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LABOUR LAW IN TRANSITION: INTERNATIONAL, NATIONAL AND PERSONAL PERSPECTIVES

Australian National University
College of Law
Inaugural Phillipa Weeks Memorial Lecture in Labour Law
Monday 7 September 2009.

The Hon. Michael Kirby AC CMG

AUSTRALIAN NATIONAL UNIVERSITY

COLLEGE OF LAW

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REMEMBERING PHILLIPA WEEKS

Memorial lecturers I have known have launched into their themes without even a passing mention of the honorand whose life is celebrated. That is not my style at all. Nor would it be appropriate in this labour law lecture dedicated to the memory of Phillipa Weeks.

In the three years since she died, there have been many occasions in this University, and beyond, to remember Phillipa Weeks and to honour her work as a scholar, teacher and mentor to her students in labour law. Although I did not know her well, I have been struck by the intensity of the tributes that have been paid to her since her death.

[**] Delivered as the Inaugurual Phillipa Weeks Memorial Lecture at the Australian National University, College of Law, Canberra, on Monday 7 September 2009. Parts of this lecture draw upon, and develop, themes expressed in an address by the author to the conference of the International Industrial Relations Association, Sydney, 26 August 2009.

[*] Justice of the High Court of Australia (1996-2009); Deputy President of the Australian Conciliation & Arbitration Commission (1975-83); President, Institute of Arbitrators & Mediators Australia (2009-).

A survey of her life, work and qualities, was presented as a eulogy by Dean Michael Coper at the Holy Rosary Catholic Church in Watson, Canberra on 9 August 2006, five days after her passing. An even fuller tribute was published by Dean Coper in the records of the School[1]. In the *Australian Journal of Labour Law*[2], colleagues of Professor Weeks combined to write an unusually lengthy obituary describing her academic life, achievements and scholarship. In order to understand the reasons why so many people loved and admired Phillipa Weeks, it is necessary to be recall once again of her remarkable life, cut short by her untimely death.

She was born in 1953 in Harden, New South Wales, the oldest of four children. In 1955, her family moved to Cootamundra and there she received her early education. This culminated in a period at Cootamundra High School where, in Year 12, she was selected as school captain. That year, 1969, she also won a scholarship to the Australian National University (ANU). However, she was only 16 years of age. Too young, under the rules, to hold the scholarship. Still, because of her outstanding results in the New South Wales Higher School Certificate (1st in the State in Modern History; 5th in French and 16th in English) an eagle-eyed Registrar of the University contacted her. He explored her entitlements. He discovered that, although the total number of subjects she had studied was below the established norm, this was only because her country high school could not offer her the wide range of subjects suitable to her interests. She was duly admitted to the ANU. So began an academic career of outstanding quality.

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1 M. Coper, "Phillipa Weeks 1953-2006", eulogy, funeral, Canberra, unpublished; "Phillipa Weeks 1953-2006", tribute delivered to the memorial gathering at the Australian National University to celebrate the life of Phillipa Weeks, 31 August 2006, Canberra.

2 C. Fenwick, B. Ford, Shae McCrystal, Rosemary Owens "Tribute to the Late Professor Phillipa Weeks" (2006) 19 *Australian Journal of Labour Law*, 243-4.

Like Phillipa Weeks, I won the first place in the State of New South Wales in Modern History and General Mathematics. I also came up to university, in my case Sydney University, at 16 years. Often in the years that followed, I wondered whether I should have pursued a career teaching history, as Phillipa Weeks initially intended. I asked myself whether it would have involved less risk of conflict. Perhaps Phillipa Weeks occasionally posed the same questions for herself. Yet, when we witnessed the animosities involved in the so-called "history wars" in Australia, perhaps we concluded that we had done well to elect for the somewhat structured disputes of legal discourse.

Phillipa Weeks's first degree was in history, in which she graduated with First Class Honours in 1974. One of her teachers, Professor Manning Clark, likened her in talent to other famous pupils of his, Geoffrey Blainey and Ken Inglis. She commenced academic life, tutoring in history at the Flinders University of South Australia. However, by 1975, she had returned to Canberra to join the Department of Foreign Affairs. In 1976, with the encouragement of her husband, Ian Hancock, she enrolled in the School of Law as a graduate student. In her last year of these studies, she was recruited by Professors David Hambly and Don Greig to teach family law, despite the fact that, at the time, she was still an undergraduate student in the discipline. She graduated in law with First Class Honours in 1979.

Whilst teaching family law, something caught Phillipa Weeks's eye and diverted her to the specialty of labour law. By 1982, she had received tenure as an academic in that discipline. By 1987, she had won her Master's degree in Law with a thesis on trade union law which won the

Crawford Prize. She quickly built a reputation as one of Australia's finest academic labour lawyers. She combined her teaching and scholarly life with positions as Associate Dean and Head of School. In 2001, she was appointed a professor of law at the ANU. Her inaugural professorial lecture in May 2002 was, presciently enough, on the subject "Fairness at Work".

Phillipa Weeks then began writing a text with her colleague Professor Marilyn Pittard of Monash University titled *Public Sector Employment in the 21st Century*. It was a natural enough topic for a labour law professor, based in Canberra. Tragically, her illness supervened. However, she stayed focused and cheerful, checking the proofs of the book to the very end.

The extraordinary compilation of tributes to Phillipa Weeks was assembled soon after her death. Her erstwhile colleagues and pupils marked her career with expressions of affection and respect. David Partlett, now a Dean of Law in the United States, described her "distinct Australianness". She was a "country girl through all the learning". Ian Holloway, now a Dean of Law in Canada, likened her grace to that of the Queen: "Most noble, dutiful, loyal". Her partner, Ian Hancock, described her as his "spouse and best friend; the shrewdest of critics; the calmest of partners; the wisest of counsellors". Shortly before her death, she was awarded a University medal for outstanding service to the ANU. Tributes and memorials aplenty have followed. This memorial lecture is but the latest of them.

The common law tradition does not always give proper respect to its legal academics and scholars. Its iconology is dominated by judges and

advocates, whose special skill is in solving particular problems justly and lawfully. If these practitioners trip over a legal principle, it is often by sheer accident. I shared that legal culture until my eyes were opened during a decade of service in the Australian Law Reform Commission. There I learned the great capacity of legal scholars, and their inclinations to think deeply about the law; to identify its undercurrents; to conceptualise its principles; and to provide the taxonomies by which it could be understood and made to move forward.

Phillipa Weeks had these sterling qualities as a scholar. She left a large legacy. In the presence of her husband and family, I am privileged to pay this tribute to her. I can do so with enthusiasm because my own career, as I shall show, took me too into several aspects of labour law. Many of the commercial and insolvency lawyers, who climb the ladder to fame and fortune in the law, have little, if any, acquaintance with labour law. Sometimes they even feel hostility towards it. Yet it was not always so. And it should not be so because labour law is people law: it concerns ordinary citizens in great numbers. I believe I can speak of Phillipa Weeks's chosen discipline with knowledge and appreciation.

I propose to describe a number of perspectives of labour law. I will start with an international perspective. I will follow with a national perspective and talk of the transition from the *Work Choices* to *Fair Work* legislation of the Federal Parliament. Finally, I will offer some personal reflections because of the characteristic of labour law to touch ordinary citizens in their capacity of employment. It is there that the individual sometimes meets the fundamental principles of universal human rights. I believe that this is the way Phillipa Weeks looked on labour law. Her remarkable intellect saw the discipline in its many facets. However, she

never lost a feeling for its significance in the lives and homes of those it affected most.

INTERNATIONAL PERSPECTIVE

Australia was a foundation member of the International Labour Organisation (ILO)[3]. That body was originally established pursuant to 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 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 constitution of the ILO was amended by the General Conference in 1922, 1945 and 1946. As it now stands, the constitution is reproduced in an Australian statute. Generally speaking, Australia has been an active, constructive and loyal member of the ILO from the beginning[4].

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

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

[4] Now pursuant to the *International Labour Organisation Act* 1973 (Cth).

Prelude to Change: Industrial Relations Reform in South Africa[5]. Please do not tell me that the ILO is a toothless international talk shop. I have seen it close up. I have witnessed the way in which it can be an important instrument for securing basic rights and protecting 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 the electorate) then was on a franchise that excluded most of the non-Caucasian population. It was part of the electoral commitment of the party that it would enforce apartheid – a theory of separate development of the races within South Africa that had already appeared in much earlier legislation. As the apartheid laws were strengthened, and new laws enacted, great disadvantages fell upon South Africans who were not of the so-called "white", or European, race. Group areas legislation and pass laws were reinforced as a means of upholding apartheid in daily life. The membership of the United Nations responded to these racist laws 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 effort 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 expand its apartheid laws and to stiffen their provisions, the government gave notice of the intention of the country to withdraw from the ILO. In

[5] 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").

that way, it was hoped, South Africa would avoid a public vote on its credentials that could spill over to the United Nations as a whole.

South Africa's withdrawal took effect. Yet in South Africa, it was generally accompanied by an increasing recognition of the injustice of the country's industrial relations laws. Limitations were imposed upon access by trade unions to work places. Unions were also banned from taking part in any 'political' activities, including challenging apartheid itself. They were required to organise themselves along racial lines. Slow and inefficient industrial 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 very grim. Hope was thin on the ground. Leaders of the freedom movement, including Nelson Mandela, were imprisoned on Robben Island. No-one could have forecast the changes that would quickly come.

In 1988, the Council of South African Trade Unions (COSATU) lodged a complaint with the ILO addressed to 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 credit, the ILO persisted with the complaint. It proceeded to initiate an investigation.

Meanwhile, in February 1990, the State President of South Africa, 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[6] 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 entered into our offices 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. It was completed in October 1992.

I acknowledge the work in completing the report of a fine Australian lawyer, Mrs. Jane Hodges, who then worked in the Secretariat team for our mission. She is still an officer of the ILO. Indeed, she is now the Director of the Bureau of Gender Equality. She continues to perform important 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 for all South Africans, including rights to freedom of association and collective bargaining: precious attributes of a free society[7].

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

[7] ILO Report, p206, par.746. See also the *Universal Declaration of Human Rights*, art.23. Adopted 10 December 1948. GAPres 217A (III), UN doc A/810, at 71 (1948); and *International Covenant on Economic, Social and Cultural Rights*, arts.6, 7 and 8. 993 UNTS No.14531 (1976).

The ILO report contained a series of recommendations for enhancing the rule of law, the 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). It 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 of meeting 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.

I was present in Pretoria on 10 May 1994 when Nelson Mandela was sworn into office as President of a non-racial South Africa. I later watched as labour reforms were introduced by his government, based substantially on the ILO report. The *Labour Relations Act* 1995 (SA) implemented many of the ILO 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, into compliance with fundamental rules for human dignity and equality. When I hear critics of the ILO and multicultural agencies of the United Nations, I think back on our mission to South Africa and the utility

of what we accomplished 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.

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 nation's industrial tribunals. Nine of the forty Justices, up to my appointment, had been presidential members of that tribunal. Justice H.B. Higgins was the leader of the tribunal in early days when it established its basic approach and principles. From time to time, cases came before me in the High Court which touched upon aspects of industrial relations law. Occasionally, Justice Gaudron and I, who had each served on the Australian Conciliation and Arbitration Commission, would reflect upon the happy days when we were legal practitioners practising before, and later presidential members of, the old Commission.

As the first decade of the 21st Century opened in Australia, the government took significant steps to alter the basis upon which the Australian Industrial Relations Commission had been established more than a century earlier. These steps coincided, in part, with the celebrations of the centenary of the establishment of the national tribunal which occurred 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[8].

Specifically, I was present on an occasion, on 22 October 2004 when a hundred years of national conciliation and arbitration in Australia were recognised. On that occasion, I made a few predictions[9]:

> "From the High Court of Australia, the other independent national decision-maker expressly envisaged by the Constitution[10], 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'[11].
>
> 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 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

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[8] 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.

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

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

[11] *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.

Electrolux case shows[12]), 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 change in 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).

The first challenge concerned an extremely expensive campaign of media advertising to support the amending legislation. It was authorised by the federal government and funded by the taxpayer. 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*[13]*.* The challenger was the then Secretary of the Australian Council of Trade Unions (ACTU), Mr. Greg Combet. He submitted 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. Accordingly, the expenditure should be halted.

The second case was an even more direct challenge to the validity of the legislation enacted by the Australian Parliament. It resulted in proceedings in the High Court of Australia in *New South Wales v The Commonwealth* (*Work Choices Case*)[14]. That challenge contested the

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

13 (2005) 224 CLR 494.

14 (2006) 229 CLR 1 at 2.

entitlement of the Parliament to shift the legal basis for Australia's national labour and employment law from its traditional reliance on the conciliation and arbitration power granted to the Parliament by s51(xxxv) of the Constitution to a power, granted by s51(xx), which give the Parliament the 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 were seen as partisan and divisive laws. Moreover, that enactment was itself highly controversial because it was viewed in many quarters as a significant departure from the protective provisions of s51(xxxv) of the Constitution to the provisions of s51(xx), lacking such protections.

Until the *Work Choices Case*, it had generally been considered in Australia that the only way the national Parliament could enact general legislation on industrial relations was by invoking the federal constitutional power with respect to conciliation and arbitration. In the *Work Choices Case*, however, by majority, the High Court held that this assumption was incorrect. The Court upheld the use of the corporations power. It thereby pulled away the constitutional underpinning that, for more than a century, had sustained general federal legislation in this area.

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 resulting 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. He was likewise defeated because of attempts to amend the conciliation and arbitration law.

Stanley Melbourne Bruce was a man of great accomplishment. As an historian *manquée*, Phillippa Weeks would have known that Bruce had a troubled relationship with the Commonwealth Court of Conciliation and Arbitration. According to his biography, in the *Australian Dictionary of Biography*[15], "[Bruce] never had a consistent policy on industrial relations".

In 1926, Bruce attempted to alter the federal Constitution to enlarge the federal control over the economy and tariff policy and to expand the federal legislative powers with respect to industrial relations. His constitutional amendment was not passed at a referendum of the electors. It was to join a number of equally futile attempts by successive federal governments to increase the federal legislative power over industrial relations.

[15] Bruce, Stanley Melbourne, *Australian Dictionary of Biography*, Vol.7 (1891-1939), 455 at 457-8.

Frustrated by this rejection, Bruce moved towards firmer federal control of the Australian economy. Following a major review of the *Conciliation & Arbitration Act* 1904 (Cth), undertaken in 1928, an amendment obliged the Arbitration Court to consider the economic effects of its awards. It also included penalty clauses and provisions for compulsory court-supervised ballots of union members wishing to strike. When an interstate waterside strike loomed, Bruce introduced legislation to deal with waterfront labour. This was designed to break the waterside union. In this respect too, there were parallels with the moves of the Howard government on the waterfront between 1996 and 1998[16].

In the Budget Session of the Federal Parliament in 1929, Prime Minister Bruce introduced a Bill to abolish the Commonwealth Conciliation and Arbitration Court. W.M. Hughes marshalled the dissidents, opposed to such a radical move. They combined to bring about Bruce's defeat in parliament. An election was called for October 1929. According to the biographer, the result was:

> "Bruce fought a poor campaign in defence of a measure which it seems doubtful he ever desired. When the Labor Party sought some arrangement which would save the Court, Bruce offered to stand aside for Latham. Latham insisted the Bill go forward. It was a tough budget and Bruce did not expect to win the election but the loss of his own seat was unexpected. On 22 October 1929 he ceased to be Prime Minister."

Mr. Combet's challenge to the appropriation law invoked by the Howard government was founded upon arguments, based partly on constitutional history and partly on the express requirements of the Australian Constitution. Those provisions require parliamentary

[16] Cf. *Patrick Stevedores Operations No.2 Pty. Ltd. v Maritime Union of Australia* (1998) 207 CLR 391.

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 to support the government's advertising campaign, Justice Michael McHugh and I dissented. We did so upon the footing that, to permit such an expenditure of funds, clear and express appropriation legislation was required. It was our view that the control by the Parliament over the expenditure of such 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 very large sums. It would not be satisfied by vague and imprecise appropriations expressed in language of high generality ("higher productivity, higher pay work places"). In a sense, the *Combet* case concerned the growing use of "spin" in public life in many Western democracies, and now in Australian legislation. The minority's attempt to forestall that 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. Our alliance constituted an unusual judicial unity ticket. The most conservative and liberal wings of the Court came together to deny the attempted alteration in the constitutional foundation of federal industrial laws in Australia. Justice Callinan based his objection on the 'original intent' of the founders of the Australian Commonwealth. I did not agree with that approach. For me, the objection to a shift of the use by the corporations power (otherwise

undoubtedly a very substantial power) rested on the high specificity of the particular provision expressly included in the Australian Constitution requiring 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 others of my reasoning in this regard (and as it may be of present interest) I will do so now[17]:

> "Before a *quietus* is administered by this Court to these longstanding, 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[18].
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> The story can be traced back at least to the decision of Higgins J in *Ex parte H V McKay* ("the *Harvester Case*")[19] 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[20]; the development of the principle of equal pay for women workers[21]; fairness and

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

18 M.D. Kirby, "Industrial Conciliation and Arbitration in Australia - A Centenary Reflection", (2004) 17 *Australian Journal of Labour Law* 229, especially at 242-244.

19 (1907) 2 CAR 1. See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* [1967] HCA 47; (1967) 118 CLR 219 at 231-232 per Barwick CJ, 265 per Windeyer J. Eventually the use of a general hearing for the purpose of deciding the basic wage received the sanction of this Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389. See also *R v Blackburn; Ex parte Transport Workers' Union of Australia* [1952] HCA 45; (1952) 86 CLR 75; McGarvie, "Principle and Practice in Commonwealth Industrial Arbitration After Sixty Years", (1964) 1 *Federal Law Review* 47 at 72-74.

20 *Australian Timber Workers' Union v John Sharp and Sons Ltd* (1920) 14 CAR 811, (1921) 15 CAR 836 and (1922) 16 CAR 649; cf *Amalgamated Engineering Union v J Alderdice & Co Pty Ltd* (1927) 24 CAR 755; *Australian Railways Union v Victorian Railways Commissioners* (1937) 37 CAR 937 at 938; *R v Galvin; Ex parte Metal Trades Employers' Association* [1949] HCA 12; (1949) 77 CLR 432 at 447-448.

21 *National Wage Cases* (1967) 118 CAR 655 at 660. See *Equal Pay Cases* (1969) 127 CAR 1142; *National Wage and Equal Pay Cases* (1972) 147 CAR 172.

training requirements in the conditions of juniors and apprentices[22] and the removal of discriminatory employment conditions for Aboriginals[23]. The regulation of excessive overtime to compensate workers[24] and to encourage employers to a better system of organising the work[25]; the introduction of bereavement or compassionate leave entitlements[26]; the introduction of provisions for retrenchment for redundancy[27]; and reinstatement in cases of unfair termination[28] are just some of the matters arising in industrial disputes in Australia decided by processes 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[29]. 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[30] 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), profoundly affected the conditions of employment, and hence of ordinary life, of millions of Australians."

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[22] *Amalgamated Society of Engineers v Adelaide Steam-ship Co Ltd* (1921) 15 CAR 297 at 325; *Australian Telegraph and Telephone Construction and Maintenance Union v Public Service Commissioner and Postmaster-General* (1916) 10 CAR 602 at 613-614 per Higgins J; *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 34 CAR 449 at 459-462.

[23] *Cattle Station Industry (Northern Territory) Award* (1966) 113 CAR 651; *Pastoral Industry Award* (1967) 121 CAR 454 at 457-458.

[24] *Glass Workers Award* (1953) 76 CAR 122.

[25] *Kennedy and Bird v Carpenters, Painters and Labourers employed by the Company* (1962) 100 CAR 524; *Metal Trades Award* (1963) 105 CAR 1015.

[26] *Commonwealth Hostels Award* (1962) 100 CAR 775.

[27] *Merchant Service Guild of Australia v Department of Main Roads, New South Wales* (1971) 140 CAR 875. But see *R v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association* [1952] HCA 38; (1952) 86 CLR 283.

[28] O'Donovan, "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission; Jurisdiction and Practice", (1976) 50 *Australian Law Journal* 636; cf *Blackadder v Ramsey Butchering Services Pty Ltd* [2005] HCA 22; (2005) 221 CLR 539 at 548 [28]- [29].

[29] See, eg, *Metal Trades Award* (*re Work Value Inquiry*) (1967) 121 CAR 587; *Vehicle Industry Award* (1968) 124 CAR 293 at 308.

[30] *Waterside Workers Federation v Commonwealth Steamship Owners Association* (1915) 9 CAR 293 at 302-303; *Amalgamated Society of Engineers v Broken Hill Proprietary Co Ltd* (1920) 14 CAR 22.

Although it is conventional in Australia to give a grant of federal legislative power a very broad reading, it is also normal that this approach is excluded 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[31]. 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[32]. By the *Work Choices* Case, a century of decisional law in Australia was swept aside. It is unlikely that it will now be restored. The neutral arbitrator and mediator are no longer constitutionally essential. 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 know little about the earlier system. Some who do know are 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. Undoubtedly, its features were influential in the evolution of Australia's labour laws and social values.

Since my retirement from the High Court, I have been elected President of the Institute of Arbitrators & Mediators Australia (IAMA). In this capacity, it is ironic for me to observe the increasing tendency to introduce into commercial and other dispute resolution in Australia alternative measures by way of mediation, conciliation and arbitration. At the very moment when these moves were introduced into the general

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

32 *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].

legal system, an interpretive legal revolution expelled their constitutional foundation for the resolution of a form of disputation that was peculiarly suited to such procedures: industrial and employment disputes. Mediation, conciliation and arbitration are usually most successful where the parties to a contest have shared reasons for seeking an agreed resolution. Normally, this is the case in employment disputes where there are usually ongoing relationships. In that sense, the adoption by the Australian Constitution of s51(xxxv) was a far-sighted 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 to attack the establishment of Fair Work Australia, the tribunal which the Rudd Government has put in place to replace the Work Choices laws. Those critics have emphasised the effective continuity of the new law with the national industrial tribunals that had preceded it. These critics denounce what they see as the "return" of a "cosy IR club"[33]. 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 such commentators must live.

The long list of industrial determinations that are the legacy of the Australian industrial tribunals made Australia a fairer and more egalitarian place. Every now and again, such economic rationalists should ask themselves what work is for. Why people live and work. Why economics operates in society. One would think that they would

[33] 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.

have learned some lessons from the chaos occasioned by the global financial crisis, substantially as a result of unregulated, or inadequately regulated, financial markets. However, 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 the equitable work provisions that I included in my reasons in the *Work Choices Case,* undoubtedly strengthened the Australian economy. More importantly, they reinforced the democratic and egalitarian features of Australian society. It is my hope that Fair Work Australia will, indeed, 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 venue. As in the past, the national industrial relations tribunal can afford a neutral space in which to explore common ground and to achieve efficient and equitable outcomes[34]. Whether this will prove so will depend on the powers conferred by the legislation, the skill of the tribunal members and the will of the disputing parties.

PERSONAL PERSPECTIVE

I come finally to a personal observation. It grows out of my previous themes. It demonstrates the fact that the struggle for human dignity and equality is 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. It concerned a new Recommendation for

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

the protection of workers living with HIV and AIDS. This Recommendation is being piloted through the organs of the ILO[35]. Because of the overlap of the work of ILO in this respect with UNAIDS, and as the ILO is one of the participating bodies of the United Nations in UNAIDS, a vigorous 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 people infected with HIV have access to anti-retroviral drugs, they 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 at 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 sex workers (CSWs), injecting drug users (IDUs), and dependent women, prisoners and refugees, all represent specially vulnerable groups from the perspective of UNAIDS, but also of the ILO.

The evolving ILO Recommendation is a welcome move. However, some of its language is obscure. Some member states are reportedly resistant to the preventive strategies that are essential to empowering the vulnerable groups to confront HIV and reduce the spread of the virus. Even today, approximately 2.7 million people every year become infected with HIV. Very large numbers of them live in sub-Saharan

[35] International Labour Organisation, *An ILO Code of Practice on HIV/AIDS and the World of Work*, Geneva 2001; *ibid*, *HIV/AIDS and the World of Work*, Report IV(2). International Labour Conference, 98th Session (Item 4).

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 Australian 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 discrimination resulting in unjust termination of employment in Australia. The *inclusive* character of the ILO definition was utilised to add to the list of expressly forbidden grounds several other bases, not specifically forbidden 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"[36].

In this way, perhaps unwittingly, the inclusive definition in the ILO Convention became a foothold in Australia for a 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.

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

That is the history of how the prohibition on discrimination against employees on the basis of their "sexual preference" and the prohibition of their termination on such grounds came to be expressed in federal legislation in Australia. It would have been better if the ILO had itself expressly 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.

In our world, the position today 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 illustrated by the AIDS epidemic. However, the fundamental reason for adopting such provisions is not HIV/AIDS, as such.

By analogy with race, colour and sex, 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. To demand that they change is akin to requiring dark complexioned people to use skin whitener and hair straightener. Such discrimination reinforces a kind of sexual apartheid, by which people will only tolerate, or value, those so long as they appear 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 racial apartheid. Sexuality discrimination is

prohibited by South African law following the decision of those who wrote and adopted the post-apartheid Constitution. They were committed to ensuring that their country would be founded on principles of equality and mutual respect for all.

Elsewhere in Africa, including in 41 of the 53 countries of the Commonwealth of Nations, criminal laws remain in place to penalise private adult sexual relations between people of the same sex. This is a shocking legacy of colonial times. It is a left-over that all of the developed countries of the Commonwealth of Nations, including Australia, have repealed. The resistance to change lies, however, in developing countries and especially in Africa. It bears out Bishop Desmond Tutu's words that "everyone must have someone to look down on". Some African countries (Nigeria, Uganda and Rwanda) far from repealing such laws have recently enacted, or proposed, laws to strengthen them.

We should applaud the ILO for its work to combat racism in South Africa. We should admire it for its contribution to the emergence of a new South Africa, freed from the blight of racism. But there are now new challenges to fundamental human rights that need to be addressed by the ILO. They arise specifically in the work place. They are therefore part of the ILO's mission. In the world of work, if you like to call it such. They involve issues presented by the AIDS epidemic. They also concern issues of employment discrimination and termination on the grounds of a person's sexual orientation.

The ILO should be bolder and braver. Its excuses for inactivity and dawdling on this issue are running out. It behoves us all to say so

clearly and emphatically. And to follow words with action. Racism is but one of the infantile disorders of human prejudice. The ILO and everyone engaged in labour law must become a leader in confronting every form of irrational prejudice. On racial discrimination at work the ILO gave a lead. It needs to learn from that experience and to be stronger in confronting work discrimination on grounds of sexuality and HIV status[37].

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[37] The main instrument of the ILO in the area of discrimination is the *Discrimination (Employment and Occupation) Convention*, 1958 (No.111). Although this covers, inter alia, "sex", it does not make explicit reference to "sexual orientation". The International Labour Office has sought to include an agenda item for the International Labour Conference on a possible protocol to Convention No.111 to expressly include "sexual orientation" as one of the additional grounds of prohibited discrimination. So far the ILO tripartite constituents have failed to make a decision on this subject. In 1997 the ILO adopted the *Private Employment Agencies Recommendation*, 1997 (No.188). In para 9, this recommends that private employment agencies should be prohibited or prevented from drawing up or publishing offers of employment that result in discrimination on a number of grounds, including "sexual orientation". The ILO's Global Report on discrimination drew attention in 2007 to the need to address the issue of sexual orientation discrimination. But effective leadership on the issue appears to be a distant goal. Had there been such an attitude to racial discrimination and apartheid in the 1970s and 1980s, it would have been an institutional scandal.