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SECURING A "FAIR GO" – ILO, AUSTRALIA AND THE WORLD

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The Hon. Michael Kirby AC CMG

INTERNATIONAL INDUSTRIAL RELATIONS ASSOCIATION
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RETURNING TO BASICS

This Congress meets at an important time for the world economy when employers, employees, and the world community face great challenges as a result of the global financial crisis.

This occasion affords me an opportunity to return to the company in which I worked intensively when I was a young barrister, here in Sydney, Australia. My first judicial appointment, in 1975, was as a Deputy President of the Australian Conciliation and Arbitration Commission. That tribunal traced its origins back to the Commonwealth Court of Conciliation and Arbitration, established by federal legislation in 1904[1]. It was re-created in a new form in 1956, when the original court was struck down for constitutional reasons by a decision of the High Court of Australia[2]. In 1996, this body was, in turn, succeeded by the Australian Industrial Relations Commission. And on 1 July 2009, I attended the

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* Justice of the High Court of Australia (1996-2009); Deputy President of the Australian Conciliation and Arbitration Commission (1975-1983); member of the ILO Fact-finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa (1997-2).

1 *Conciliation & Arbitration Act* 1904 (Cth).

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

inaugural sitting of the latest manifestation of Australia's national employment tribunal: Fair Work Australia.

As the representative of the employers told that body, assembled on that occasion[3]:

> "Over the past 100 plus years a uniquely Australian industrial relations system has evolved which has served this country well. The central tenet of the system has been the notion of a "fair go all around". Whilst this central tenet has endured, the system has continued to change and evolve. The pace of change has been particularly rapid over the past 15 years with different political parties pursuing their industrial relations ideas and policies."

I am specially grateful that, in this international congress, an occasion arises for the Industrial Relations Society of Australia to present to a number of my colleagues, and to me, awards for lifetime service in industrial relations. I am proud to join Mary Gaudron, Pauline Griffin, Joe Isaac, Keith Hancock, John Niland and Di Yerbury in receiving this award. All and any of them are better qualified than I to present this address. However, the privilege has fallen to me. But I start by honouring my colleagues and all those many others who have contributed, during more than a century, to the distinctive, ethical and human rights-respecting institutions that have protected the rights and privileges of workers and employers in Australia and upheld the public interest in this uniquely important field of human endeavour.

Two of the honorands, Di Yerbury and I, returned to Australia from overseas this morning to be present on this occasion. Professor Yerbury arrived a few minutes behind me on QF2 from London. I returned on QF12 from New York. Such is also the world that has

[3] Stephen Smith, Director, National Work Place Relations, Australian Industry Group, address to the inaugural sitting of Fair Work Australia, Sydney, 1 July 2009.

brought the international visitors to this Congress and overcome the tyranny of distance that once substantially cut Australia off from the rest of humanity. Our overnight journeys demonstrate vividly the essential unity of the world and of the human species. They illustrate the reasons why the discipline of labour and employment relations is not now one of purely domestic concern. It is one of global concern. It touches upon several basic features of human existence and fundamental human rights.

For me, getting here for this dinner was no sure thing. I travelled from Halifax, Nova Scotia, Canada, on the far side of the North American continent. The challenge was to avoid Hurricane Bill and to slip in and out of Halifax when Bill was not watching to give my address yet to be here for this dinner. After doing so, I sat through the night and had a long time to reflect on these remarks.

My journey demonstrates the impact upon all of our lives of international realities. My address at the Halifax conference concerned the *International Child Abduction Convention*. This is itself a consequence of the new technology of flight that makes it possible to take a child to the other side of the world but equally possible to return it, under court orders, so as to discourage parties from taking the law into their own hands.

Technology cements the international relationships that now exist. It helps the human mind to reach out into space and to explore the furthest planets and distant galaxies. It allows us to plunge into the deepest oceans and to view the Titanic as it lies deep at the bottom of the Atlantic, not far from Halifax. It also permits us to split the atom and to

map the genome. In between the vastness of space and the tiny reality of the genome stand human beings: with all their faults and foibles. The global dimension that technology reinforces, teaches us to think as human beings and to endeavour to act together upon matters of common interest. One such matter is labour and employment relations. This has brought us together on the brink of a Southern Spring to explore our differences and to discover the issues that we share in common.

So this is the structure of my remarks. I will first offer some observations on the international dimension. I will then proffer some comments on the national scene in Australia. Finally, I will turn to some personal remarks because universal human rights are generally concerned with individual human beings. And people are the stuff that labour and employment relations are ultimately about.

THE INTERNATIONAL DIMENSION

Australia was a foundation member of the International Labour Organisation (ILO)[4]. That body was originally established under Art 387 in Pt. XIII of the *Treaty of Versailles* that brought the First World War to a conclusion. The article is worth remembering. It said in part:

> "And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of employment, the protection of children, young persons and women, provision for old age and injury, protection of

[4] See *Victoria v The Commonwealth (Industrial Relations Act Case*) (1996) 187 CLR 416 at 489.

> the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures."

The legal foundation for the constitution of the ILO was amended by the General Conference in 1922, 1945 and 1946. The constitution as it now stands is reproduced in an Australian statute and, generally speaking, Australia has been an active, constructive and loyal member of the ILO from the beginning[5].

One of the most interesting and useful tasks of my life was to participate in a mission of the ILO to South Africa. The results of that mission were published in the *Official Bulletin* of the International Labour Office titled *Prelude to Change: Industrial Relations Reform in South Africa*[6]. Please do not tell me that the ILO is an ineffective international talk shop. I have seen it close up. I have witnessed the way in which it can be an important instrument to achieve basic rights and to protect human dignity. I took part in that endeavour as it concerned South Africa.

Some background will be useful. In 1948, the National Party won the general election in South Africa, based as it was then on a franchise that excluded the majority of the non-Caucasian population. It was part of the electoral mandate of the party that it would reinforce apartheid – a theory of separate development of the races within South Africa that already had support in earlier legislation. As the apartheid laws were strengthened, and new laws enacted, great disadvantages fell upon

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5 *International Labour Organisation Act* 1973 (Cth).

6 ILO, Fact-finding and Conciliation Commission on Freedom of Association, *Report Concerning the Republic of South Africa*: *Prelude to Change: Industrial Relations Reform in South Africa* (*ILO Official Bulletin* (Special Supplement), Vol. LXXV, 1982, Series B, Geneva, 1992) (hereafter "ILO Report").

South Africans who were not of the so-called “white” or European race. Group areas legislation and pass laws were strengthened as the machinery to enforce apartheid in daily life. To these racist laws, the membership of the United Nations responded with indignation.

In 1965, a special report on apartheid was presented to the Director-General of the ILO. Moves were then taken to challenge the credentials of the government of South Africa within the ILO. These moves were seen as a test case for a broader move to expel South Africa, as then represented, from the United Nations, of which it had been a foundation member. In 1966, as the government of South Africa proceeded to elaborate its apartheid laws and to stiffen those provisions, the government gave due notice of the intention of the country to withdraw from the ILO. In that way, it was hoped, South Africa would avoid a public vote on its credentials.

The withdrawal duly took effect. It was accompanied in South Africa by an increasing recognition of the injustice of the country’s industrial relations laws. Limits were imposed upon access by trade unions to work places. Unions were also banned from taking part in any ‘political’ activity, including challenging apartheid itself. They were required to organise themselves along racial lines. Slow and inefficient court procedures were left unreformed. Domestic, farm and most state employees were excluded from protection under the nation’s labour laws. At this time, from within South Africa, the situation seemed grim. Hope was not plentiful. Leaders of the freedom movement, including Nelson Mandela, were imprisoned on Robben Island. No-one could have forecast the changes that would come quite quickly.

In 1988, the Council of South African Trade Unions (COSATU) lodged a complaint with the ILO concerning the failure of South Africa to observe the requirements of international law as expressed in ILO conventions. By 1991, the South African government had rejected the COSATU complaint. Within the ILO, the procedures for determining the complaint became mired in legal arguments about the validity of the challenge and what the ILO should do about it. To its great credit, the ILO persisted with the complaint. It proceeded to initiate an investigation.

In February 1990, the State President, Mr. F.W. De Klerk, had made an important speech to the South African Parliament calling for the repeal and amendment of many of the apartheid laws. It was in the wake of this announcement[7] that the ILO decided to establish a Fact-finding and Conciliation Commission to investigate the labour laws of South Africa. After some initial difficulties, the De Klerk government agreed to receive the commission.

The Director-General of the ILO (Mr. Michel Hansenne) appointed a three-member body: Sir William Douglas, former Chief Justice of Barbados; Justice Rajsoomer Lallah, judge and later Chief Justice of Mauritius, and myself. We held our first meeting in Geneva in October 1991 when we each took the promises of office and began preparing for the mission. In February 1992, we proceeded to South Africa where we conducted an investigation in several parts of the country. Thereafter, we began to write our report, which was completed in October 1992.

I wish to acknowledge the presence at this Congress of a fine Australian lawyer, Mrs. Jane Hodges, who then worked in the Secretariat team for

[7] ILO Report, p40, pars 108-9.

our mission and who is still an officer of the ILO. Indeed, she is now the Director of the Bureau of Gender Equality. She continues to perform vital work for human rights. Our mission worked with great harmony, efficiency and focus. We knew that we enjoyed the special privilege of contributing to important changes in South Africa's economy and society. We were determined to ensure, so far as we could, that the changes we proposed would secure basic civil liberties of all South Africans, including the rights to freedom association and collective bargaining as precious attributes of a free society[8].

The ILO mission report contained a series of recommendations for enhancing the rule of law, protection of basic rights and observance of ILO principles. It called attention, particularly, to the *Protection of the Right to Organise Convention* (No.87, 1948); the *Right to Organise and Collective Bargaining Convention* (No.98, 1949); and the *Workers' Representation Convention* (No.135, 1971). We gave close scrutiny to the situation in South Africa and how its laws and practices could be brought into conformity with the ILO principles, with a view to the eventual return of that country to full membership of the ILO.

During our visit to South Africa, the mission had the advantage of meeting leaders of COSATU and employer organisations, government, church and other officials. We had the privilege to meet Mr. Nelson Mandela, then newly released from his long imprisonment. In our proposals, we were not content with generalities but drew on our own backgrounds and experience to offer practical suggestions for the ways forward in South Africa as it faced the prospect of transition to democratic government.

[8] ILO Report, p206, par.746.

I was present in Pretoria on 10 May 1994 when President Mandela was sworn into office. I later watched as the labour reforms were introduced by his government, based substantially on the ILO report. The *Labour Relations Act* 1995 (SA) implemented many of our recommendations. This was, I believe, a fine example of the way the organised international community can sometimes help to bring a country, divided and disengaged from the world community, into compliance with fundamental rules for human dignity and equality. When I hear critics of the ILO, I think back on the mission to South Africa and the utility of what we did on that occasion. All of us should remember such achievements. Above all, we should honour the faithful officers of the ILO who quietly and efficiently take part in such activities all the time.

THE NATIONAL PERSPECTIVE

By a series of chances, my career eventually took me away from industrial relations and led ultimately to my appointment to the final national court of Australia. That court, the High Court of Australia, has had a very long association with the national industrial tribunal. Nine of the forty Justices, up to my appointment, had been presidential members of the tribunal. Justice H.B. Higgins was the leader of the tribunal when it established its basic approach and principles. From time to time, cases came before me in the court which touched upon aspects of industrial relations law. Occasionally, Justice Gaudron and I would reflect upon the enjoyable days when we were legal practitioners before, and later presidential members of, the old Arbitration Commission.

As the first decade of the 21st Century unfolded in Australia, significant steps were taken to alter the basis upon which the Australian Industrial

Relations Commission had been established. These steps coincided, in part, with the celebrations of the centenary of the predecessors of the tribunal which fell in October 2004. I took part in that celebration. I contributed, with Professor Breen Creighton, to a book that was written to record, and celebrate, the many contributions of the tribunal to the economic and social life of Australia[9].

Specifically, I was present on an occasion, on 22 October 2004 when a hundred years of national conciliation and arbitration in this country were celebrated. At that event, I made a few predictions[10]:

> "From the High Court of Australia, the other independent national decision-maker expressly envisaged by the Constitution[11], I offer words of respect and praise on the centenary of industrial conciliation and arbitration in Australia.
>
> Let there be no doubt that the national conciliation and arbitration tribunal was expressed in our Constitution. In the words of Justice Isaacs, one of the founders of the Commonwealth, it was 'conspicuously on the face of the Constitution, the third party to every significant industrial dispute'[12].
>
> Each of the constitutional bodies, the High Court and now the Australian Industrial Relations Commission, required legislation to set them up so as to perform the functions envisaged at the creation. Each of the bodies has celebrated, within a year of the other, their centenary, which accompanied, in turn, the centenary of the Commonwealth. Each of the national bodies has played an influential, even pivotal, role in the history and culture of this continental country. Each has been an exemplar of good governance and the rule of law. Each has been an instrument for

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[9] J. Isaac and S. Macintyre (Eds), *The New Province for Law and Order: 100 Years of Industrial Conciliation and Arbitration*, Cambridge Uni Press, Cambridge, 2004. See ch3 "The Law and Conciliation and Arbitration", Ibid, 98.

[10] M.D. Kirby, "Industrial Conciliation and Arbitration in Australia – A Centenary Reflection", (2004) 17 *Australian Journal of Labour Law*, 229

[11] Australian Constitution, s71; cf. s51(xxxv).

[12] *R v The Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild of Australasia; Ex parte Merchant Allen Taylor & Co*. (1912) 15 CLR 586 at 609-10. See also *J.C. Williamson Ltd v Musicians' Union of Australia* (1912) 15 CLR 636 at 654.

> the defence of fundamental human rights and dignity. The overlap of personnel between the two bodies has existed over much of the century ... Our two institutions are therefore locked together in a yoke devised by the Constitution. Sometimes the burden has been easy; but not infrequently (as the recent decision in the *Electrolux* case shows[13], it is heavier and, from time to time, dictates a change of course."

As I made these remarks, I had no reason to believe that, within so short a time, there would be a challenge to the constitutional basis of the Australian way of resolving labour and employment disputes. Yet that challenge came in two guises. Each arose ultimately out of the enactment by the Australian Parliament of the *Work Place Relations Amendment (Work Choices) Act* 2005 (Cth).

In point of time, the first challenge concerned an extremely expensive campaign of paid media advertising in support of the legislation, authorised by the federal government and funded by the tax payer. This campaign, and the millions of dollars of public funds spent on it, were challenged before the High Court of Australia, in an important case, *Combet v The Commonwealth*[14]. The challenger was the then Secretary of the Australian Council of Trade Unions (ACTU). He alleged that the Parliament had not expressly approved the appropriation of funds for the particular purpose of "political advertising". He argued that this defect rendered the expenditure of such funds by the government of the day unconstitutional, so that it should be forbidden and the expenditure halted.

The second case was an even more direct challenge to the validity of the legislation enacted by the Australian Parliament. It produced

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13 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309.

14 (2005) 224 CLR 494.

proceedings in the High Court of Australia in *New South Wales v The Commonwealth* (*Work Choices Case*)[15]. That challenge contested the entitlement of the Parliament to shift the legal basis for Australia's national labour and employment law from the traditional reliance on the conciliation and arbitration power granted to the Parliament by s51(xxxv) of the Australian Constitution to a power, granted by s51(xx), which give the Parliament power to enact laws with respect to defined corporations.

Unusually, for most constitutional litigation, these two cases attracted a great deal of attention in Australia. From the start, the Work Choices legislation and the appropriation of very large funds to promote its acceptance in the community were highly controversial moves by the former (Howard) government. Undoubtedly, there was resentment in many sections of the community over the expenditure by that government of public funds to promote what was seen as partisan and divisive laws. Moreover, that enactment was itself highly controversial because it was viewed in many quarters as a significant shift from the protective provisions of s51(xxxv) to the provisions of s51(xx), lacking such protections.

Until the *Work Choices Case* before the High Court, it had generally been considered in Australia that the only way the national Parliament could enter upon the field of legislation on industrial relations by way of general measures was by invoking the Federal constitutional power to enact laws with respect to conciliation and arbitration. The *Work Choices Case*, however, by majority, held that this assumption was incorrect. The High Court of Australia upheld the invocation of the corporations power. It thereby pulled away the constitutional

[15] (2006) 229 CLR 1 at 2.

underpinning that, for more than a century, had provided the legal foundation for general federal legislation in this area in Australia.

To say the least, there was a great deal of consternation in many circles in Australia about each of those developments. Many citizens resented the paid political advertising. Many others resented the *Work Choices Act*. At a federal election held in November 2007, the Howard government was defeated at the polls. The Australian people elected a government led by Mr. Kevin Rudd. Exit polls at the time of the election indicated that resentment of the two measures I have mentioned was the major consideration that resulted not only in the defeat of the government but also the defeat of Prime Minister John Howard in his own electorate. Only once before in the history of the Australian Commonwealth had a prime minister been defeated in a general election. This was Mr. Stanley Bruce in 1929. And he was likewise defeated because of attempts to amend the conciliation and arbitration law.

The political considerations to which I have referred have to be distinguished from the legal challenges to the legislation. Essentially, the challenge to the appropriation law was founded upon arguments, based partly on constitutional history and on the express requirements of the Australian Constitution, obliging parliamentary approval for expenditures of revenues raised from the people by way of taxation. Although the majority of the High Court upheld the Appropriation Acts as adequate, sufficiently specific and constitutionally valid, Justice Michael McHugh and I dissented. We did so upon the footing that, to permit such an expenditure of funds, particular and express appropriation legislation was required. It was our view that the control by the

Parliament of the expenditure of public funds was central to the democratic accountability of the Executive through Parliament to the people. This therefore obliged a measure of precision in the parliamentary approval for appropriations of such sums. It would not justify vague and imprecise appropriations expressed in language of opaque generality ("higher productivity, higher pay work places"). In a sense, the *Combet* case concerned the growing use of "spin" in public life, and now in legislation, in many Western democracies. The minority's attempt to forestall that particular trend failed. However, public resentment in Australia was undoubtedly created by the advertising. This remained unabated after the failed challenge by Mr. Combet before the High Court.

The *Work Choices Case* involved an intricate exercise in Australian constitutional law. Once again, two Justices dissented, namely Justice Ian Callinan and myself. This alliance represented an unusual judicial unity ticket. The most conservative and liberal wings of the Court came together to protest at the alteration in the constitutional foundation of federal industrial laws. Justice Callinan based his objection on the footing of the 'original intent' of the founders of the Australian Commonwealth. I could never agree with that approach. For me, the objection to a shift of the use by the corporations power (otherwise undoubtedly a substantial one) rested on the high specificity of the particular provision expressly included in the Australian Constitution obliging any federal industrial legislation to proceed by way of the indirect procedures of conciliation and arbitration.

As I may never again have the opportunity and pleasure to remind an audience of the essence of my reasoning in this regard (and as it may be of present interest) I will do so now[16]:

> "Before a quietus is administered by this Court to these long-standing, basic and beneficial features of Australia's constitutional arrangements, reflected in past federal legislation, adopted and amended by successive Parliaments and a mass of case law, it is necessary to recall to mind the important guarantee of industrial fairness and reasonableness that has been secured by this Court's adherence to the requirements of s51(xxxv) over more than a century.
>
> The story can be traced back at least to the decision of Higgins J in *Ex Parte H.V. McKay* (the *Harvester Case*) which, with its successors, had a profound effect on the wages and conditions of life of Australian workers and their families. But it also extended to decisions concerning standard hours of work; the development of the principle of equal pay for women workers; fairness and training requirements in the conditions of juniors and apprentices and the removal of discriminatory employment conditions for Aboriginals. The regulation of excessive overtime to compensate workers and to encourage employers to a better system of organising the work; the introduction of bereavement or compassionate leave entitlements; the introduction of provisions for retrenchment for redundancy; and reinstatement in cases of unfair termination are just some of the matters arising in industrial disputes in Australia decided by the process of federal conciliation and arbitration over the course of a century. Work value cases frequently ensured attention to the provision of fair wages and conditions to manual and other vulnerable workers which market forces and corporate decisions alone would probably not have secured. Attention to particular conditions of work, including arduous, distressing, disagreeable, dirty or offensive work, instilled in Australian work standards an egalitarian principle not always present in the pure operation of the market or the laws and practices of other countries. The effect of this history, clearly anticipated by the language of the grant of constitutional power in s51(xxxv),

[16] Work Choices Case (2006) 229 CLR 1 at 218 [523]-[524] (citations omitted).

> profoundly affected the conditions of employment and hence of ordinary life of millions of Australians."

Although it is conventional in Australia to give a heads of the grant of federal legislative power a very broad reading, it is also normal that this approach is limited where the grant is itself subject to a condition that would be nullified by permitting other heads of power to be utilised to circumvent the constitutional guarantee[17]. Proceeding with industrial regulation through an independent and neutral decision-maker had been a guarantee of "a fair go all round" in the resolution of industrial disputes in Australia[18]. By the *Work Choices* Case, a century of decisional law in Australia was swept aside. It is unlikely that it will be restored. The neutral arbitrator and mediator are no longer constitutionally required. An ingredient for producing the socially advantageous features of Australia's federal industrial relations system is effectively written out of the Constitution.

Some lawyers in Australia knew little about the previous system. Some were possibly hostile to it. Yet for those, on all sides of the record, who took part in the application of the old law, its benefits were generally recognised as significant and incontestable. Undoubtedly, its features were most influential in the evolution of Australia's labour laws and practice.

Since my retirement from the High Court, I have been elected President of the Institute of Arbitrators & Mediators Australia (IAMA). There is a certain irony for me to observe the increasing tendency to introduce into

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[17] See e.g. *Bourke v State Bank of NSW* (1990) 170 CLR 276 at 285.

[18] *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548-549 [30], citing *Re Loty and Holloway v Australian Workers' Union* (1971) AR(NSW) 95. See also Work Choices Case (2006) 229 CLR 1 at 244 [609].

most forms of commercial and other dispute resolution in Australia alternative measures by way of conciliation, mediation and arbitration. Yet, at the very moment when these moves were afoot in the general legal system, a legal revolution expelled their beneficial constitutional foundation for the resolution of a form of disputation that was peculiarly suited to such procedures: employment disputes. Mediation, conciliation and arbitration are usually most successful where the parties to a contest have shared reasons for seeking an agreed resolution by reason of their ongoing relationships. Normally this is the case in employment disputes. In that sense, the adoption by the Australian Constitution of s51(xxxv) was a prescient move by the founders. It anticipated by a century the shift to alternative dispute resolution outside the courts that is now underway elsewhere in Australian legal disputation.

Of course, opponents have emerged from the woodwork to attack the establishment of Fair Work Australia and even to emphasise its continuity with the national tribunals that had preceded it. These critics denounce what they see as the "return" of the "cosy IR club"[19]. As someone who was only a temporary member of that club, and who has long since ceased to use the club's facilities, I often questioned the world in which those commentators must live.

The long list of just, industrial determinations, that are the legacy of the Australian industrial tribunals, made Australia a fairer and more egalitarian place. Every now and again, these economic rationalists need to ask themselves what work is for. Why people live. Why

[19] M. Stutchbury, "Cosy IR Club Returns", *The Australian*, 7 July 2009, p10; M. Stutchbury, "Back to Bad Old Days", *The Australia*, 24 August 2009, p8.

economics operates in society. One would think that they would have learned some lessons from the chaos that has been occasioned by the global financial crisis, substantially as a result of unregulated, or inadequately regulated, financial markets. However, these dogmatists learn nothing from the past. They are like the Bourbons truly, they are industrial ayatollahs.

The fact is that there are values in life other than economic maximisation. The list of equitable work provisions that I included in my reasons in the *Work Choices Case,* strengthened the Australian economy. More important, they reinforced the democratic and egalitarian features of our society. It is my hope that Fair Work Australia will find an honoured place in the continuity of the national industrial relations tribunals in Australia. Employers and employees still enjoy the facility of a common ground. As in the past, the national industrial relations tribunal can afford the neutral space in which to explore that common ground and to achieve efficient and equitable outcomes[20]. Whether this will prove so will depend on the terms of the legislation, the skill of the tribunal members, and the will of the disputing parties.

A PERSONAL PERSPECTIVE

I come finally to a personal observation. It grows out of my previous theme. It demonstrates the fact that the struggle for human dignity and equality are never over.

A few weeks ago, I was in Geneva attending a meeting of the Human Rights Reference Group of UNAIDS. A presentation was made to the meeting by officers of the ILO, concerning a new Recommendation for

[20] M. Steketee, "Unions and Employers Share Common Ground", *Weekend Australian*, 4 July 2009, p21.

the protection of workers living with HIV and AIDS that is being piloted through the organs of the ILO. Because of the overlap of the work of ILO in this respect with UNAIDS, and as one of the participating bodies of the United Nations and UNAIDS, a robust exchange took place at the meeting. I was glad to see the ILO taking new initiatives to protect employees from stigma, discrimination and injustice. If those infected with HIV have access to anti-retroviral drugs, such employees can continue, possibly indefinitely, to play a full and active part in the economy and in full and productive lives for themselves and their families.

Because of my own sexuality, I looked closely of the provision of the draft ILO Recommendation concerning one cohort of persons particularly vulnerable to HIV who, in Australia and elsewhere, have been in the forefront of measures designed to reduce the spread of the virus. I refer to men who have sex with men (MSM). This group, and also commercial sex workers (CSWs), injecting drug users (IDUs), and dependent women, prisoners and refugees, all represent especially vulnerable groups from the perspective of UNAIDS, but also of the ILO.

The emerging ILO Recommendation is undoubtedly a welcome move. However, some of its language is obscure. Some member states are reportedly resistant to the preventive strategies that are essential to empower the vulnerable groups and to reduce the spread of HIV. Even today, approximately 2.7 million people every year become infected with HIV. Very large numbers of them live in sub-Saharan Africa, including in South Africa which had just overcome the blight of apartheid when the full force of HIV/AIDS struck.

The first time I saw in an Australian federal statute a reference to the need for special protections for persons on the ground of sexual orientation (there called "sexual preference") was in an Act designed to implement, as part of federal law, provisions of the ILO *Convention concerning Discrimination in Respect of Employment and Occupation* of 1958 and also the *Termination of Employment Convention* of 1982. In the former Convention, Article 1 contained an inclusive definition of discrimination as including "any distinction, exclusion or *preference* on the basis of race, colour, sex, religion ... (etc)". That Convention was invoked by the Australian parliament as a basis for enacting a federal law to provide remedies against forbidden discrimination or unjust termination of employment in Australia. The *inclusive* character of the ILO definition was invoked to add to the list of forbidden grounds certain other bases, not expressly stated by the ILO Convention, including "sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin"[21].

In this way, perhaps unwittingly, the inclusive definition in the ILO Convention became a foothold in Australia for a slightly wider definition in the relevant federal law. I am not sure that the ILO can take much credit for this expansion of coverage. Rather, the credit would appear to lie with the Australian government and Parliament which concluded that the ILO Conventions were too narrow, restricted and old-fashioned.

That is the history of how the prohibition on discrimination against employees on the basis of their "sexual preference" and the prohibition

[21] See *Industrial Relations Amendment Act* (No.2) 1994 (Cth), Objects. Discussed in *Industrial Relations Case* (1996) 187 CLR 416 at 471.

of their termination on such grounds came to be expressed in federal law in Australia. It would have been better if the ILO had itself explicitly adopted such a ground and forbidden it. But, instead, the ILO list was still largely anchored in the traditional language of the *Treaty of Versailles* of 1919. It had not caught up with the scientific, social and other advances that taught the need to prohibit discrimination on other grounds analogous to race.

The position today, in our world, is that discrimination against persons on the basis of their sexual orientation is still a major challenge awaiting an effective human rights response, including by the ILO. To some extent, the urgency of providing a response has been created by the AIDS epidemic. However, the fundamental reason for adopting such provisions is not AIDS as such. By extension from race, colour and sex, it is the fact that individuals do not choose their sexual orientation. They cannot change it, easily or at all. To discriminate against them, or to terminate their employment on such a ground, is as wrong as doing so on the basis of race, colour or sex. Moreover, such discrimination reinforces a kind of sexual apartheid, by which people will only tolerate or value those who seem to be like themselves. This was the vice that lay at the heart of racial apartheid. Sadly, a great deal of sexual apartheid exists in the African continent which should have learned from the lessons of apartheid. Fortunately, such discrimination is prohibited by South African law following the determination of those who wrote the new Constitution. They were determined that their country would be founded on broad principles of equality and mutual respect.

Elsewhere in Africa and specifically in 41 of the 53 countries of the Commonwealth of Nations, the law retains the criminal laws that

penalise private adult sexual relations between people of the same sex. This is a shocking legacy of colonial times. It is a legacy that all of the developed countries of the Commonwealth of Nations have repealed. The greatest resistance to change lies, however, in developing countries. They bear out Bishop Desmond Tutu's wise words that "everyone must have someone to look down on".

The journey of human rights respect is never ending. In the ILO, the treatment of the issues of sexual orientation has been, at best, muted and generally rather ineffective. There seems to be a lack of resolve and of leadership on this subject. Just imagine what an outrage it would have been if there had been a similarly passive attitude to racial apartheid in the 1960s and thereafter. Just imagine how weak the ILO would have seemed if its Director-General had not, in 1965, commissioned the special report on apartheid. If the ILO remains committed to the fundamental values of human rights, dignity and equality, it is well past time that it should take strong and firm initiatives on this issue. Such initiatives depend on principled leadership.

I am at this Congress in Sydney with my partner Johan van Vloten, who has shared my life these past 40 years. If anyone has a problem about this, they need to get over it: just as the 'white' rulers of South Africa had to get over their notions of racial separateness and superiority. Just as Australians up to my generation had to get over their notions of 'White Australia'.

From Sydney and this Congress the message should go back to the ILO in Geneva, loud and clear. We applaud you for your work to combat racism in South Africa. We admire you for your contribution to the

emergence of a new South Africa freed from the narrowness of racism. But there are new challenges to fundamental human rights that need to be addressed by the ILO. They arise in the work place. They are therefore your concern. They certainly involved issues presented by the AIDS epidemic. However, more fundamentally, they concern issues of discrimination and termination on the grounds of a person's sexual orientation. From Sydney, we should call on the ILO to be bolder and braver. It can be done. The excuses are running out. It behoves us all to say so clearly and emphatically. And to follow words with actions; innovations with implementation. The time for progress on this issue is now. Racism is but one of the infantile disorders of human prejudice. The ILO and every civilised person, must be against them all. In the words of the old union song, presented to us with gusto by the Sydney Gay & Lesbian Choirs: "We shall not give up the fight ... Holding hands together we will have the victory".

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