INDUSTRIAL RELATIONS SOCIETY OF VICTORIA

SIR RICHARD KIRBY LECTURE

MELBOURNE, 20 NOVEMBER 1996

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The Hon Justice Michael Kirby AC CMG

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SIR RICHARD KIRBY AND HIS LEGACY

We meet at a remarkably exciting time for industrial relations in Victoria. Federal dreams, so long harboured and shared, have been rejected, rejected and rejected again. But now they are, it seems, to be brought to pass, by joint agreement of the Federal and Victorian Governments. The Victorian Parliament is to be invited to refer its powers over

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* Justice of the High Court of Australia. One-time Deputy President of the Australian Conciliation and Arbitration Commission and Judge of the Federal Court of Australia. Formerly President of the Court of Appeal of New South Wales and Chairman of the Australian Law Reform Commission. President of the International Commission of Jurists.

industrial matters to the Commonwealth[1]. Truly, this is a time of change in Victoria of great significance to this Society, its members and every employer and employee on this State. The prospect that the change will spread to other States, including New South Wales, is seriously canvassed and cannot be dismissed[2]. Looking upon the promised change, with a wry smile, is the fine Australian, Sir Richard Kirby, in whose name this lecture series is given.

It is a special pleasure for me to be invited to give the lecture. When I was first appointed to the old Conciliation and Arbitration Commission (which Sir Richard Kirby virtually founded), many people thought I must have been his son. Many people since have made this mistake. It was as if we were setting about the establishment of one of those legal dynasties for which Australia is famous. Like the Streets (three generations of them in New South Wales). Or the Winnekes, here in Victoria. But it was not so. Dick Kirby used to tell me, early in my days in the Arbitration Commission and in the Law Reform Commission, that he did not mind his acquaintances

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1 "Kennett cedes IR powers", *The Age*, 12 November 1996, 1; "Howard hails historic deal on IR powers" in *Sydney Morning Herald*, 12 November 1996, 1.

2 "Kennett leads the way" in *Sydney Morning Herald*, 14 November 1996, 16.

referring to me as his son. He drew the line when I was portrayed as his grandson. No chance of that now.

In my youth, growing up in post-War Australia, it was common to hear references to Dick Kirby on the ABC radio news. It is difficult for Australians of this generation - even those living in the special world of industrial relations - to realise the enormous national importance accorded to industrial relations in post-War Australia and specifically to the industrial relations tribunal which Sir Richard Kirby headed. During his long tenure, that tribunal grew enormously in stature. Without that growth, the events of recent days would have been impossible. It grew because of its independence, skills in mediation in a volatile industrial setting and the grace and ability of its first President, Sir Richard Kirby. In those days, great national strikes were more common than they are today, doubtless a reflection of a long period of comparative economic prosperity and an even longer Australian tradition of industrial militancy. The nation really looked to the Federal and State industrial tribunals to solve the large battles of enormous importance to the economy. The willingness of Australia to do so was an enormous tribute to Sir Richard Kirby.

He is still with us. He seems completely indestructible. More importantly, he is still concerned about issues of industrial justice in Australia, as I shall show. It is inevitable that young members of this Society will not have known him. They will not

have known the institution over which he presided. They will not have known the Australia in which that institution was so dominant. Indeed, they may not realise what an important person is the hero of this lecture series.

Let me therefore, just for a time, recall to mind some of the milestones in Sir Richard Kirby's most interesting and varied career. It is easy to do so because it is gracefully outlined in the second lecture in this series delivered by Barry Jones in 1990[3].

Sir Richard is a child of the Australian federation. He was born on 22 September 1904 in that *fin de siècle* town, Charters Towers, in Queensland. At the time of his birth, the federation was but three years old. The High Court of Australia was one year in existence. The *Conciliation and Arbitration Act* of the Commonwealth, built on the constitutional power in s 51(xxxv) of the Constitution, was almost exactly contemporaneous with his birth.

The young Dick Kirby moved to Sydney and was educated at the oldest school in Australia, the King's School. At Sydney

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3 B O Jones, *Technology, the Work Ethic and Industrial Relations*, Sir Richard Kirby Industrial Relations Lecture, 1990 (Industrial Relations Society of Victoria Monograph Series No 2).

University he was lectured by H V Evatt, later a High Court Justice and Labor Leader. He practised as a solicitor and went to the Bar in 1933. As Barry Jones tells it, he was "reasonably active" in the Australian Labor Party, being selected as a candidate for a Federal Seat in 1940. However, he dropped out of politics and was spared for more enduring national service.

During the War, Dick Kirby served in the armed forces and then returned to the Bar. He had been briefed to appear for William Dobell in the notable proceedings arising out of the challenge to the award of the Archibald Prize for Dobell's portrait of Joshua Smith. Had he won that case, his future as a silk and large money earner would have been assured. But, shortly before the trial, he accepted appointment to the New South Wales District Court. Soon thereafter, in 1947, he was appointed an Acting Judge of the Supreme Court of New South Wales. A very young Gough Whitlam became his Associate. Rescued from a life in the divorce jurisdiction of that Court, he was appointed a member of the Australian War Crimes Commission. This took him to Ceylon. His skills were soon recognised by his appointment as Australia's representative on the Security Council's Good Offices Committee on the Indonesian question. He played an important role in the settlement between the nationalist forces and the Netherlands. His name is still honoured in Indonesia, as I discovered when I returned there and some of his fame rubbed off onto me.

In 1947 Dick Kirby was appointed by Chifley to the old Arbitration Court. He was the youngest federal judge then appointed. He was to grow uncomfortable with the attempts to change the old Court's focus "from protecting the weak to manipulating the economy"[4]. He was there in 1956 when, in the *Boilermaker's Case*[5], the High Court of Australia ruled that the Arbitration Court was a constitutionally invalid attempt to breach the doctrine of the separation of powers. In response to that decision, the Act was changed. A new Industrial Court was established to exercise judicial functions. The head of that Court was likely to have been Sir Raymond Kelly, the former Chief Judge of the Arbitration Court. However, he died and the position fell to Mr (later Sir) John Spicer, the Federal Attorney-General. Mr Justice Richard Kirby was appointed first President of the Commission. He was to hold the position for 17 years until 1973 when he was succeeded by another fine Australian as President, Sir John Moore. Kirby and Moore were in the minority in 1961 when the Commission over-ruled an earlier decision and abolished wage indexation. It was a bitter blow to Kirby and to the ACTU advocate, the up and coming Bob Hawke.

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4 *Ibid,* at 3.

5 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

In her book on Sir Richard Kirby's life, Blanche d'Alpuget[6] recounts that Kirby had "an almost superstitious dread of non-drinking men". This is a secret quality of my own that I have always tried to keep from him. He was described as "eating and drinking, in the company of attractive women and of articulate and robust men". The excitement of sporting competitions remained his pastime[7]. When he retired from judicial office (and it must be remembered he held a life appointment in the old Arbitration Court), he became active as Chairman of the Advertising Standards Council, as a member of the Council of the University of Wollongong and as President of the H V Evatt Foundation. In the first lecture in this series, Bob Hawke, whose respect for our hero, enmeshed with affection, shines forth, describes Kirby's quality in terms that give us all an example and an inspiration:

> "The influence of Kirby as President ... of the Conciliation and Arbitration Commission was profound. Indeed, in a sense, it was beyond measure - not only in influencing, by argument and example, the attitudes and approaches of his colleagues at the time, but also in developing an approach which others would follow and build on in the future. Kirby had many notable qualities and strengths: his readiness to listen to new arguments, and the integrity and the courage to change

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6 B D'Alpuget, *Mediator - A Biography of Sir Richard Kirby*, Melbourne Uni Press, 1977.

7 B O Jones, above n 3, 5.

> positions previously taken publicly; his willingness to foster reform ... his humanity and his sense of social justice; his determination to maintain the Commission's authority and independence against outside influence or pressure; his great sense of humour; and finally - but certainly not least - his great skills as a negotiator and mediator which, as you all know, were evident throughout his career"[8].

Bob Hawke singled out a number of the Commission's decisions as being of critical importance. The 1959 Basic Wage case, where Kirby moved away from his own previously enunciated position. The 1961 opinion which built on the judgment of 1959. The 1966 Cattle Station Industry Case where the Commission declared "there must be one industrial law, similarly applied, to all Australians, Aboriginal or not". In that decision, the Commission ruled in favour of equal pay for Aboriginal stockmen. Finally, the decision in April 1967 when the Margins Bench struck a blow for equal opportunity in Australia. It declared:

> "It seems to us to be industrially unjust that women performing the same work as men would be paid a lower margin"[9].

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8 R J L Hawke, *Kirby: The Precursor of Consensus*, Inaugural Sir Richard Kirby Industrial Relations Lecture (Industrial Relations Society of Victoria Monograph Series No 1, 1988 at 4).

9 Cited Hawke, above n 8, at 6.

That decision led, directly, to the equal pay case later in the same year.

George Polites, in delivering this lecture in 1991, described the way that, during Kirby's presidency, "the Commission had its ups and downs. It was liked, loved, hated and spurned as has been the Court before it, and as is the IRC today"[10]. The lecturer called for a return to the cooperative approach to industrial relations "which is encouraged by persuasion and example rather than by threat and coercion"[11]. This was the approach which Dick Kirby always encouraged and facilitated.

In 1994 this lecture was given by my colleague, Justice Mary Gaudron. Like me, appointed in the 1970s to the Arbitration Commission, Justice Gaudron well knew the power of Sir Richard Kirby's legacy to industrial relations in Australia. She records the (surely apocryphal) story told in our hero's biography of the visit of two old school friends in London, to view the workings of the Privy Council. Imagine their surprise on hearing the case called on "The Queen against Richard Clarence Kirby".

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10 G Polites, *Change and the Industrial Relations Commission*, Sir Richard Kirby Industrial Relations Lecture, 1991 (Industrial Relations Society of Victoria, Monograph Series No 3 at 1).

11 *Ibid*, at 10.

The tale has it that one friend turned to another and said "Good God, Dick's done it this time! It must be either murder or rape to have landed him here"[12]. But he had gone by the time Mary Gaudron was appearing before the Arbitration Commission. I too had no chance to plead before him. Yet in those early days of our work before, and membership of, the federal tribunal, the name of Sir Richard Kirby was legion. It was greatly honoured. It seemed impossible to conceive that the system which he had built would go otherwise than from strength to strength.

FOUNDATIONS

Justice Gaudron is the seventh and I am the eighth Justice of the High Court of Australia to have held commission in the national conciliation and arbitration tribunal. O'Connor, Higgins, Isaacs, Powers, Rich and Starke preceded us. It is an indication of the close connection which has existed, over virtually the entire history of the Australian federation, between the highest court of the land and the institution charged with implementing our unique national experiment in industrial relations.

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12 D'Alpuget, above n 6, at 147.

As the centenary of the Constitution approaches, it is inevitable that we should be looking back to those years shortly before, and shortly after, Sir Richard Kirby was born when this remarkable national experiment began. It is specially relevant in the context of the current plan to refer State powers to the Commonwealth and the reconsideration of industrial law that will follow.

It was in the 1891 Convention that Kingston, from South Australia, moved for the insertion in the draft Constitution of a new clause giving the Federal Parliament legislative power with respect to the establishment of Conciliation and Arbitration Courts with jurisdiction throughout the Commonwealth for the settlement of industrial disputes. Sir Samuel Griffith, from Queensland, suggested that this power would be better placed under the judiciary power[13]. Accordingly, Kingston withdrew his proposal and later moved to include in the federal judicature "courts of conciliation and arbitration for the settlement of industrial disputes". A short debate ensued. Kingston, who was a remarkably progressive and intelligent lawyer, said that he did not wish to enlarge generally the legislative power of the Commonwealth. But he pointed out that, even in colonial

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13 R R Garran, *Prosper the Commonwealth,* Angus and Robertson, 1957 at 378.

Australia, there had been industrial disputes which were too extensive to be dealt with by local legislatures or tribunals and which had become a matter of national concern. Remember that these debates were taking place in the 1890s.

According to Sir Robert Garran, the debates revealed several things[14]:

> "First, that there was a general opinion that industrial matters were best left to the States; secondly an admission by a few members that there were disputes of national concern; and thirdly the recognition that both employers and employees were already organised on a federal basis."

Griffith expressed concern that the assignment of this subject matter to the Federal Parliament would affect property and civil rights which ought not to be interfered with by the new federal polity. But Deakin and others in the national and federal movement were impressed by Kingston's argument about nationwide disputes. So long as concurrent State legislative power was reserved, they saw no difficulty with a federal body having national responsibilities.

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14 *Ibid,* at 378.

Nobody, in those far-away and different days, suggested that a general federal power should be given to the federal Parliament to deal directly with industrial questions. That would have been entirely out of harmony with the conception of the federal Parliament's powers held in those days. The only palatable proposal was Kingston's that, for national disputes only, there should be a means to endeavour to deal with them first by conciliation and, if that failed, by a court which could arbitrate upon disputes which transcended State powers[15]. Kingston's argument was deliberate. He hoped to keep industrial conditions out of the political sphere. But in the end, his amendment was defeated by a large majority. The only leading federalists who voted for it were Kingston and Deakin. Griffith maintained his objection as to property and civil rights implications. The rest of the majority against the federal proposal appeared to be influenced by the principle that no sufficient case had been demonstrated for giving any part of the industrial power to the federal Parliament. A hundred years ago this was definitely regarded as, basically, a State matter.

The issue did not die there. At the 1897-8 Convention, H B Higgins, later a Justice of the High Court and second

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15 *Loc cit.*

President of the Arbitration Court, obtained a small majority for the power as it now stands in the Constitution. From the first, the power was highly controversial. Doubtless this was because of the large economic ramifications which rested upon it. According to Garran, the Conciliation and Arbitration Bill wrecked two Ministries before it was passed in 1904, the year of Sir Richard Kirby's birth. The Deakin Ministry resigned after the Opposition, in combination with the Labour Party, passed amendments to include in the Bill employment in State railways or other State industries. Then the Watson government was brought down by a clause providing for preference to unionists. Only then did the Bill get into a safe harbour in the Senate and was passed.

In 1906, in harmony with the view then obtaining about the implications of federalism in the Constitution, the High Court, in the *Railway Servants Case*[16] held that the application of the federal Act to State railway employees was an invalid attempt by a federal law to interfere with State prerogatives. We have recently seen how this old debate continues right up to the

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16 (1906) 4 CLR 488. See also *Fed Engine Drivers &c Association v B H Pty Co Ltd* (1911) 12 CLR 398; (1913) 16 CLR 245; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319; *R v Kelly* (1953) 89 CLR 461 (Railway Union Case).

present time. Within the last few weeks, a decision by the High Court upheld the wide constitutional powers available to the federal Parliament, beyond s 51(xxxv) to make broad based laws governing industrial relations[17].

Before the multi-pronged federal legislative approach was adopted, and before the *Engineer's Case*[18] the federal Governments of the first decades of the century felt bound to appeal to the people at referendum to enlarge the federal power over industrial relations. Three attempts were made by the Fisher government in 1911 and 1913. A fourth attempt was made by the Hughes government in 1919 to give wide industrial powers to the federal Parliament. Each of these was carried in the federal Parliament but defeated at referendum. These failures, and still others later, proved once again the intense conservatism of the Australian people when asked to change their Constitution[19]. How ironic, in the light of these ardent battles of earlier days are the events of recent weeks in this State.

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17 *State of Western Australia v The Commonwealth,* unreported 4 September 1996; *The State of Victoria and Ors v The Commonwealth of Australia,* High Court, unreported, 4 September 1996. See note CCH *Australian Industrial Law News, Newsletter 8/96* at 2.

18 (1920) 28 CLR 129.

19 Garran, above n 13, 379.

Following the *Engineer's Case* in 1920, the disputes about the relevant powers of the federal and State arbitral bodies became the constant subject of discussion in the successive Premier's Conferences. In 1921 there was the first agreement that the States would refer the industrial power to the Commonwealth to the intent that Basic Wage and standard hours could be dealt with nationwide. However, as Garran puts it, in 1921 the State Premiers "went home and forgot about it"[20]. Similarly, in 1923, the federal government agreed to try to amend the Constitution by excluding State instrumentalities from the federal power. But again nothing was done. The Royal Commission on the Constitution in 1927-29 recommended omitting the industrial power from the Constitution. The recommendations went the way of most constitutional reforms. In 1929 Prime Minister Bruce announced the intention of his government to vacate the whole field of industrial relations to the States, except for the shipping and waterside industry. His Government had long been concerned with aspects of dual control. Having failed to get full federal powers it resorted to the alternative of handing virtually the whole issue over to the States. This proposal brought about the defeat of the

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20 *Ibid.*

Government in Parliament. Later efforts were made to enlarge or alter the federal power by referendum. But none of them succeeded. Until they discovered the multi-pronged approach to sustaining federal legislation on industrial relations, the governments of Australia, after the 1940s, came to the view that this minefield of law was perilous and problematical. Only very bold spirits continued to dream of a single national regime.

This was the world of federal industrial arbitration into which the young Mr Justice Kirby entered in 1947. Until the recent announcement by Minister Reith and Premier Kennett, it was left largely to the High Court of Australia, rather than the people at referendum, to alter the understanding of the foundations of the legislative power of the Commonwealth with respect to industrial relations.

COURT AND COMMISSION

I think it is fair to say that, over the course of the century, the High Court has, by almost imperceptible steps, taken in a multitude of decisions, gradually enlarged the power of the federal Parliament to enact laws with respect to conciliation and arbitration of industrial disputes. Its recognition that other heads

of federal power, notably the corporations power[21], could be used to sustain laws on industrial relations, clearly circumvented many of the problems that had bedevilled governments, and industrial relations in Australia, during the first half of the century.

Very occasionally difficulties arose in relationships between the High Court and the arbitral tribunal. Thus, in *Alexander's Case*[22] the High Court invalidated the appointment of federal judges to the Arbitration Court for a period of seven years. It held that, by the Constitution, all such judges must enjoy life tenure, which was then the standard for the federal judiciary.

In 1948, a curious event occurred which I have recorded elsewhere and of which Sir Richard Kirby may have recollections. Mr Justice Williams, in the High Court, made an order under s 21AA of the *Conciliation and Arbitration Act* 1904 (Cth). In purported reliance on that Act, proceedings in the form of an appeal were taken to the Full Bench of the Arbitration Court:

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21 *Dingjan & Ors; Ex parte Wagner and Anor* (1995) 183 CLR 323.

22 *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

titled "On appeal from the High Court of Australia"[23]. No motion was ever filed by any party to bring the matter before the High Court. However, the Principal Registrar of the High Court drew the purported "appeal" to the attention of a Full High Court sitting in Melbourne on 24 February 1948. Of its own motion, the High Court issued an order *nisi* for prohibition directed to the judges of the Full Court of the Arbitration Court, and to the parties, prohibiting further proceedings and returning the matter before the High Court. Latham CJ stated:

> "The proceeding raises the important question as to whether an appeal may be given from the High Court to another court in Australia. The circumstances are unusual. In these unusual circumstances, which raise a question of profound importance, the Court adopts the unusual procedure of making an order *nisi* on reading the report of the Principal Registrar, for a writ of prohibition"[24].

On the same day, the Chief Judge of the Arbitration Court (Mr Justice Drake-Brockman) announced that he had been notified of the order *nisi*. After some discussion as to whether the purported "appeal" from the High Court should be struck out, it was, with the consent of the respondents, withdrawn by the

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23 *Federated Ship Painters' and Dockers' Union of Australia v Operative Painters' and Decorators' Federation of Australia and Anor* (1948) 21 ALJ 453.

24 *Ibid.*

appellant. There have been no more "appeals" from the High Court to other courts or tribunals in Australia. The last line of "appeal" from the High Court to the Privy Council has been terminated by statute, save for the residual and anomalous facility of appeal which remains in s 74 of the Constitution but which the High Court has said will never be again exercised[25].

There remained other tensions in the relationship. It was said, for example, that Justice Dixon became upset when the Chief Judge of the Arbitration Court (Kelly CJ) was knighted at a time when some of the Justices of the High Court were not so honoured. The reason for Kelly's knighthood was that he was a close personal friend of Prime Minister Menzies. It is also said that Justice Dixon objected to the inscription "CJ" on Kelly's wig tin[26]. According to Sir John Moore, Dixon's eyes fell upon Kelly's tin at the legal convention in Sydney in 1951. Whether this is so or not, the great Dixon, taking his oath of office as Chief Justice of Australia in April of 1952, adverted to the importance of maintaining the status of the federal judiciary:

> "There is in Australia a large number of jurisdictions and a confusion in the public mind as to their

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25 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, 464-465.

26 D'Alpuget, above n 6, 141.

> function ... The public does not maintain the distinction between the administration of justice according to law and the very important function of industrial tribunals"[27].

This comment of Dixon's did not go unnoticed. Predictions were made that the Arbitration Court's days might be numbered. The hint planted by Dixon was duly taken up when the Boilermaker's Society was fined for contempt. It objected to the payment of its fine. The validity of the order was challenged. The High Court, led by Dixon, upheld the challenge. It effectively destroyed the old Arbitration Court. In accordance with federal convention, that court remained on the statute books until the last of its judges had either died or retired. But it had no further effective jurisdiction. Sir Richard Kirby is the only living remnant of that page of Australia's history, stretching back to O'Connor and Higgins.

THE PRESENT DAY

It is at this point that a speaker in this lecture series will normally turn to a controversial issue of importance in the present day. The events of this month give ample scope. Bob

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27 Sir Owen Dixon, swearing in as Chief Justice (1952) 85 CLR xi at xvi. See also M Gaudron, "Some Reflections on the *Boilermaker's Case*", Sir Richard Kirby Lecture 1994 (1995) 37 JIR 306 at 307.

Hawke spoke of his government's commitment to consensus, to the Prices and Incomes Accord, to labour market reforms, award restructuring, workplace reform and the *Industrial Relations Act* of 1988. Barry Jones spoke of the impact of technology on production and workforce trends. He described the decline in traditional work areas, the changes in labour participation rates and working hours; the dynamism of the labour market today and the need for Australia, in its global and regional setting, to "work smarter"[28]. George Polites spoke of the support for deregulation in the 1990s, the need for flexibility in labour market strategies as revealed by the OECD studies and the need to enhance enterprise bargaining supported by legislative reform sustained by a non-partisan approach by government and opposition[29].

We are in the midst of extremely important developments in industrial relations in Australia. One of them was marked out by the recent decision of the High Court on the constitutional foundations of federal law in this area. That decision was described by the Minister for Industrial Relations, Mr Reith as a "useful boost at a critical time"[30]. The reference was to the fact

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28 See Jones, above n 3, 13.

29 See Polites, above n 10, 10.

30 *The Australian,* 5 September 1996.

that a number of the provisions in the present government's proposed legislation invoke the corporations power upon which the former government's legislation had been upheld.

Already, in the High Court, I have sat as a single Judge in a matter in which the constitutionality of legislation in this field is to be challenged[31]. You will therefore understand a certain reluctance on my part to explore constitutional questions with you. Fascinating though they are, they bear greater risks than historical reflections. Out of my ruminations upon them might spring a necessity to disqualify myself from participating in future litigation. I would not wish to impose that extra burden on my colleagues or to deprive you all of my opinion on such matters.

The new federal industrial relations Bill introduced into the House of Representatives on 23 May 1996. As a result of negotiations between the government and the Australian Democrats in the Senate, the Workplace Relations and Other

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31 *R v Turner; Ex parte Homestead Award Winning Homes Pty Ltd* (1996) 70 ALJR 562 (HC). News reports suggested that the new legislation may be challenged upon the basis that "the Parliament cannot direct the Industrial Relations Commission to exercise its power so as to produce a specific result". See S Marris, "IR Bill Legally Dubious: McMullan", *The Australian,* 7 June 1996 at 4. See also *The Age,* 7 June 1996 at 5; the *Canberra Times,* 7 June 1996 at 5 and *Sydney Morning Herald,* 7 June 1996 at 2.

Legislation Amendment Bill 1996 (Cth) (which will substantially amend the *Industrial Relations Act* 1988 and rename it the *Workplace Relations Act* 1996) would introduce important changes to our law. The negotiated settlement between the political parties has been described as "a new era [dawning] for industrial relations"[32]. It has been called a "good and effective compromise from which both negotiators have emerged smiling, and with good reason"[33]. The government has retained the essential principle of its industrial relations policy - productivity-driven workplace agreements in which wages are more directly linked to productivity and to the ability of particular businesses to pay. The Australian Democrats have won concessions which safeguard the rights of workers to choose whether or not they wish to be represented by a union and the basic role of unions to maintain a presence in workplaces in which they have members[34].

For my purposes, the most important change to the Bill, as introduced, is the strengthening of the role of the Industrial Relations Commission as the ultimate guardian of industrial

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32 *Canberra Times,* 20 November 1996, at 2.

33 *The Age,* 29 October 1996 at 14.

34 *Ibid.*

justice. The role of employment advocates has also been strengthened. Industrial awards are to remain, as long as they are needed. The amendments, which have safeguarded the status of the Commission, have been generally welcomed in the media[35]. The original legislation significantly reduced the role of the Commission. It limited its jurisdiction to a number of designated subject areas. It required the Commission to ensure that awards were "suited to the efficient performance of work according to the needs of particular workplaces or enterprises". It also required the Commission to ensure that awards were "confined in scope to providing a safety net of fair minimum wages and conditions of employment". However, the new stream of non-union bargaining was to be available without any requirement to have agreements vetted by the Commission for compliance with minimum legal entitlements[36].

It remains to be seen how the amendments and the new legislation, if enacted and upheld, will operate. But I hope that I have demonstrated that the history of industrial relations in this country, over the past century, has shown that the national industrial tribunal has been remarkably resilient. It has gone

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35 *The Age, loc cit.*

36 CCH Special Despatch, "Senate Report - Workplace Relations Bill 1996.

through many changes in the constitution of its members. It has undergone significant change from a highly judicialised body to one which is more informal, flexible and suitable to an economy undergoing rapid structural change. Its members, in all but three cases, no longer have the judicial title. I have always considered that a serious blow was done to the Commission when it was reconstituted from the old Arbitration Commission. The fundamental convention, previously observed in federal courts and tribunals, was breached when Justice Staples was not reappointed to the IRC. The convention of appointing, successively, persons with backgrounds in unions, employer organisations and government was also breached. The convention (and law) which linked the salaries of Presidential Members to the judges of the Federal Court was severed. Now the powers of the Commission have been reduced.

Yet the Commission goes on. It is virtually contemplated by the terms of s 51(xxxv) of our Constitution. It is deeply etched in the Australian industrial relations psyche. A human institution, it has undoubtedly made mistakes. But it has done many good and fine things over the years to protect the weak and the vulnerable. At a time of structural change, relatively high unemployment, serious and continuing youth unemployment (and the danger of more to come) it seems unlikely to me that the Commission will now wither on the legislative vine. As in all institutions, much depends upon the personnel who make up the Commission. It depends on their intelligence, sensitivity to new

circumstances and manifest independence and integrity. These were the qualities which Sir Richard Kirby brought to bear to the Arbitration Commission in his day. I do not doubt that the present office-holders realise the importance of the same qualities in the Australian Industrial Relations Commission today. My own experience in the Law Reform Commission taught me that formal legislative power is often less important to a public office-holder than demonstrated utility, neutrality and independence.

In 1990 I was invited by the International Labour Organisation (ILO) to take part in the Fact-Finding and Conciliation Commission on Freedom of Association. I was appointed to a panel on South Africa. I went to that country with two other judges (Sir William Douglas of Barbados and Justice Rajsoomer Lallah, now Chief Justice of Mauritius). Our task was to review the industrial relations law in South Africa on the eve of great constitutional changes. South Africa had walked out of the ILO in the 1960s. It was now seeking guidance on its future industrial relations law.

When the mission arrived in South Africa we found the industrial relations system wholly undeveloped and ramshackled. In particular, there was absolutely no capacity to offer rapid response to industrial disputes which tended to drag on: causing great suffering and economic loss, particularly to the black community. Cases meandered slowly through the courts. The

situation was intolerable for employer and employee organisations alike. Drawing on my experience in the Arbitration Commission, our mission put together our proposals. These included a system for rapid response to disputes with a procedure for conciliation and arbitration. The South African *Industrial Relations Act,* now passed by the South African Parliament, draws extensively on the ILO mission report. It would be an irony if, at the very moment that an efficient and responsive industrial relations body was being created in South Africa, modelled on the Australian experience, we denuded our national body of its relevance, prestige and capacity to act speedily and to safeguard the basic rights of the industrially weak and the vulnerable. I am hopeful that the federal legislation, in its reformed content, will strike the median course - reforming and modernising; but keeping the best of a peculiarly Australian institution harmonious with our society and its history.

THE CONTINUING EXAMPLE OF SIR RICHARD KIRBY

There remains a serious problem of long-term unemployment in Australia, particularly amongst the young. This is a matter which will be the concern of the Australian Industrial Relations Commission and the Parliament. Everyone hopes that the new industrial relations legislation and initiatives will help improve the availability of employment and assist in the structural changes that are necessary if Australia is to compete in the dynamic geographical and economic region in which we

find ourselves. It will not be a contribution to the long-term well-being of our country if high levels of productivity in Australian enterprises are won at the cost of accepting serious and continuing, high levels of unemployment. In that climate will fester despair, disillusionment with our society, resort to drugs and crime and a gradual demolition of the egalitarianism which has been a special feature of the Australian nation. Egalitarianism to which the industrial relations system and its institutions, federal and state, have contributed for a century, during the long lifetime of Sir Richard Kirby.

Sir Richard Kirby has not remained silent about this problem. In recent days he has raised his voice at the University of Wollongong where there is another lecture named in his honour, now in its eighteenth year. In the previous years he took no part in the formal business of that lecture. But this year he broke with tradition. He addressed the audience. He expressed his deep concern about the "dreadful problem" of prolonged, systemic unemployment:

> "Past periods of recession and unemployment have been cleaned up relatively quickly and unemployment was the exception rather than the rule. We have had unemployment for a decade or more and we must do something imaginative or we will have another decade. What a tragedy that would be. I asked to speak these few words

> because I have a gut feeling that whilst we have worked long and hard to solve the problem ... a more positive ambition is needed rather than just working to cure it or heal it"[37].

Sir Richard Kirby urged universities to encourage research on this topic. He offered a substantial prize for the best essay on full employment and the means of obtaining it. He is still concerned. He is still motivated by the light on the hill of industrial relations. Gone from the hill are the commanding heights of government enterprise. The command economy and its variants were tried. They were seen to fail. But the basic motivation of most people in industrial relations remains the same today as it was in Sir Richard's day. It is to ensure an efficient economy and a cooperative agreeable workplace within which investors will make the profits which reward inventiveness and service. And workers will have the satisfaction of work well done, just rewards for their labours, protection from avoidable harm and a safety-net against industrial unfairness.

After the new legislation is passed through the Parliaments, subject to any constitutional challenges, it will begin a new phase in the history of industrial relations in Australia. Yet a reflection on the long life of Sir Richard Kirby teaches us about

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37 Sir Richard Kirby, noted in University of Wollongong, *Campus News,* 25 September 1996 at 2.

the enduring things. We must keep them in mind in this time of change. Remembering that history, we should maintain our faith in the capacity of our fellow citizens, through good industrial relations, to work together to solve new challenges. Most of the solutions will come from agreements reached between the bargaining parties in the enterprises most closely involved. But sometimes a neutral intermediary will be necessary. In South Africa, I saw the acute problems of a society without a trusted mediator and without a fireman able to attend quickly to the disputes that can so easily flare up in the highly charged atmosphere of industrial conflict. In Australia, we must surely adapt to new times of global capital markets, regional competition, technological and structural change and changing ideas on the role of the state, the corporation and the individual. But we should not turn our back entirely on our history or the genius of our peculiar Australian approach to industrial relations. That is why I have sought to describe and explain that history in this lecture. It has lessons and it has ironies. It may not have been perfect. It can doubtless still be improved. But it was built on the firm foundation of our concept of a nation of equals and a just society in which an industrial accommodation can be struck in the name of fairness and justice to all.

These are the values which Sir Richard Kirby has upheld through his long life. They still have lessons for us in Australia. In the coming century we will surely need more like him.