THE JULIAN SMALL FOUNDATION

INAUGURAL JULIAN SMALL FOUNDATION ADDRESS

SYDNEY, 31 OCTOBER 1997

LOOKING BACKWARDS. LOOKING FORWARDS

The Hon Justice Michael Kirby AC CMG

THE JULIAN SMALL FOUNDATION

INAUGURAL JULIAN SMALL FOUNDATION ADDRESS

SYDNEY, 31 OCTOBER 1997

LOOKING BACKWARDS. LOOKING FORWARDS*

The Hon Justice Michael Kirby AC CMG**

JULIAN SMALL

I feel very privileged to be invited to speak in this series which honours Julian Small. Although I did not know him well myself (having retired from active combat when he was still in swaddling clothes) I know of his wonderful reputation and the high regard in which he was held, as a lawyer and as a man, by people whose good opinions are worth having. I refer to Chief Justice Michael Black of the Federal Court of Australia and

---

* Adapted and updated from the Sir Richard Kirby Lecture given by the author in Melbourne on 20 November 1996.

** Justice of the High Court of Australia. Formerly Deputy President of the Australian Conciliation and Arbitration Commission (1974-83); Judge of the Federal Court of Australia (1983-84); President of the New South Wales Court of Appeal (1984-96).

Justice John Cahill, Vice-President of the New South Wales Industrial Relations Commission.

Chief Justice Black telephoned me last week to speak of Julian and to honour his memory. He spoke of his fine qualities as a lawyer and as a human being. He permitted himself to mention that Julian Small had showed exquisite judgment in the choice of counsel - having briefed Michael Black on several occasions. You never forget such insightful people. I have been told how Chief Justice Black spoke movingly about Julian Small and with encouragement about the Foundation when it was inaugurated. His spoke of Julian Small's love of discussion and ever-readiness to challenge conventional thinking. It is a good thing that his friends have gathered to establish the Foundation to keep Julian Small's memory alive. I am glad that before this address, the first Foundation Research Grant of $5,000 was made to foster study, research and development of the law relating to employment and industrial relations in Australia. There are few areas of the law more important. Those who think otherwise are simply ignorant about this vital province of law and human relations.

It is a province that tends to attract people of a creative bent - not content simply to apply laws mechanically to ever-shifting circumstances. Within the last year another fine lawyer, brought up in the field of industrial relations, died. I refer to the former Justice of the Supreme Court of the United States,

William J Brennan Jr. He was a progressive voice of that court as it modernised its work and role. As a Justice he had unequalled influence on the life of his fellow citizens. Like Julian Small, he could see the social issues which stood behind the legal problems. He became one of the chief strategists of the civil rights revolution which was forged by the Supreme Court of the United States. He demonstrated an unmatched ability to build consensus within the Court. He thereby made himself a central figure in the Warren Court. In his early life he had handled labour disputes on the staff of the Under-Secretary of War in the United States.

So Julian Small, and others of us who have worked in this field, like Brennan of the United States, looked on the law as a problem-solving mechanism whose task was to contribute to the ordering of a more just society. That is a view of the law that I have myself never lost, although I have wandered from the vineyard of industrial relations.

FOUNDATIONS

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, Starke and Gaudron preceded me. 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.

As the centenary of the Constitution approaches, it is inevitable that we should be looking back to those years when this remarkable national experiment began. It is specially relevant in the context of such dramatic changes in industrial legislation.

It was in the 1891 Convention that Charles 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 a Conciliation and Arbitration Courts with jurisdiction for the settlement of industrial disputes throughout the Commonwealth. Sir Samuel Griffith, from Queensland, suggested that this power would be better placed under the judiciary power[1]. So, 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

---

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

Commonwealth. But he pointed out that, even in colonial 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[2]:

> "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 particular subject matter to the Federal Parliament could 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 the creation of a federal body having limited national responsibilities.

---

2 *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[3]. Kingston's argument was deliberate. He hoped to keep destructive 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. 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 proposed federal Parliament. A hundred years ago this was definitely regarded as, basically, a matter for State law.

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

---

3 *Loc cit.*

President of the Arbitration Court (after O'Connor) 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 its large economic ramifications. According to Garran, the Conciliation and Arbitration Bill wrecked two Ministries before it was passed in 1904. The Deakin Ministry resigned after the Opposition, in combination with the Labor Party, passed amendments to include in the Bill jurisdiction over 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*[4] 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 saw i September 1996 how reflections of this old debate continue right up to the present time. A decision by the High Court upheld the

---

4 (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).

wide constitutional powers available to the federal Parliament, beyond s 51(xxxv) to make broad based laws governing industrial relations in the States[5].

Before the *Engineer's Case*[6] the multi-pronged federal legislative approach was adopted, and the federal Governments of the first decades of the century appealed 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[7]. How ironic, in the light of these ardent battles of earlier days, were the moves to transfer the powers of the Victorian Parliament to the Commonwealth and to abolish the State machinery.

---

5 *Victoria v The Commonwealth* (1996) 71 ALJR. Cf W J Ford, "Reconstructing Australian Labour Law: A Constitutional Perspective" (1997) 10 *Aust J Labour Law* 1 at 20ff.

6 (1920) 28 CLR 129.

7 Garran, above n 1, 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 at 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"[8]. 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 Government in Parliament. Later efforts were made to enlarge or

---

8 *Ibid.*

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, seemed to have reached the view that this minefield of law was politically perilous and problematical. Only very bold spirits continued to dream of a single national regime.

COURT AND COMMISSION

By almost imperceptible steps, taken in a multitude of decisions, the High Court gradually enlarged the power of the federal Parliament to enact laws with respect to industrial disputes. Its recognition that other heads of federal power, notably the expanded corporations power[9], 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 three-quarters of the century.

Very occasionally difficulties arose in relationships between the High Court and the arbitral tribunal. For example, in

---

9 *Dingjan & Ors; Ex parte Wagner and Anor* (1995) 183 CLR 323. See Ford, above n 5, 22, 26-27.

Alexander's Case[10] the High Court invalidated the appointment of federal judges to the Arbitration Court for a term 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. 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: titled "On appeal from the High Court of Australia"[11]. 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:

---

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

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

> "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"[12].

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 appellant. There have been no more such "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[13].

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

---

12 *Ibid.*

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

time when some of the Justices of the High Court were not so honoured. The reason for Kelly's knighthood was apparently 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[14]. 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 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 function ... The public does not maintain the distinction between the administration of justice according to law and the very important function of industrial tribunals"[15].

This comment of Dixon's did not go unnoticed. Predictions were made that the Arbitration Court's days were 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.

---

14 B Alpuget, *Mediator - A Biography of Sir Richard Kirby,* Melb Uni Press, 1977.

15 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.

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 as it does to O'Connor and Higgins.

THE PRESENT DAY

It is at this point that a speaker in this lecture series in the future will turn to a controversial issue of importance in the present day. Thus in one of the other notable lecturer series, named for Sir Richard Kirby, Bob 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"[16]. 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[17]. Only last week, giving the Sir Albert Jennings Lecture, the Federal Minister for Workplace Relations and Small Business, Mr Peter Reith, gave an overview of the present Government's legislative and other changes affecting industrial relations. He declared that it was vital to create the right sort of environment for industry to prosper in Australia

We are in the midst of extremely important developments in industrial relations. 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"[18]. The reference was to the fact that a number of the provisions in the present government's

---

16 See B O Jones, Technology, the Work Ethic and Industrial Relations", 1990 at 13.

17 See G Polites, "Change and the Industrial Relations Commission", 1991 at 10.

18 *The Australian,* 5 September 1996.

proposed legislation invoke the corporations power upon which the former government's legislation had been upheld.

Already, in my relatively short time on the High Court, I have sat in matters in which the constitutionality of some of the legislation in this field was challenged[19]. I notice from the media that the New South Wales Government is said to be considering a challenge to the *Workplace Relations Act*, described by the State Attorney-General, Mr Jeffrey Shaw QC, as "a poorly constructed and confusing piece of legislation". You will therefore understand a certain reluctance on my part to explore constitutional or controversial questions with you. Fascinating though they are, they would bear greater risks than historical reflections. Out of my constitutional ruminations 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 opinions on such matters.

---

19 *Attorney-General for the State of Queensland* v *Riordan*, (1997) 71 ALJR 1173. See also *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.

The new federal industrial relations legislation is now law. As a result of negotiations between the government and the Australian Democrats in the Senate, the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) (which substantially amended the *Industrial Relations Act* 1988 and renamed it the *Workplace Relations Act* 1996) introduced important changes to the law. The settlement between the political parties in the Senate was described by the Government as "a new era [dawning] for industrial relations"[20]. It has been called a "good and effective compromise from which both negotiators have emerged smiling, and with good reason"[21]. The Government retained the essential principle of its industrial relations policy (productivity-driven workplace agreements in which wages are more directly linked to employer productivity and to the ability of particular businesses to pay). The Australian Democrats won concessions which were designed to 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[22].

---

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

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

22 *Ibid.*

For my purposes, the most important change to the Bill as first introduced was the strengthening of the role of the Industrial Relations Commission as the ultimate guardian of industrial 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[23]. 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". 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 industrial entitlements[24].

---

23 *The Age, loc cit.*

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

It remains to be seen how the amendments and the new legislation will operate. But I hope that I have shown that the history of industrial relations in this country, over the past century, has demonstrated that the national industrial tribunal has been remarkably resilient. It has gone through many changes in the constitution of its members just as the Australian Industrial Relations Commission has lately done in the replacement of President Deidre O'Connor by the new President, Justice Geoffrey Guidice. It has undergone significant change from the highly judicialised body I first knew to one which is more informal, flexible and suitable to an economy undergoing rapid structural change. Of its members, only three now have the judicial title. Perhaps I am wrong but 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, (including Sir Richard Kirby when the Arbitration Court was abolished) 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. The unrelenting attacks on the Commission by some sections of the union movement took their toll. Now the powers of the Commission have also been reduced.

Yet the Commission goes on as do the State Commissions. The Federal Commission is virtually contemplated by the terms of s 51(xxxv) of our Constitution. It is still deeply etched in the Australian industrial relations psyche. A human institution, it has undoubtedly made many mistakes. But it has done many good and fine things over the years, especially 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), currency crises and stock market "re-adjustments" 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 past members brought to bear. 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 to the body politic, 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, later 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 Australian 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 basic motivation of most people in industrial relations remains the same today as it was in 1904 and during the whole time that Julian Small worked in this field. It is to ensure an efficient economy and a cooperative and agreeable workplace within which investors will make the profits which reward inventiveness and service. And in which 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.

Subject to any constitutional challenges, the new federal legislation will introduce a new phase in the history of industrial relations in Australia. So will the reference of powers by Victoria. Yet a reflection on the long life of our industrial relations institutions teaches us about the enduring things of Australian industrial relations. We must keep them in mind in this time of change and as we look into the future. Remembering our 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, it is true, may now come from agreements reached between the bargaining parties in the enterprises most closely affected. 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, in my view, completely turn our back on our history or the genius of our peculiar Australian approach to industrial relations. That is why I have sought in this lecture to remind you of that history. By looking backwards we sometimes look forward. Our history has lessons and it has present ironies. It may not have been perfect. It can doubtless still be improved. But it was built on the firm foundation of a very Australian concept of a nation of equals and a just community in which an industrial accommodation can be struck in the name of fairness and justice to all. That is the concept which motivated Julian Small in his professional life. He was one of life's "finest jewels" according to Justice Monica Schmidt. He was technically one of the very best lawyers, according to Chief Justice Black. He was respected by both sides. He was a demanding task-master, according to Charles Alexander, speaking at his memorial service. He was scrupulously honest and a contributor to a better Australian society. A real model for industrial relations law as it has been practised for nearly a century. *Orta recens quam pura nites.*