AUSTRALIAN TRADE UNION TRAINING AUTHORITY

CLYDE CAMERON COLLEGE

ALBURY-WODONGA, 30 SEPTEMBER 1980

CONCILIATION & ARBITRATION : A SYSTEM RIPE FOR REFORM?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

September 1980

AUSTRALIAN TRADE UNION TRAINING AUTHORITY

CLYDE CAMERON COLLEGE

ALBURY-WODONGA, 30 SEPTEMBER 1980

CONCILIATION & ARBITRATION : A SYSTEM RIPE FOR REFORM?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

A CONTINUING DEBATE

In the long and often turbulent history of compulsory conciliation and arbitration in Australia, the past 12 months must surely be described as a 'vintage year'. It ends, as we enter a Federal Election campaign with suggestions that the whole system should be 'thoroughly revamped' after a major review. My first commission was an appointment to the Australian Conciliation and Arbitration Commission. I still hold that commission and in 1982 I shall return to that work. Inevitably, as Chairman of the Law Reform Commission, I watch with interest the suggestions for constructive reform of our industrial relations system. It is a system which owes as much to accident, history and power as it does to logic, fairness and the rule of law.

I propose to put before you the 'memories' of times past. The hope is that if we reflect upon what has gone before, we will become happy and optimistic: believing that things cannot possibly get worse and therefore must get better.

COPING WITH TECHNOLOGY

In September 1979 Mr. Justice Ludeke delivered a paper to the Constitutional Association reviewing the possibility that we could avoid cumulative State and Federal bites at the cherry by a reference of industrial powers from the States to the Commonwealth.[1] Though the provision for interchange of constitutional powers has been there from the start, and does not require a referendum, the co-operative spirit has already been there for the use of this power.

In October 1979, addressing the Industrial Relations Society in Western Australia, His Honour spoke of what is plainly one of the principal concerns of us all today: the impact of technological change on employment.[2] He pointed to the legal problems of tribunals interfering too closely in the prerogatives of management, and he asked whether the unions generally had demonstrated a capacity to participate, either in the boardroom or before tribunals, in the resolution of the economic and personal problems that attend technological change.

CONSTITUTIONAL REFORM

Early in the New Year, Mr. Wran, himself no stranger to the Byzantine complexities and legalities of Australia's system, began talking of the need for reform: if necessary, constitutional reform. Addressing the 1980 Annual Conference of the Industrial Relations Society of South Australia, he called for a referendum on the transfer of industrial powers by the States to the Commonwealth. He was as aware as any of us that seven previous attempts had been made to this end, none with success.[4] He urged re-examination of the relevant legislation by the Law Reform Commission. The Federal Government pointed to the already existing Working Party of officers set up by the Ministers of Labour and the Attorneys-General. We still await their report.

By and large the editors approved of the Premier's proposals. The Sydney Morning Herald pointed out that there had been no comprehensive review at least since Federation. A national stocktaking, it said, was overdue.[5] The Australian, referring to the endemic problems of the Kurnell Refinery, called the suggestions 'undeniably constructive'.[6] Even the acid pen of the editor of the Australian Financial Review commended the idea. His spleen was diverted from his usual target (the Arbitration Commission) to lawyers and the Law Reform Commission, when he said:

> To put the Law Reform Commission in charge of such a report would be tantamount to setting the mice to guard the cheese.[7]

Later in April, under the banner headline 'Arbitration Act Under Threat' the Financial Review explored the potential consequences of the interaction of the Trade Practices Act and our industrial relations machinery. The threat passed.

TOO MANY UNIONS?

By May the big issue had become the merits of amalgamation of unions. It was said that bites at the cherry would be reduced and the system more manageable, if only there were fewer people biting. The 21st Annual Conference

of the N.S.W. Industrial Relations Society held in the bracing air of Bathurst heard union and employer delegates call for fewer unions and for the organisation of unions on an industry basis. It was pointed out that there are now at least 279 unions in Australia. It was suggested that after the German model we would do much better if we reduced them to 17.[8] Mr. Norm Amos, N.S.W. Secretary of the Australian Mines and Minerals Association, urged the Federal Government to change the law to make union amalgamation easier. I was one of the Counsel in the steps that led to the amalgamation of the Metal Unions. Because of legal impediments, the road to lawful matrimony there proved intensely frustrating to the intended and a very large dowry indeed was paid to the lawyers.[9]

I am told that this very week Mr. Whitlam has contributed an article, 'Too Many Unions', to that wellknown industrial relations journal 'Playboy'. In it, he regales the astonished and distracted readers with the intimacies of Moore v. Doyle and the inaction of many governments on this basic structural problem.[10] In May we read of predictions of a 'massive shortage of skilled labour'.[11] We seem to live in a time of contradictions. The highest unemployment levels since the War coincide with shortages of skilled tradesmen. High unemployment coincides (as we were once taught, impossibly) with significant levels of inflation.

NEW COLLECTIVE BARGAINING

By June, the focus had switched. There was a new emphasis on collective bargaining. Mr. Barrie Unsworth, Secretary of the N.S.W. Labor Council, addressed the Australian American Association in Sydney and urged that parties involved in an industrial dispute before the Arbitration Commission should be permitted to choose their own arbiter. He said that this would lead to a greater moral persuasion to accept the decisions when handed down.[12] Earlier in the year, in April, Mr. Hawke said that collective bargaining was worth examining because employers and unions were more likely to adhere to the terms they had mutually accepted.[13]

By July the 35-hour week issue was before us. Somewhat more obscure than normal, the Financial Review urged the Federal Government:

> The only acceptable answer to problems such as the campaign for a 35-hour week ... is for the government to embrace the philosophic need for an incomes policy — or have the courage to reject incomes policies entirely.

I am not sure whether Mr. Howard and Mr. Street found these observations helpful. Also in July, a conference of Labor Lawyers in Sydney debated 'the future of industrial conciliation and arbitration in Australia'. A total overhaul of our industrial institutions was called for. The lead paper asserted:

> It is because we have allowed the arbitration system to carry so much of the load that it is now in difficulty, and its difficulties will grow unless there is an attempt to spread that load more widely.[15]

THE MYERS REPORT

By July we had the Myers report. You will remember that the Prime Minister established the Committee of Inquiry into Technological Change in December 1978. It was required to identify technological changes which were occurring and likely to impact Australia. The committee's report was released in July 1980. It concluded that there was no doubt that likely future technological changes 'have the capacity to reduce the number of jobs required to produce a given level of output'. (Vol. I, 3.195). The committee then made this point:

> The enterprises and individuals most likely to manage the changes with the least disruption are those that implement the changes progressively and keep up with the technology. Those most likely to have difficulty will be enterprises that defer changes over a long period and then attempt to catch up in a single investment—rationalisation plan. (Vol. I, 3.197).

There is a wealth of material in the Myers report pointing to the rigidities and inflexibilities in Australia's institutional arrangements, some of which stand in the way of ready managerial adjustment to the pressures of technological change. Not the least of these is the proliferation of industrial tribunals, industrial awards, industrial union employer organisationsand industrial classifications. The fine distinctions and relativities long established between particular categories of work and the conflicting industrial organisation of differing occupations make it more difficult easily to switch employees, within a firm, from one task to another. To do so would be to disturb time-honoured relationships and possibly even established industrial rights. Yet unless there can be greater flexibility to adjust to technological change, the rigidities may uphold rights for a time but, Canute-like, they will fail to hold back the tide of international technological innovation. Myers again:

> The effects of a particular technological change on the different firms within an industry are likely to be as varied as the characteristics of the firms. Some will be less able to cope with change and will contract, change their operations or go out of business; these consequences are more likely for firms with less flexible and adaptable management and labour and for those with higher costs and lower profits. Other firms will continue profitable operations at a smaller scale, or will expand; and new firms may commence operations in the industry. (Vol. I, 4.37).

The Myers Report calls attention to the differential way in which the effects of technological change will be perceived in the community. Whereas some workers and individuals may experience adverse effects, some will find new opportunities. Government will be concerned for the impact on community welfare and on our competetitive place in the world. Particular interest groups and particular geographical areas may suffer disproportionately from the change. For example, it is suggested that married women, the intellectually handicapped, migrants and others doing relatively unskilled work will find the competition of machines too cost-effective to withstand.

Reflection on the pace of change, its sophistication and complication and the individual human 'fall-out' which cannot simply be swept aside as the unimportant left-over of inevitable developments led the Myers Committee to call for better consultative processes. Good unionism and good management in Australia will heed this call, if only out of self-interest:

> A comparative study of approaches to industrial change in Britain and West Germany ... showed that in Britain the threat of industrial conflict heavily influenced the way some managements went about securing change, and made them reluctant to inform employees of proposals at an early stage. By contrast the study showed the German approach to securing change as one that avoided open conflict by means of what has been described as 'co-operative conflict resolution'. The study concluded that the British system was clearly deficient in that 'institutions for consultation tended to be poorly established, consultation was haphazard and irregular, not a familiar part of the industrial environment. ... As a result management approached change hesitantly, secretively and fearfully, while the work force, as might be expected under the circumstances, responded suspiciously and aggressively. Change thus becomes inseparable from a mood of crisis'.

I leave it to this audience to judge whether we in Australia are closer to the situation of Germany's determined, open and fearless implementation of change by 'co-operative conflict resolution' or whether we exhibit the British features of hesitancy, secretiveness and fear resuling in union suspicion and aggression.

JOINT TRIBUNALS

In August 1980 Sir John Moore addressed the proliferation of State and Federal tribunals. Addressing the Industrial Relations Society of Australia in Darwin, he raised the possibility of members of State Industrial Commissions sitting with members of the Federal Commission in national wage case decisions and others involving national industrial issues.[16] Sir John Moore was characteristically direct:

> Whether changes are to come from within the [Australian] Commission itself or from outside it, whether the changes relate exclusively to the Australian Commission or also include State tribunals, changes must come about.[17]

The President of the South Australian Industrial Commission, Mr. Justice Olsson, told the same convention that Australia has reached 'something of an industrial cross-roads'. He too is reported to have called for the elimination of the 7 industrial arbitration systems 'with all their marked differences'.[18]

As if to underline the problems of duplicating, indeed seplicating industrial relations machinery, recent days have brought reports of anguished reactions in South Australia to a recent decision of the South Australian Industrial Commission suggesting that it would apply the Federal Commission's indexation guidelines in South Australia 'but with significant modifications mainly to provide for "comparative wage justice".' The Industrial Director of the South Australian Employers' Federation, Mr. T.M. Gregg, has described this move as 'horrendous'.

ELECTION PROPOSALS

And here we are now on the eve of elections. The Parties' policies on industrial relations have not been spelt out. But hints have been dropped. The Australian Democrats' spokesman on industrial relations, Mr. John Siddons, is reported to have called the Arbitration Commission 'a sacred cow which has outlived its usefulness'. He has called for it to be revamped and replaced

with a system which he describes as 'productivity bargaining'.[20] He blamed the problems of the Commission on issues 'associated with the overlapping Federal and State awards'.

Mr. Hawke has predicted a national referendum to give the next government direct control over prices and non-wage incomes.[21] In recent days the Australian Labor Party's suggested policy has been unveiled. As reported, it proposes a major overhaul of the Conciliation and Arbitration Act, especially to give greater emphasis to conciliation and to facilitate amalgamation of unions. A national inquiry is promised.

The Minister for Industrial Relations (Mr. Street) has now unveiled the Government Parties' plans. They include simplification of the laws governing union amalgamations, legislation on strike secret ballots and review of the functions of the Industrial Relations Bureau.

PUTTING IT IN PERSPECTIVE

My resume is ended. Most of the debates which I have recounted are as old as compulsory conciliation and arbitration in Australia. That means they are as old as our federal country itself. Debate and criticism is a healthy thing, vital to a free society. Generally, out of a clash of ideas progress, reform and improvement of our institutions ensue. Without embarrassment, I can remind you of the good work that is done by all those engaged in industrial relations in Australia: unions, employers and tribunals alike. There are no headlines in disputes quietly settled. The cameras are rarely there when the system works: as for 90% and more of its time, it does. And so far as wage indexation is concerned, let us never forget the situation which it replaced. The first three years of its operation introduced a marked change, almost certainly beneficial for everyone in this country. The increase in male award rates for the 12 months to June 1975 was 21.4%. To June 1976 it was 15.6%. To June 1977 it was 11.7%. To June 1978 it was 6.1%. The Commission has made it plain that the 'guidelines' and 'principles' are a short-term not a long-run solution to our industrial relations and economic problems. What we should now all be addressing is the question 'What follows?' Here then are the issues:

- Should federal power in the areas of industrial relations and economic regulation be extended?

- Is the system capable of coping with the problems of the new technology?

- Are there too many unions in Australia and if so what can we do in practice as well as law to simplify amalgamations?

- Is there an increased role for collective bargaining?

- Should we move to joint Federal and State industrial tribunals to diminish the snowball phenomenon?

- Is it time for a general overhaul of this remarkable indigenous system?

I hope that those in this College, who will have important responsibilities in the future to solve these problems will give them their earnest attention.

FOOTNOTES

1. J.T. Ludeke, 'The Reference of Industrial Powers from the States to the Commonwealth', a paper presented to the Constitutional Association of Australia, mimeo, 27 September 1979.

2. J.T. Ludeke, 'Technological Change — Some Legal Aspects', a paper delivered to the 9th Annual Convention of the Industrial Relations Society of W.A., 27 October 1979, mimeo.

3. ibid, 8. The reference is especially to R. v. Flight Crew Officers' Industrial Tribunal; ex parte Australian Federation of Air Pilots (1971) 127 CLR 11.

4. Mr. Wran's proposals, as reported in the West Australian, 21 April 1980.

5. Sydney Morning Herald, 21 April 1980, 6.

6. The Australian, 22 April 1980, 10.

7. Australian Financial Review, 22 April 1980, 8.

8. Sydney Morning Herald, May 1980.

9. At the same conference Mr. Tas Bull of the Waterside Workers' Federation likewise urged simplification of statutory requirements for amalgamation of unions on an industry basis. ibid.

10. E.G. Whitlam, 'Too Many Unions', Australian Playboy, October 1980, 12.

11. N.K. Wran, quoted Canberra Times, 2 May 1980, 7.

12. Sydney Morning Herald, 26 June 1980.

13. The Australian, 12 April 1980, 2.

14. Australian Financial Review, 18 July 1980.

15. A. Cunningham, 'The Future of Industrial Conciliation and Arbitration in Australia', paper for the Second Conference of Labor Lawyers, 5 July 1980, mimeo.

16. As reported in the Adelaide Advertiser, 11 August 1980.

17. ibid.

18. ibid.

19. The Adelaide Advertiser, 6 September 1980, 3.

20. Sydney Telegraph, 8 September 1980.

21. The Australian, 10 September 1980, 3.