Australia in the 1930s has only recently been fully disclosed.[36] In England, before and following the dissenting speech

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

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 criticized 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 irony 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 protecting the integrity of the judiciary and the reputation of the Lords in testing times.[43]

Challenges to the non-assignment

Justice Staples did not challenge in the courts the failure or refusal of successive presidents to assign him to the duties of his office. But neither did he 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] An extraordinary general meeting of members of the association was called and was well attended. Its purpose was to discuss the action of Sir John Moore, in 'preventing Justice Staples from discharging the duties of his office'. By a significant majority, the meeting decided to take no action. The Bar Council followed this decision. It did not speak up in support of Justice Staples, nor did it address itself publicly to the principle that the president's discretion should not be exercised to deprive Justice Staples substantially of the duties of the office to which he was commissioned. The Bar declined the invitation to champion either Justice Staples or his cause.

The reasons for the meeting's decision and the majority against action are impossible to know. Some members may have been affected by the suggested distinction between Justice Staples 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 Justice Staples's express refusal to be the plaintiff or applicant in mandamus or other proceedings to challenge

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.

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 Justice Staples's unconventional and sometimes florid style. Whatever the reasons, the Bar Association declined not only to support Justice Staples 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 Justice Staples's virtual exclusion from duty in the commission. For his own part, Justice Staples was unrepentant. The essential mischief of his Adelaide speech[4] 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. In time, the criticisms made by Justice Staples became more widely accepted in industrial relations circles. Indeed, the recognition of the anomalies eventually led to the adoption of the 'two-tier' structure later 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 prescience of Justice Staples, displayed either in his decisions or in his Adelaide speech. His offence, according to his colleagues' letter, was disloyalty to the president 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 Justice Staples. 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. Neither informally nor by legal action were steps taken to terminate his exclusion from the duties of a deputy president. Any hope that a change would accompany the appointment of a new president were dashed. The appointment of Justice Maddern as president entrenched more deeply Justice Staples's isolation. Even the occasional full bench assignments came to an end. Letters by Justice Staples to the new president were unanswered. The president simply ignored him and his correspondence. Whatever the Act provided and his commission said, Justice Staples was to all intents treated as if he were not a deputy president of the commission.

Labor lawyers—and an explanation

At the 8th Annual Conference of the Australian Society of Labor Lawyers, held in Hobart on 19 October 1986, a resolution was passed concerning Justice

office to discharge their duties while holding that office' the conference noted that Justice Staples 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 re-instate Mr Justice Staples to the duties of a Deputy President.'[45]

Copies of the resolution were sent to the prime minister, the attorney-general (L. F. Bowen) and the minister for industrial relations (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 Justice Staples. It propelled him to writing a letter to the attorney-general, which was also widely distributed,[47] inviting his critics to 'come out in the open' and to state the faults that 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.

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

Justice Staples invited the attorney-general to have Parliament pass upon the action of the president in effectively removing him from office. No such step was taken by the attorney-general or anyone in the government.

In the November 1987 issue of the industrial relations bulletin *Workforce* appeared an item '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.'[48] This prompted an immediate rebuttal from Justice Staples. 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 Justice Staples 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 in 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.[49]

Nothing was done pursuant to these demands. Neither Justice Staples nor Justice Maddern was brought before Parliament. The status quo persisted. But then an important development brought 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, requiring it to examine, among other topics, all aspects of Commonwealth law relating to the prevention and settlement of industrial disputes.[50]

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 that 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 industrial relations institutions of Australia.[51] The proposal was, however, rejected by the Hancock Committee. Another proposal was considered for the appointment as presidential members of the reformed

48. *Workforce*, 665, 20 November 1987.
49. Letter J. F. Staples to R. Willis, 26 November 1987, 2.
50. The terms of reference are set out in Australia, Report of the Committee of Review, *Australian*

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 that should apply to the transfer of members of the Arbitration Commission to the Australian Industrial Relations Commission. Specifically, no mention was made of the unique position of Justice Staples. It cannot be said that the Hancock Report was initiated as a covert means of reorganizing the industrial relations institutions of the Commonwealth to dispose of the embarrassment of Justice Staples. But, at least after the report

52. Hancock Report, above in 50, vol. 2, 390.
53. ibid., 393.
54. ibid., 395.
55. Statement R. Willis, 'Hancock: A Thorough Examination of Arbitration System' 20 Mav

delivered, the prospect of utilizing the occasion of the restructuring to inate the embarrassment was openly discussed both in the general media in industrial relations circles.[57] Justice Staples referred to these rumours is letter to the minister of 26 November 1987.

he report of the Hancock Committee was welcomed by the government he 'first comprehensive review of Australia's industrial relations system ghty years'. Professor Hancock was appointed a deputy president of the itration Commission in 1987. Steps were set in train to draft legislation ffect its main proposals.

new commission

lue course the government introduced legislation to enact a number of proposals of the Hancock Committee. The legislation, known as the ustrial Relations Bill 1988, was described by the minister as 'the most stantial revision in Australia's Federal industrial relations system under- n since the system was established in 1904'.[58] Great emphasis was placed he second reading speech upon the way in which the legislation would litate 'the Accord', which was the cornerstone of the government's ustrial relations policy and a critical element in its general economic tegy. The new title of the Australian Industrial Relations Commission was lained as reflecting the 'expanded activities of the new Commission'. It ıld place 'less emphasis on a pro-active determinative role'.[59] There was eneral rationalization to bring into the Australian Industrial Relations nmission a number of specialist arbitral bodies. Still further developments hat direction were foreshadowed.

. cognate Bill introduced with the foregoing legislation was the Industrial ıtions (Consequential Provisions) Bill 1988. Its purpose was stated to be epeal the Conciliation and Arbitration Act 1904; to effect certain technical ndments; and to 'ensure that the transition from the system established er the previous Act to the system established by the Industrial Relations is as smooth as possible'.[60] The minister instanced the transfer of part- rd cases from the Arbitration Commission to the Australian Industrial ıtions Commission on the commencement of the new Act. No specific ıtion was made of the transfer of personnel.

he opposition opposed the legislation describing it as 'seriously flawed'.[61] suggestion that it amounted to a major revision of the industrial relations em was rejected. The cognate Bill was also opposed. There was no mention er by the minister or the opposition about its possible implications for

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, 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. Justice Maddern 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 Australian Industrial Relations Commission. Only the name of Justice Staples was missing. Even Justice Coldham, 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, Justice Williams. The new deputy presidents of the Australian Industrial Relations Commission took their order of seniority according to that which they had enjoyed within the Arbitration Commission, except for Justice Coldham 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.

The passage of the legislation and the announced appointments finally brought into the party and Parliamentary forums the question of the future of Justice Staples. 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 Justice Staples would be appointed to the Australian Industrial Relations Commission. According to newspaper reports, Mr Willis stated that the appointment of Justice Staples 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'.

Before the public announcement of the new appointments, Mr Morris on 22 December 1988 wrote a letter to Justice Staples. 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 offices 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

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

> 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, Justice Staples wrote to the minister. After complaining that the minister would not come to the telephone as promised, Justice Staples 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 the 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 a 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 politicans 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 race 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.

Justice Staples 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, Justice Staples wrote a letter to the prime minister after an answer given to the Senate by the leader of the government, Senator 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, Justice Staples appealed for an inquiry into the merits of the 'unique position' that 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 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', Justice Staples 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 refusal 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 Australian Industrial Relations Commission, Justice Staples 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. Justice Staples then, on 2 February 1989, again asked the attorney-general to intervene, but once more without avail.[69]

Second, Justice Staples wrote to the presiding officers of the two houses

65. Senator S. Button, *Commonwealth Parliamentary Debates* (Senate), 8 November 1988.
66. Letter J. F. Staples to R. J. Hawke, 25 November 1988, 3.
67. ibid., 4.
68. See P. Malloy, 'Judge moves to prevent government axing him' in *Australian*, 25 January 1989, 1.

of federal Parliament. They tabled a letter from him in Parliament. But they pointed out that this represented the limit of their authority. Third, Justice Staples 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 Justice Staples '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 Justice Staples by the president of the Bar, 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 Justice Staples would now 'return to the Bar'.

On 14 February 1989, Justice Staples 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 Justice Staples's commission occurring in this way. The support of the Bar would be critical. In his letter, Justice Staples 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 Justice Staples from his office.

On 13 February 1989 in a radio broadcast for the Australian Broadcasting Corporation, I made a public observation on the Staples affair. I did so in my capacity as a commissioner of the International Commission of Jurists in Geneva. That body, comprising not more than forty 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 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 principles [of judicial independence] sufficiently not to breach it', I responded with reference to the applicability of the *Basic Principles* in the case of Justice Staples, 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 the established conventions of Australian law that 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 Australian Section of the International Commission of Jurists, D. Bitel, identified 'three fundamental questions' arising out of the treatment of Justice Staples. These were:

(a) The bypassing of proper legal procedures to remove a member of a court or tribunal by the expedient of establishing a new tribunal;
(b) The misuse of the discretion to allot work to a member of a court or tribunal; and
(c) 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 Justice Staples, from the conventions that 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 after 1 March 1989.[78]

72. M. D. Kirby, Interview by M. Peacock, Australian Broadcasting Corporation, 13 February 1989, transcript.
73. See press release by the President of the New South Wales Law Society (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.

Reactions of the judiciary

The judicial voice about the approaching 'removal' of Justice Staples was more muted. No doubt this was because of the conventions observed by the judiciary in Australia in refraining from public comments in matters of controversy. It has always been recognized 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 Justice Staples was Judge P.T. Allan, a deputy president of the Industrial Court of South Australia. On 25 November 1988 he wrote to Justice Maddern 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 judges who are subject thereto', Judge Allan expressed concern that the by-then notorious allocation of the work of the Arbitration Commission to Justice Staples '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 R.M. Hardie, industrial magistrate, authorized Judge Allan to say that they agreed in the views expressed by him. There was no response from Justice Maddern.

With the public announcement that Justice Staples would not be appointed to the Australian Industrial Relations Commission, 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 Justice Staples 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'.[83]

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

79. S. Shetreet, *Judges on Trial*, North Holland, 1976, 319f, 314ff.
80. Letter P.T. Allan to P.J. Maddern, 25 November 1988.
81. ibid., 2.
82. Letter P.T. Allan to R.J. Hawke, 2 February 1989. This was disclosed by *Age*, 8 February 1989, 3.
83. Letter K.P. Shadbolt and Ors to R.J. Hawke, February 1989, unpublished

signatories, apart from myself, were Justices Hope, Samuels, Priestley and Clarke. 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 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 signatories of the foregoing statement were all of the Judges of Appeal, except for Chief Justice Gleeson (who as the head of the Trial Divisions of the Supreme Court is in a different position), Justice Mahoney (who was overseas) and Justice Meagher. The 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]

Reactions of the media

As 1 March 1989 approached, the Australian media, both print and electronic, 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 Australian Industrial Relations Commission 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 desired 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

84. Statement by the Judges of Appeal, 27 February 1989, reported *Sydney Morning Herald*, 28 February 1989, 1. See commentary *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, 11.

> 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 a 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 officers in New South Walles, 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 the Government's 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]

Only the Melbourne *Age* took an antagonistic stand. Describing Justice Staples 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.[92]

88. J. Slee, 'The Virtue of Jim Staples', *Sydney Morning Herald*, 3 March 1989, 12.
89. *Herald* (Melbourne), 25 January 1989, 10.
90. *Sydney Morning Herald*, 25 January 1989, 1.

The facts upon which this editorial opinion was based were incorrect. The decisions of Justice Staples did not result in 'widespread industrial disputation'. Moreover, each member of the Arbitration Commission held an independent commission. He or she 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 Justice Staples 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 Justice Staples was deafening. Not only did the president refuse to respond to letters, whether from Justice Staples or others, no presidential member made any statement in or out of a hearing, concerning the matter. Even when it was publicly suggested that Justice Staples's 'removal' would demonstrate the lack of independence of the members of the new Australian Industrial Relations Commission, none spoke out in challenge of that accusation. None deplored the effective removal of a colleague from the duties attaching to his commission partially from 1980 and totally from December 1985.

The one 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 Justice Staples. 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 of 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.[93]

Commissioner Sheather urged that Australia would be the poorer if Justice Staples were not given a 'fair hearing' over why the government had decided not to appoint him to the commission.

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

93. Letter by Commissioner J. Sheather, *Age*, 8 February 1989, 12. Justice Staples later said that three of the forty-three members of the Arbitration Commission had contacted him about his 'removal'; see *Age*, 23 February 1989, 1. On 1 March 1989 the officers of the Industrial Registry in the Australian Industrial Relations Commission in Sydney unanimously resolved not to support the 'purported dismissal' of Justice Staples as a 'duly appointed deputy President of the Arbitration Commission'. Later in 1989 the [illegible]

industrial bodies might be under contemplation, the precedent in the Staples case was met by them with silence.'[94]

Two commentators with experience in industrial relations gave different perspectives in newspaper columns. Dr G. Henderson, director of the New South Wales Institute of Public Affairs, urged that Justice Staples 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'.[95] He suggested that Justice Staples 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 Justices 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, Justices Sweeney and Nimmo 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, Justice Staples, like Justices Sweeney and Nimmo before him, was heavily penalized, 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 [Industrial Relations] Club'. Dr Henderson criticized the academic or journalistic members of the Industrial Relations Club who failed to 'speak up against the quite scandalous treatment of these three judges'.[96]

Kenneth Davidson in the *Age*, on the other hand, denied that judicial independence was at stake in the treatment of Justice Staples. The decisions of the Australian Industrial Relations Club (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.'[97]

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 Justice Staples, Mr Davidson concluded:

> The brutal fact is that Mr Staples, through his judgments, when he was given

94. As to suggested restructuring of the New South Wales Industrial Commission see M. Moore, 'Judge Not Lest Ye Be Sacked', *Sydney Morning Herald*, 4 March 1989, 14.
95. G. Henderson, 'Staples—Blackballed but is it Justice?', *Australian*, 30 January 1989, 9.
96. ibid. After 1 March 1989 a number of industrial organizations spoke up against what had occurred, notably the Trades and Labor Council of Western Australia and the Seamen's Union of Australia.
97. K. Davidson, 'The Issue is Not Independence But Loss of Confidence', *Age*, 1 March 1989,

> 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.

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 Deputy President Isaac wrote to the Hancock Committee, the members of the national industrial tribunal enjoy appointment to age 65. That is why they have the guarantee against removal in terms derived from section 72 of the Constitution.

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 Justice Staples. As reported, he conceded that the resolution of the issue was 'unsatisfactory' and the treatment of Justice Staples 'inelegant'.[99] He was, however, adamant that Justice Staples would not be appointed to the Australian Industrial Relations Commission. 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. 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'.[100] The leader of the Australian Democrats said that it was the intention of her party to force a stay of government action against Justice Staples 'until after a proper inquiry'. In response to the charge that Justice Staples was a maverick, she retorted 'the world needs mavericks'.[101]

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 that should govern the tenure of office of quasi-judicial and other appointees to Commonwealth tribunals. The government ultimately agreed to this proposal, although reluctantly.[102] Outside Parliament, Mr Brown suggested that the inquiry's

98. R. J. Hawke, reported *Sydney Morning Herald*, 28 February 1989, 1.
99. As reported in *Age*, 23 February 1989, 1.
100. ibid.
101. 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.

terms of reference would permit it to look into the circumstances surrounding Justice Staples's 'removal'.

In the light of the reported support of the Confederation of Australian Industry for the decision not to appoint Justice Staples to the Australian Industrial Relations Commission, together with the earlier strong criticism of his decisions by employer organizations 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 invitation emerged in the comments of the prime minister during question time on 1 March 1989. The substance of his comments 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 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.'[102]

After critical commentary about the alleged 'hypocrisy' of the opposition from whose period in office his government had inherited the problem, Mr Hawke criticized as 'contrived nonsense' the suggestion from 'some members of the legal fraternity' that the failure of the government to appoint Justice Staples to the Australian Industrial Relations Commission '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 the 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.[103]

The prime minister's statement raised as many questions as it sought to answer. It made no mention of the parliamentary promise to Justice Staples when he accepted his commission that he would not be removed from office except in 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.[104] It failed to mention the conventions that 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 Justice Staples a judicial pension in a substantial sum. Only by implication did it seek to bring responsibility for the exclusion of Justice Staples 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.

103. ibid.
104. See CAA, sections 7(4), 7(5), 11A.

Only one matter that was inherent in the answer of the prime minister had been followed up. If, as has now been repeatedly asserted, judges of the Arbitration Commission (and of the Australian Industrial Relations Commission) 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 Justice Staples's title of Justice had no bearing 'except in title and style'. He stated that in future appointees would not be known as Justice.[105] Subsequently, the leader of the opposition, J. Howard, declared that a Coalition government would propose legislation to remove the title of Justice from the deputy presidents of the Australian Industrial Relations Commission.[106]

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 Justice Maddern 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.[107] 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.[108]

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 that: 'The Principles have been formulated

105. See P. Morris reported *Sydney Morning Herald*, 2 March 1989.
106. As reported *Sydney Morning Herald*, 2 March 1989.
107. United Nations, *Basic Principles on the Independence of the Judiciary*, GA 40/146, 1985.
108. GA Resolution 40/146, 13 December 1986. See also resolution 41/149 of 4 December 1986.

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 Justice Staples 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 in 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 include 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 Montreal, 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 the 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: '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 negative a lawful commission held by a judge.

The explanatory note to the equivalent clause in the Montreal *Universal Declaration* (clause 2.15) 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 Justice Staples 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.

The emerging legal issues

A number of legal issues are raised by what has occurred to Justice Staples. As these (or some of them) may come before courts, it is inappropriate that I should do more than to note some of them at this time.

Exclusion from sitting

The first is the lawfulness of the exclusion of Justice Staples for nine 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.[109] In the present case, the relevant powers are those provided to the president of the Arbitration Commission to constitute a full bench of the commission[110] and to assign an industry or group of industries to a panel of members of the commission consisting, among others, of a presidential member.[111] 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,[112] it is impossible to contend that the power was intended to authorize 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.

Misconduct of exclusion

Consequential questions arise as to whether persistent refusal by the president to recognize a lawful commission and to use the discretion as Parliament provided would amount to the 'misconduct' so as to warrant the removal from office of a person who wilfully acted in this way in the face of the protests of the office holder.

Waiver of complaint

A question may arise as to whether Justice Staples, by failing during the currency of the Arbitration Commission himself to challenge the president's exercise of the discretion, waived his right to complain about it, at least in the circumstances that the body involved has been abolished by Parliament and the only person still in office the subject of such complaint now holds office in a new and different tribunal.

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 old law on commissions from the Crown. Justice

109. See, for example, S. A. de Smith, *Judicial Review of Administrative Action* (3rd edn), London, 1983, 268ff.
110. CAA, section 17(3).
111. ibid., section 12.
112. ibid., section 7(4).

Staples's commission was from the governor-general, and 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, at least 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 derives his or her authority from the Crown's commission, which has not been terminated as the law provided. Some support for this 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 Justice Staples. He claims to hold office pursuant to a commission that 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 (e.g. judicial pension).

Judicial protection

There is also the obverse side of this question: subject to the Constitution, Parliament may undo that which it has earlier done. If it acts clearly enough, it can 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. Justice Staples 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 Justice Staples as for those judges.

Fairness of decision making

There is finally the natural justice question suggested by the decisions of the Court of Appeal in *Macrae* and *Quin*. Despite numerous requests, Justice Staples was never given the reasons for the failure or refusal of Justice Maddern to assign him to normal duties. Nor was he given the reasons for the decision of the government not to appoint him to the Australian Industrial Relations Commission. The only publicly stated reasons for the latter decision are those stated by the prime minister in Parliament. These refer to the failure of Justice Maddern to assign him 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 Justice Staples to the Australian Industrial Relations Commission. 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 that reveal, as they did in the case of the New South Wales magistrates, the reasons advanced for the decision not to appoint Justice Staples to the new commission. Perhaps those reasons were only ever expressed

in oral conversations amongst the 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.[13]

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. But some general comments can 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 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, if it is not reversed, will display that fragility for all to see.

At first the New South Wales Bar Association, to which Justice Staples twice appealed for support, showed itself unduly blinkered by the personality of Justice Staples and the technical distinction laid down in the Boilermakers case. In the end, whether Justice Staples 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, just as much as had he been a judge in law as well as title. The other legal bodies in Australia that 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 New South Wales 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 restructuring was taken to achieve such an end, it would be equally objectionable in principle.

The response of the media generally was praiseworthy. They repeatedly drew attention to the important principles 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 the proud hope of Justice Higgins 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

[13] *Re Macrae* (above n. 11)

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 acquiesced in by office holders who are themselves now the subject of the exercise of even larger discretions[114] is a source of concern. A question is raised as to whether the acquiescence of the members of the Arbitration Commission in what happened to Justice Staples 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 Justice Staples. If there is acquiescence in what has occurred, it 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 that Deputy President Isaac gave to the Hancock Committee for tenure of such office holders until age 65 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 Australian Industrial Relations Commission begins its life and important national responsibilities with a clear message from what has occurred in the case of Justice Staples. 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 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 to late. The inquiry established by Parliament may become a vehicle, indirectly, of consideration of the case of Justice Staples. But if the Commonwealth's legal advice is correct, then he 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 the most serious. How could any member of the Australian Industrial Relations Commission 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.[115] But what Parliament gives it may take away. And that renders the promise defeasible, effectively, at the behest of powerful interests in the commission, the government or the marketplace. 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

114. See Industrial Relations Act (1988) (Cth) sections 36, 37, 38 and 40. By section 36 the pre-[illegible]

independence, hitherto thought to be a strong protection for such independence, has been shown, in the case of Justice Staples, 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 Justice Staples 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. It was in this way that Parliament's promise to Justice Staples was purportedly withdrawn and his 'removal' effected, not by Parliamentary procedure, but by the expedient of abolishing the Arbitration Commission.

And what of Justice Staples 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.[116]

In a review of the lessons to be derived from his exclusion from the new commission, Justice Staples, on the day of its establishment, has written 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 governnment of the day. We enter the era of the carrot and the lash.[117]

In Justice Staples's opinion everyone is diminished by this affair. I agree with that assessment. But I consider that Justice Staples is diminished less than others. His chief legal error lay in his failure earlier to challenge his effective exclusion from the exercise of the duties of the office to which he was commissioned. But this error is not fatal. It does not affect the fresh

development of his purported removal from that 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. Perhaps Justice Staples should never have been appointed to such an important and sensitive post with such large implications for the national economy. 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 as a public conference. 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 that he was presented by the presidents of his commission, successive governments and ministers, 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.

This is not a proud tale. But it must 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, it is a sorry one.

Symbolism and judicial independence

Thomas a Becket, Archbishop of Canterbury, was a flawed character as historians now generally agree.[118] 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 of 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.[119]

Facing his end, a 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.

À Becket's martyrdom almost instantly assumed an importance beyond its immediate causes. His shortcomings, his old-fashioned ideas and his trucculence were soon forgotten, and he was canonized 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 notion of the best interests of the realm in mind. But everyone, including ultimately the king, came to recognize the folly of destroying 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 Justice Staples, an agnostic, will aspire to martyrdom, still less canonization. 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 with the law by holders of high office. Adherence by Parliament to long established conventions. 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'. An ex-Communist, who exposed Stalin, is for years banished to a judicial Siberia and virtually made a 'non-person' by his colleagues. 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 while 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?