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TURNER FREEMAN LAWYERS

AUSTRALIAN MANUFACTURING WORKERS' UNION AMALGAMATION ANNIVERSARY DINNER, SYDNEY

PRESENT AT THE CREATION – THE STRANGE, EVENTFUL BIRTH OF THE AMWU

8 NOVEMBER 2012

The Honourable Michael Kirby AC CMG

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THE HON. MICHAEL KIRBY AC CMG[**]

ABSTRACT

The author was one of the counsel who assisted in achieving the amalgamation of the three industrial organisations of employees that formed the AMWU in 1972. In this article, based on address to a dinner celebrating the 40th anniversary of this event, he describes the hard fought battles that proceeded amalgamation, including contested proceedings before the High Court of Australia in *ex parte Bevan* (1972) 172 CLR 1; the Commonwealth Industrial Court in *Drinkwater v Amos* (1972) 20 FLR 359; and the Arbitration Commission. From these experiences he derives lessons about the role of courts and tribunals in industrial relations; the role of well targeted industrial advocacy; the advantages of the old system of conciliation and arbitration; and the need to simplify the system of amalgamation. He also reflects on the idealistic quality of union leadership in 1972 and contrasts this with some cases today.

The history of Australia is intertwined with the history of the labour movement. The great maritime strikes of the 1890s led to co-operation amongst the industrial unions in the several Australian colonies. That co-operation focused attention upon the need to develop a new province of law to supplement the imperfections of the common law and the defects of collective bargaining[1]. It led to co-operation between unions and industries that had already developed elements of a national character.

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[*] Text on which was based an address to the dinner in Sydney on 8 November 2012, which celebrated the 40th anniversary of the amalgamation leading to the AMWU. The author expresses his thanks to Mr Armando Gardiman of Turner Freeman Lawyers for the provision of historical papers in the files of the AMWU and in the files of his Firm. He also acknowledges the assistance of Mr Simon Creeley, for materials on the amendments to legislation on amalgamation of federal industrial organisations following the saga recounted in these pages.

[**] Justice of the High Court of Australia (1996-2009); President New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-4); Deputy President of the Australian Conciliation and Arbitration Commission (1975-83); one of the counsel for the AMWU and amalgamating organisations (1972-3).

[1] M.Rimmer, "Unions and Arbitration" Joe Isaac and Stuart McIntyre (eds.), *The New Province for Law and Order, One Hundred Years of Australian Industrial Conciliation and Arbitration* (Cambridge Uni Press, Cambridge, UK, 2004) 275 at 277.

These developments, in turn, led to demands for the imitation of the new system of compulsory conciliation and arbitration, then lately enacted in New Zealand. They hastened the establishment of the Australian Labor Party (ALP). They added impetus to the federal movement itself, that was already gaining momentum in Australia. Within that movement, this led to demands for provision of a federal head of power and federal law - and eventually a federal court - that could deal with industrial disputes extending beyond the limits of a single jurisdiction of Australia. At the same time, the policies of White Australia and protectionism were pushed forward because of the feeling in most sections of the labour movement that the Australian market and community were vulnerable to competition from cheap labour sources close to the new nation's doorstep, in Asia and in the Pacific Islands.

By the concurrence of many miracles, a national constitution was negotiated, agreed and accepted at referendums held amongst the electors of Australia, then entitled to vote. The Constitution was taken to the Imperial authorities in London. It contained, in what became section 51(xxxv), an express provision empowering the proposed Federal Parliament to make laws with respect to:[2]

> "(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state:"

With very few amendments, none to paragraph (xxxv), the Imperial government accepted the colonists' draft. Queen Victoria, in one of her last acts as monarch, gave her Royal Assent to the Constitution. It came into force in January 1901. In 1903, the Federal Supreme Court, envisaged by s 71 of the Constitution, the High Court of Australia, was constituted. In 1904, after several false starts, the *Conciliation and Arbitration Act* 1904 (Cth) was enacted. Justice Richard O'Connor, recently appointed to the High Court, and later Justice H.B. Higgins of that Court, were appointed successively as the first and second Presidents of the Commonwealth Court of Conciliation and Arbitration, established by that Act. Thus

[2] Tim Rowse, "Elusive Middle Ground: A Political History", in Isaac and McIntyre above n.1, 17 at 26.

was born the peculiar and distinctive Australian system of compulsory conciliation and arbitration.

The combatants and adversaries, needed to breathe life into the new system, were provided by industrial organisations, including, on the workers' side, successors to trade unions already operating in the colonies, now the States. Their task was to agitate to improve the pay and industrial conditions of their members. This they did by creating interstate industrial disputes. To do this, they invoked a handy legal fiction by serving logs of claim upon employer interests in more than one State. Armed with the jurisdiction that came from the resulting dispute, and with the power to order compulsory conciliation and arbitration to prevent or settle such dispute, a new federal court quickly became a major player in the industrial economy of the young nation.

In the famous *Harvester* decision of 1907[3], and other leading cases, Higgins and his Court assumed the jurisdiction to settle disputes by declaring a "fair and reasonable wage". A national "basic wage", fixed by the Court, would be one sufficient to enable a male worker to live as "a human being in a civilised community" and to keep his family in "frugal comfort". A symbiotic relationship was thus forged between the new court, industrial organisations, the national economy, law and politics. The history of the new court, and ultimately of the tribunals that succeeded it after 1956,[4] relied heavily on the unions for a constant flow of cases. It was also those industrial organisations that advanced an ever expanding catalogue of industrial demands. These produced a gradual inclination to enlarge both the ambit of industrial disputation and the reach of federal awards. The valid operation of such federal awards would exclude, to the extent provided, the continued operation of inconsistent State jurisdiction[5].

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[3] Re *H.V. McKay; ex parte* (*The Harvester case*) (1907) 2 CAR 1 at 2-3.

[4] *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. There the High Court of Australia declared invalid the provisions of the *Conciliation and Arbitration Act* 1904 (Cth) constituting the Commonwealth Court of Conciliation and Arbitration. It did so because it held that the body purported to exercise both judicial and non-judicial functions, contrary to an implication of the Constitution.

[5] Pursuant to the Constitution, s107 and the provisions of the Federal Act.

By the 1970s, the federal system of compulsory arbitration was evidencing various defects. One of the clearest of these could be seen in the significant number of demarcation disputes between industrial organisations of employees that competed for members and for relevance in what was basically the same industry, viewed in economic terms. The ultimate ambit of coverage that was open to employees' organisations under the federal Act was, from the start, resolved by reference to the rules of the claimant organisations. Those rules were sometimes inherited from parent trade unions in the United Kingdom. Such was the case in the instance of the Amalgamated Engineering Union (AEU). That union had initially been created in Australia as a branch, or chapter, of the British trade union of the same name.

Many federal employees' organisations were otherwise manifestations, under federal law, of trade unions that had earlier created under colonial or state legislation. The historical character of the organisations, their multiplicity and overlapping industrial coverage presented many instances of friction, competition and conflict. Such conflict could often not be resolved by amicable agreement because of personal, factional and industrial rivalries. As a consequence, part at least of the energy of federal industrial organisations of employees was devoted to expensive litigation between the organisations themselves. Viewed from the perspective of members and their interests, this was usually wasted industrial effort. Therefore, by the late 1960s and early 1970s, a number of discussions were initiated, encouraged by the Australian Council of Trade Unions (ACTU), to promote the absorption of older more particular and historic organisations in the larger, preferably industry-wide, organisations.

The ACTU generally favoured such moves to amalgamation both to reduce the barren internecine conflict between member organisations and to enhance the strength and power of the enlarged organisations, to serve their members and to pursue innovative, evidence-based and policy-driven initiatives that would benefit members and extend the ambit of the organisations' industrial and political initiatives.

The federal legislation governing industrial organisations and the system of compulsory conciliation and arbitration in which they were engaged had many

detailed provisions to regulate participating organisations both of employers and employees[6]. However, as such, there was no express statutory provision, or regulation, to smooth the path of "amalgamation". Essentially, the Federal Parliament left it to the civil society organisations to form and to seek a space for offering services, respectively to employees and employers participating in the federal system of conciliation and arbitration.

Power was provided to the original Arbitration Court to cancel an organisation's registration under the Act, at its own request. That power was granted in the widest possible terms. However, in 1913, in a case involving an employers' organisation, Justice Higgins held that cancellation would not be allowed so that the members might form a new association with a wider constitution: *Re Victorian Miners' Association: ex parte Murray.*[7] The provision so interpreted stood until 1958. In that year, s143 (3G)(c) was enacted stating, relevantly:

> "s143(3G) The Registrar may, if he thinks it appropriate to do so in the circumstances, cancel the registration of an organization where –
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> a) the number of the members of the organization or of their employees, as the case may be, will not entitle them to registration under [s132 of] this Act;
> b) the Registrar has satisfied himself, in accordance with the regulations, that the organization is defunct; or
> c) the organization has, in accordance with, and in circumstances prescribed by, the regulations, requested that its registration be cancelled.

Regulations 138D and 138E of the Conciliation and Arbitration Regulations 1958 (Cth) were made pursuant to the 1904 Act, prescribing the manner and circumstances in which a request might be made under s143(3G)(c). Relevantly, reg. 138(D) provided for cancellation pursuant to a request in two cases – where it was intended that the organisation would amalgamate with another organisation or

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[6] *Conciliation and Arbitration Act*1904 (Cth), Part VIII (ss132-158) ("Registered Organisations") and Part IX ("Disputed Elections in Organisations") (ss159-171).
[7] (1913) 7 CAR 41.

with an association that had applied for registration, and where the organisation intended to withdraw from the federal arbitration field.

In the case of an amalgamation, the applicant organisation had to show that arrangements had been made whereby members of the departing organization might be admitted to the successor organisation or association; that appropriate arrangements had been made in respect of the property of the organisation that was to be transferred, together with its debts and obligations; that a resolution authorising the dissolution or winding up had been approved by a majority of members voting in a ballot held for that purpose; and that there were no proceedings pending against the organisation, or penalties outstanding, in respect of any contravention of federal law or a federal award. Notice of intention to make the request had to be served on other organisations and persons bound by any award binding on the organisation whose registration was to be cancelled[8].

These ungainly and unhelpful provisions of the Act and regulations were the subject of adverse comments in the practice book on federal industrial laws at the time. The procedural steps were condemned as "unduly complex".[9] The authors urged that a broad power should be conferred on the then new Commonwealth Conciliation and Arbitration Commission to facilitate the amalgamations of industrial organisations. However, no such power had been conferred in the decade after 1965.

It was in the AEU that talks began towards establishing a new federal industrial organisation of employees whose story it is my purpose to recount. The catalyst for the move that first triggered the amalgamation included a decision made at the Blackpool conference of the AEU in Britain to restrict membership of the British Union to members resident in the United Kingdom, Gibraltar and Malta. By the 1960s, Britain was abandoning its imperial role and was retreating to Europe. The result of this decision was to propel the Australian branch of the AEU to proceed to consider complete autonomy and independence from the British parent body. However, the establishment of a new legal personality for the AEU necessitated

[8] C.P. Mills and G.H. Sorell, *Federal Industrial Laws* (4th ed.), (Butterworths, Sydney, 1968), 439 [644].
[9] See ibid, 440 [644].

alteration of the rules; property adjustments; and the conduct of ballots, under court supervision, to permit these changes to be made. Set free from the apron strings of the parent union in Britain, the AEU, already one of the largest industrial organisations of employees in Australia, began to envisage an even larger change in its self conception. The idea of amalgamating with other organisations having similar interests began to be discussed. As a news item in *The Australian* newspaper in 1968 suggested: [10]

> "In a world where companies are always amalgamating with each other, it is inevitable that trade unions should try out the same technique."

Interestingly, the reason given publicly for the proposed amalgamations was the challenge that technology was posing for the future of union membership in Australia, including the spread of "push button computerists" who would take over the jobs traditionally performed by union labour. [11]

THE AMALGAMATION PROPOSALS

Early in 1966, the governing body (the "Commonwealth Council") of the AEU in Australia initiated discussions with other unions in the metal trades industry with a view to instituting steps towards amalgamation and the formation of a powerful metal workers' union with a total envisaged membership of 120,000.[12]

As a first step towards this process, the AEU approached the Sheet Metal Workers', Boilermakers' and Moulders' Union (SMWU) to open discussions. Such discussions had to include such matters of the number of officials, the proposed organisational structure, rates of contributions, salaries and benefits of an amalgamated organisation and the attitude of the members of the respective organisations towards the idea of amalgamation. However, progress was slow. Despite the recognition that smaller and ill-funded organisations of workers would be too poorly resourced to

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[10] N. Swancott, "The Wobblies May Have the Last Word After all" in *The Australian* 28 September 1968, 3.
[11] G. Gleghorn, "Engineers and Boilermakers to amalgamate by 1972", *Australian Financial Review*, 24 February 1970, 1.
[12] "Top ACTU Man Quits Before Poll", *The Australian*, 3 August 1967, 1.

perform effectively the innovative work of industrial representation, essential for the survival of the union movement, sentiment, loyalty, tradition and in some cases personal ambitions and office led to a slowing of the moves towards reform.

Nevertheless, encouraged by ACTU support for amalgamation expressed in February 1970, the SMWU in May 1970, at its biennial federal conference, decided to seek participation in joint amalgamation discussions that had, by then, also commenced between the AEU and the Boilermakers' and Blacksmiths' Society of Australia (BBS). A leading force in the amalgamation discussions was the Secretary of the AEU, Mr John Garland. The discussions between the AEU and the BBS led to consultations with Mr Roy F. Turner, an experienced solicitor with knowledge of industrial law based in Sydney. Roy Turner briefed Neville Wran, an up and coming barrister at the Sydney Bar, with experience in industrial law and practice. He had been appointed Queen's Counsel in 1968.

The three industrial organisations AEU, SMWU and BBS reached agreement in principle, which they outlined in their *Amalgamation Proposals.* They were helped in the formalities by Neville Wran and Roy Turner.[13] The *Proposals* explained that the AEU had already altered its own rules so as to be in a position to operate as part of a transitional amalgamation "jointly operating" for a period of two years, beginning January 1972. The document containing the *Proposals* was signed by the chief executives of the three unions concerned, J.W. Bevan (BBS), J.E. Heffernan (SMWU) and J.D. Garland, (the Commonwealth Secretary of the AEU). The program for interim co-operation, the conduct of a Commonwealth conference, the undertaking of ballots of members of the three participating organisations and the rationalisation of entrance fees and contributions were all outlined in the *Proposals*. To ease the path towards amalgamation, many questions of mixed legal and industrial content were presented to Neville Wran for his advice. Roy Turner's files show a flurry of consultations in November and December 1970 as the greatest care was taken, at every step on the way, to minimise any grounds of challenge by rival, and potentially hostile, industrial organisations, which could be expected to be fearful

[13] The AEU, BBS and SMWU *Amalgamation Proposals*, (September 1970).

of the dominance that the amalgamated union might secure, both industrially and politically.

As shown in the successive opinions contained in Roy Turner's files, the criterion adopted by Mr Wran for his advice was that all ambiguity under the several organisations' rules, and under the Act and regulations, should be construed in a way that promoted the manifest transparency of the process of amalgamation. This reflected the objective to ensure that any opportunity to challenge the amalgamations before the Commonwealth Conciliation and Arbitration Commission or the Commonwealth Industrial Court should be reduced. A ballot to determine whether the members of the three participating organisations agreed in principle to the amalgamation, and to the means proposed to achieve it, was fixed to be held during March 1971. In a message to the members of the three participating unions, the ACTU President, Bob Hawke, was recorded as saying: [14]

> "The policy of the ACTU, clearly laid down in the forefront of our Constitution, asserts the desirability of the closer organisation of workers by 'amalgamation of unions'. The moves by [the three metal workers unions] towards amalgamation into one union can therefore be seen as a significant step in giving effect to this important plank of trade union policy. The world of the 1970s is a far different place from that in which our early trade unions arose. In particular, industry and employers' organisations have become more highly integrated and efficient. They have not, however, become more generous. To meet these and other challenges of our increasingly complex society, the Trade Union Movement itself has to mobilise its resources more effectively and streamline its organisation. The amalgamation between your unions will service (sic) these purposes. You will be creating an organisation with tremendous potential for advancing the interests of hundreds of thousands of Australians and their dependants."

Notwithstanding the approval at the ballots that followed amongst the members of the three participating organisations, rumblings began to emerge concerning the ballot, and objections both to the amalgamation itself and to the proposal, then

[14] Statement in an advertisement published in *Sydney Morning Herald*, 4 March 1971, 10.

gathering steam, that the new union should be named the Amalgamated Metal Workers' Union (AMWU). For example, in December 1971, the Federal Secretary of the Democratic Labor Party (DLP), Senator J.T. Kane, criticised what was described as the forthcoming merger of "three militant trade unions". He expressed anxiety that, especially if the amalgamating unions were later joined by the Federated Engine Drivers' and Firemens' Association (FEDFA), as was then being proposed, the total membership of the new organisation would exceed 200,000. Senator Kane attacked such an amalgamation as "the brainchild of Laurie Carmichael, the top Communist union strategist" of the union movement, saying that it "has long been communist policy". [15] He ignored the endorsement of the policy of amalgamation by the ACTU.

An editorial in *The Australian* newspaper of the same time picked up Senator Kane's theme. It referred to the danger inherent in the amalgamation of "militant trade unions". However, the leader writer regarded the trend towards larger and fewer unions as one that, on the whole, was both worldwide and probably inevitable. Although the McMahon Government had probably expected the amalgamating unions to baulk at the payment of fines previously imposed on the AEU in consequence of earlier industrial action by its members, as a necessary precondition to preregistration and amalgamation, the participating organisations faced up to the legal necessity of taking this step, distasteful as it was for them, as one that was essential to the process of merger. Media reports suggested that a group of Coalition parliamentarians was pressing for action by the McMahon Government to halt the amalgamation. However, the general belief was that any such intervention by the Federal Government had by then been left too late.[16] Resistance, if there was to be any, had to come from within the union movement itself. In practice, this meant resistance by unions having links with the DLP, or sharing similar industrial and political objectives. On this possibility, an editorial in the *Sydney Morning Herald* put the situation quite bluntly:[17]

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[15] "DLP Attacks Union Merger", in *The Age*, 30 December 1971, 1.
[16] *The Australian*, 29 December 1971, "Unions and Unity".
[17] J. Stubbs, "Government Action on Union Merger Now Unlikely", *Sydney Morning Herald*, 25 February 1970.

> "The DLP's Senator McManus expresses a late concern for the property rights of union members absorbed in amalgamations. But he makes it clear that the DLP's prime objection is that metal unions are left-wing and that amalgamations are supported by the Communist Party. Many people will suspect that the DLP is less concerned with the trade union organisations than with internal politics of the trade union movement."

Meantime, the three organisations proposing amalgamation had lodged their applications to secure rule changes to facilitate the transitional steps necessary to achieve de-registration of the outgoing industrial organisations and the reception of their property and members into a new and enlarged receptacle, as proposed by the amalgamation agreement between the three bodies. As early as September 1971, the Secretary of the Shop Assistants' Union, Mr Barry Egan, indicated that his organisation would object to the planned legal moves on the basis, that, if accomplished, they would cut across the "coverage" then enjoyed by the Shop Assistants' Union under that organisation's registered rules.[18] Similarly, in October 1971 the Federated Clerks' Union, through its Chief Executive John Riordan, and the Federated Ironworkers' Association, through its Chief Executive Laurie Short, indicated their misgivings. [19]

The scene was therefore set for the challenges that were to follow in the industrial tribunals. It was at this time that Mr Wran, who had been elected to the Legislative Council of New South Wales in 1970 and was doubtless distracted by his growing political engagement, withdrew from advising the amalgamating organisations. In his place, a new team was assembled by Roy Turner. This was Harold Glass QC, Frank Hutley QC and myself. It was a team that was to have an uninterrupted record of success before the courts and in the Commonwealth Conciliation and Arbitration, as I will now describe.

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[18] Maxamian Walsh, "DLP versus the Rest" *Australian Financial Review*, 25 February 1972, 1.
[19] *Sydney Morning Herald* ("DLP's Dilemma"), SMH, 27 February 1972, 10.

IN THE COURTS

On 7 February 1972, a Melbourne solicitor who regularly appeared for the political and industrial interests of right-wing industrial unions, Mr Bernie Gaynor, contacted Roy Turner to seek substituted service of process under the *Conciliation and Arbitration Act* 1904 to challenge the procedures being adopted by the three organisations seeking amalgamation. Mr Gaynor sought agreement from Mr Turner to accept, in principle, substituted service on the officers of the impugned associations, responsible for the amalgamation. Ever cautious, Roy Turner indicated that he would not himself accept substituted service. However he agreed, subject to the advice of Mr Hutley QC, to provide the names and addresses of the current office holders so as to facilitate service, if that were intended.

The litigation initially took two forms. First, on 10 January 1972, there was listed before the Industrial Registrar (at the time Dr Ian Sharpe prior to his elevation to be a Deputy President of the Commission), an application for approval to the proposed rule changes designed to render the amalgamation possible. Mr Hutley QC appeared for the applicants before the Industrial Registrar. Mr Hal Wootten QC appeared for the FIA, voicing objections. Notwithstanding the objections, the Registrar approved the rule changes. Inferentially, he dismissed the complaint that the proposed enlargement in the eligibility conditions of the enlarged receptacle organisation (the AEU) would invade the industrial interests of the objecting registered organisations. He pointed out that the proposed amended rules amounted to nothing more than the repetition, in the recipient organisation, of the membership eligibility conditions of the organisations intending de-registration.

Having secured this approval, on 17 January 1972 the agreement for the actual scheme of amalgamation of the three organisations was signed by the authorised officers of the AEU, SMWU and BBS. In that scheme, it was noted that the name of the new organisation would be the AMWU. This widely embracing title proved to be the last straw for the objectors. They initiated challenges both in the Commission and in the Commonwealth Industrial Court. Exceptionally, the objectors, newly inflamed, also led to the invocation of the jurisdiction of the High Court of Australia.

Early in March 1972, Mr Hutley was giving advice to the three organisations on the gift duty implication of the sale of a property in Sydney belonging to one of the organisations. The objectors for their part realised that, unless steps could be taken promptly to prevent the sale of the property, the omelette would be well and truly scrambled, making later remedial action virtually impossible.

Accordingly, on 16 March 1972, the objectors appeared in chambers in the Commonwealth Industrial Court before Justice John Kerr (later Chief Justice of New South Wales and later still Governor-General of Australia). He granted the objectors an order calling on the amalgamating organisations to show cause why final orders should not be made requiring them to observe their rules. Specifically, relief was granted to William John Forbes, discontented with the proposed amalgamation, against John Bevan, Secretary of the BBS. Mr Forbes demonstrated his interest by proving that he was a member of the BBS. Justice Kerr returned the proceeding before a Full Court of the Commonwealth Industrial Court to be heard on 26 April 1972.

Meantime, on 1 April 1972, Mr Forbes appeared additionally before Justice Dunphy, judge of the same court, *ex parte*, to seek orders restraining the BBS from withdrawing moneys, or transferring funds or securities, belonging to it, except as required for ordinary daily functions of the organisation. Justice Dunphy was a long serving federal judge, often irascible and generally believed to be hostile to industrial organisations that he perceived as radical or left-wing. He granted the relief sought by Mr Forbes on an interim basis - a step that immediately stopped the practical steps in the amalgamation in their tracks. The amalgamating organisations immediately obtained advice about mounting a counter-attack.

On 6 April 1972, following a joint conference with counsel, Mr Harold Glass QC, Mr Frank Hutley QC and I waited on Justice Sir Cyril Walsh in his chambers in the old seat of the High Court of Australia at the Darlinghurst court complex in Sydney. The tall, angular, reticent Justice, who had been appointed to the High Court on 3 October 1969 from the Court of Appeal of the Supreme Court of New South Wales,

was persuaded that an arguable case was established that Justice Dunphy lacked the power to make the freezing orders that he had imposed. With his shining intelligence, and legal knowledge, gifts of a double university medallist noted for his unfailing courtesy, Justice Walsh granted a rule nisi for prohibition and certiorari out of the High Court. That was returned promptly before the High Court, sitting in Sydney on 19 April 1972. This was the day immediately before the scheduled commencement of the proceedings in the Full Court of the Commonwealth Industrial Court, returned earlier by order of Justice Kerr.

When the argument before the High Court of Australia commenced, on 19 April 1972, the court was constituted by the Chief Justice [Sir Garfield] Barwick, and Justices McTiernan, Menzies, Walsh and Stephen. Mr Hutley QC led in the opening argument submitting that the Industrial Court had no jurisdiction to make the *ex parte* order. He submitted that the judges, although judges of a federal court, were nonetheless "officers of the Commonwealth". They were thus answerable (as any other officer was) to the constitutional writs (in those days called "prerogative writs") created by s75(v) of the Constitution. Carefully analysing the sole injunctive powers given to the Industrial Court by the express provisions of s109 of the *Conciliation and Arbitration Act* 1904 (Cth) and the provisions of the rules of court of the Commonwealth Industrial Court, the argument contested any express foundation for the order that Justice Dunphy had purportedly made.

Mr H.H. Glass QC supplemented this argument by countering a possible argument that, because the Industrial Court was declared a "superior court of record" by the statute, it enjoyed all the inherent powers of the State courts. True, it would enjoy some "implied power", derived from its statutory charter and character, Mr Glass conceded. But any invocation of the broader "inherent" powers by the respondents was misconceived. Any such powers had to be invoked, if at all, by an application to a State Supreme Court. A federal court, under the Constitution, enjoyed only the powers expressly granted to it by valid legislation together with any powers necessarily implied from such express grant of powers.

Counsel appearing for Mr Forbes was Mr Dennis Mahoney QC, appearing with Mr Kenneth Handley and Mrs P.A. Voss. They submitted that the inherent power would sustain the orders made by Justice Dunphy and that it was a fundamental principle of the law that duly created courts could protect the utility of their own processes.

The oral hearing of the proceedings before the High Court dribbled over to 20 April 1972, when the Court reserved its decision. Counsel then hurried back to Temple Court, in the centre of the legal district of Sydney, where the proceedings, commenced on return of the order of Justice Kerr, where awaiting hearing. That hearing was addressed to the conformability with their respective rules of the steps taken by the three industrial organisations. Under the 1904 Act, any member believing that an industrial organisation was in breach of its rules could seek an order that it conform to them. [20] Mr Handley alone appeared before the Full Industrial Court for the objectors. The respondent organisations were once again represented by Mr Glass, Mr Hutley and me.

The claimants in the proceedings in the Industrial Court were the same Mr Forbes who had appeared in the High Court, together with Mr Drinkwater, members respectively of BBS and SMWU. Their principal submission attacked the validity of the ballot that had been conducted amongst members of the three organisations in March 1971. The argument was the ballot was vitiated by the late payment of the outstanding fines which was a precondition for the lawful de-registration of the amalgamating unions. The objectors contended that the payment of the penalty, referred to in reg. 138(D)(1)(d), *after* the request for cancellation had been filed but before the deregistration hearing, constituted an insufficient compliance with that sub-regulation. Moreover, they argued that reg. 138(D)(1)(c) required that the request for cancellation needed to gather support from a majority of the members of the organisation, not simply the majority of the members who voted on the ballot. Finally, the objectors complained about the inadequacy of the rules of the three organisations to permit the ballot being undertaken as conducted by the amalgamating organisation.

[20] *Conciliation and Arbitration Act* 1904 (Cth), s141(1).

The Full Court gave Mr Handley a full opportunity to advance his arguments for the objectors. The judges, Chief Justice [Sir John] Spicer, Justice Dunphy and Justice [Sir Reginald] Smithers listened patiently and then heard the rebuttals advanced with withering scorn by Messrs Glass and Hutley. In the manner of those times, when orality still reigned in Australian courts, the hearing lasted a full sitting week of five days. Judgment was reserved on 3 May 1972. It was delivered on 18 May 1972.

In brief and unanimous reasons,[21] the Commonwealth Industrial Court held that it was sufficient compliance with the requirements of reg. 138(D)(1)(d) that the outstanding fines for industrial penalties should have been paid before the hearing of the request for cancellation of the registration of the new rules was concluded and the orders made. Moreover, the Court held that, in all other respects, the conduct of the ballot had been lawful and authorised by the express rules or by the implied requirements of those rules. The steps taken amounted to an industrially sensible and practical resolution of the technical but meritless points advanced in resistance to the steps necessary to amalgamation. In a beneficial interpretation of the approach to the rules of industrial organisations, the judges said: [22]

> "We are of opinion that in each case in which a ballot or referendum is authorised by the rules set out above the governing body of the union itself had implied authority to choose the means by which it is to be conducted as fully and as effectively as if express provision were made to that effect."

The decision of the High Court on the summons before it was listed for judgment on 7 June 1972. That court was also unanimous in its conclusions and orders. It concluded that the Commonwealth Industrial Court had no power, through the order of Justice Dunphy, to make an interlocutory order restraining the officers of the amalgamating organisation from withdrawing funds from the banks or from transferring money or securities. There were two foundations for the High Court's decision that the orders made by Justice Dunphy were invalid. The first was that, so far as the provisions of the 1904 Act providing for non-compliance with rules were

[21] *Drinkwater v Amos* (1972) 20 FLR 359.
[22] Ibid, 362-362.

concerned, the Act expressly required that no order could be made without first giving "any person against whom an order is sought an opportunity of being heard".[23] As that had not been done by Justice Dunphy, it was fatal to the validity of the orders he had made. The second argument, suggesting an "inherent" power to make the order was also rejected by Justice [Sir Douglas] Menzies. He wrote the leading opinion of the High Court. He draw on the distinction between "inherent jurisdiction" (a feature of common law courts) and "implied jurisdiction" (which had to be found where a court was created by statute, as the Commonwealth Industrial Court was). [24] Only common law courts could enjoy unlimited inherent jurisdiction. The Commonwealth Industrial Court could not. The High Court Justices did not stay to reflect upon the fact that the High Court itself owed its existence to the Constitution and to statute. [25] In many judicial opinions over the years, there had been loose talk of "inherent jurisdiction" of statutory courts. *Ex parte Bevan* was addressed to putting an end to that language by the clear binary differentiation endorsed in that case.

The sweetest aspect of the High Court victory, so far as the amalgamating organisations were concerned, was not only the removal of the last legal impediment to the moves of the three organisations towards amalgamation. It was the order that the objectors pay the organisations' costs in the High Court.

On 16 June 1972, Mr Turner provided a report to his clients outlining the sweeping victories they had won in the litigation. However, some uncertainty remained concerning the precise date of the 'amalgamation'. Was it 17 January 1972, (the 'date of amalgamation' provided for in the amalgamation agreement)? Or was it a time later in the year when all of the impediments to amalgamation had been finally disposed of by the courts? The organisations were inclined to adhere to the earlier date, for reasons respecting the will of the members of the organisations and for administrative convenience. Advice provided by me in conference on 20 July 1972

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[23] The Act, s141(1)(d). See *ex parte Bevan* (1972) 127 CLR 1 at 5 (per Barwick CJ), 5 (per McTiernan J), 6 (per Menzies J), 9 (Walsh J) 10 (Stephen J).
[24] (1972) 127 CLR 1 at 7.
[25] Now the *High Court of Australia Act* 1979 (Cth). See earlier *High Court Procedure Act* 1903 (Cth) *High Court Procedure Amendment Act* 1903 (Cth); *High Court Procedure Act* 1915 (Cth); *High Court Procedure Act* 1921 (Cth); *High Court Procedure Act* 1925 (Cth) and *High Court Procedure Act* 1933 (Cth).

suggests that a more accurate date was probably mid-year or later. Inferentially, my advice may belatedly have been accepted by the AMWU because of the date, assigned 40 years later, for the anniversary celebration which was held in November 2012.

CHANGE OF NAME

One remaining impediment remained outstanding to the amalgamation as planned. This was the objections to the proposal of the amalgamating organisations that, upon cancellation of registration of the amalgamating bodies, the new combined organisation should be named the AMWU. This also required an alteration of rules, relevantly of the name of the receptacle organisation into which the members, officers, funds and property of the amalgamating organisations were being merged. That had been the former AEU.

By s139 of the *Conciliation and Arbitration Act* 1904, the sensitivity of name changes of industrial organisations had been recognised by the Federal Parliament. Self evidently, by claiming an overly broad title, and altering its name for that purpose, an industrial organisation could hope to influence potential members into believing that it was the only, or primary, industrial organisation capable of representing their interests. The objections of competing industrial organisations, particularly the FIA, had already been voiced in the public media. There was therefore little surprise that the separate application for rule changes to permit a name change, when it was made, was hotly contested. Once again, Mr Hal Wootten QC with Mr Ken Handly appeared for the objectors. On this occasion, on the insistence of the applicant organisation, Mr Turner was instructed to retain me to appear alone in their interests. The new organisation was very keen to secure the generic description of its coverage as proposed by the name: “the Amalgamated Metal Workers’ Union”. The objectors were just as determined to prevent this happening.

Section 139 of the *Conciliation and Arbitration Act* 1904 provided, relevantly:

> "139(1) A change of the name of an organization or an alternation of its rules in so far as they relate to conditions of eligibility for membership or the description of the industry in connection with which the organization is registered shall not have effect unless the Registrar consents to the change or alteration upon an application made as prescribed;
>
> (2) The Registrar may consent to the change or alteration in whole or in part;
>
> (3) The Registrar shall record the change or alternation to which he has consented in the register and upon the certificate of registration and thereupon the change or alteration shall take effect."

Provision for supervision of name changes had existed in federal industrial law for many years. In 1945, the then Arbitration Court had held that, where that name was reasonably applicable, whilst the Court should not normally interfere with a choice made by members as to the name of their organisation, in the face of opposition, no name could be chosen as a description of the industries covered that would be equally appropriate to the objecting industrial organisation. [26] That rule, which had been declared in earlier litigation between the FIA and AEU, became the chief consideration over which the argument before the Industrial Registrar was fought.

By the time the argument came on for hearing, Dr Ian Sharpe had been promoted to Deputy President of the Arbitration Commission. The new Industrial Registrar was Mr Keith Marshall. He listed the application for argument before him in Sydney on 20 February 1973. Meantime, in the world beyond the courts and industrial hearing rooms, a great change had occurred in the Australian nation. In December 1972, the McMahon Coalition Government was defeated in a federal general election. For the first time since December 1949, a government was formed by the ALP. The new Ministry was sworn into office by Sir Paul Hasluck, Governor-General. One of the counsel who had given early advice to the AEU, on particular aspects of the amalgamation proceedings, Senator Lionel Murphy QC, was appointed Federal Attorney-General.

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[26] *Conciliation and Arbitration Act* 1904-1956 (Cth), ss 76, 79.

In form, the application before industrial Registrar Marshall was to permit the AEU to change its name to AMWU. In addition to the objections voiced by Messrs Wootten and Handley for the FIA, Mr D. Swaine appeared for the Australasian Society of Engineers (ASE) to oppose the change. The hearing continued before the Industrial Registrar on 21 February 1973. [27] On that day I handed him written submissions on behalf of the applicants. In Mr Turner's file appears a detailed memorandum, written, or rather printed, in my neatest hand, that constituted the outline of the arguments for the name change. It is interesting for me to read that document now, after 34 years of judicial service. I can see how, even at 35 years of age, I had pressed my mind into the way of thinking of a decision-maker. My submissions progressed from broad propositions expressing the issues to be decided; through the foundation for jurisdiction and power; an analysis of the applicable statute and regulations and the purpose of the relevant powers; and an examination of the relevant authorities and invocation of the principles for the facts of the instant case. If advocates can imagine themselves as decision-makers, they will be better advocates.

Mr Wootten castigated these submissions as needlessly propounding issues beyond those really in contest. However, sometimes a decision on a narrow point needs to have the issues for decision placed in context so that the moment of determination will follow from the surrounding rules, practice and legal and factual atmosphere, like a well targeted rocket homing in to its ultimate objective.

The Industrial Registrar reserved his decision, which he announced on 2 April 1973. He said then, essentially: [28]

> "In the exercise of my discretion, weighing material that favours the grant of the name change sought against the objections... I have decided to consent to the change of name."

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[27] *Federated Ironworkers' Association of Australia v AEU* (1945) 54 CAR 21.

[28] Transcript of proceedings before Industrial Registrar Marshall, Commonwealth Conciliation and Arbitration Commission, 2 April 1973, 142.

In his reasons to sustain this exercise of power, Industrial Registrar Marshall paid tribute to the thorough preparation of counsel of both sides "which I have found helpful". He expended particular care in analysing, and distinguishing, the reasons of Justice O'Mara in 1945, when refusing an application of the Ironworkers' Association (the present objector) to change its name to the "Metal Ammunitions Union". The AEU had then objected to that name as constituting an attempted overreach by the FIA into its industrial domain, as envisaged by its then rules. That had been the strength of the objectors' contentions in February 1973. But their weakness (as I repeatedly pointed out in my oral argument recorded in the transcript) was their inability to come up with a better and more appropriate descriptive title for the amalgamated organisation than that proposed by the applicant. Especially so because the new enlarged industrial organisation of employees expanded the membership to permit the AEU to include members who had previously been represented by BBS and SMWU.

Skirmishes between the competing organisations continued following the Industrial Registrar's ruling. Rival personal and philosophical hostility between personnel of AMWU and the objecting organisations lingered on. However, the legal battles were over. A new organisation, a major player in the Australian industrial and political scene, the AMWU, was well and truly established.

LESSONS FOR TODAY

Courts and tribunals: As I look back on the battles of the early days of the AMWU, I learned many lessons: both for myself and for the public institutions in which I would later make my way and with which I would be associated for the rest of my professional life. [29]

The courts and tribunals emerged with credit from the saga. So did the lawyers on both sides, who did their best to advance the respective interests of their clients. Little did I think, as I sat in the modest Darlinghurst court room of the High Court of

[29] M.D. Kirby, "Judging: Reflections on the Moment of Decision" (1999) 18 *Australian Bar Review* 4.

Australia, that a quarter of a century later, in Barwick's new building at the permanent seat of the Court in Canberra, I would be taking my oaths of office to join the court over which Barwick had then so powerfully presided.

It is not always easy for the High Court, with its important national responsibilities, to deal quickly with invocations of its jurisdiction. It is not unknown for the court, where the appeal comes from an interlocutory and procedural order (as did the case in *ex parte Bevan*) to refuse leave to appeal, or to leave it to an intermediate court in the first instance, to vacate an offending order or circumvent it by an early substantive decision.[30] That could have been the course that Justice Walsh might have taken in refusing an *order nisi* – or that the Full High Court might have ordered in vacating his order and rejecting the summons. But in those days, there were few federal courts and federal judges. Effectively, the High Court itself was an intermediate appellate court to the Privy Council. It was then the constitutional supervisor of the Commonwealth Industrial Court. Any personal reservations that some of the Justices of the High Court might have had about the "radical" nature of the amalgamating organisations were completely put to one side. The decision was given with effective unanimity and great speed. Rare is it that such a case can be decided by the Full High Court within little more than six weeks of hearing.

Likewise, the substantive decision of the Commonwealth Industrial Court was reached within three weeks of the hearing and without even waiting for the High Court to resolve the matter before it. One gets a feeling that the Commonwealth Industrial Court wanted to demonstrate that it could deal just as promptly with the substantive matter as the High Court might with issues of constitutional and general legal significance.

I am as conscious as anyone of the defects of costs, delays and occasional formalism on the part of Australia's courts. However, I believe that the AMWU litigation showed the courts in a good light. They were swift, decisive, practical and

[30] M.D. Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 *UNSW Law Journal* 731.

facultative. They were not part of the problem; they were part of the solution. In industrial disputes, decisions must always be reached quickly. So they were here.

The rule of law is an important protection for individuals, corporations and institutions, great and small. Independent and uncorrupted decision-makers are a hallmark of our constitutional traditions and law. Sometimes, especially perhaps in industrial matters, there are circumstances where the courts appear to some critics to take artificial and overly-precious decisions, disconnect from the industrial realities of the contest. [31] In the AMWU litigation, the courts avoided these supposed errors and moved to sensible conclusions quickly and unanimously.

Advocate to judge: The way by which, in common law countries, judges and other decision-makers are mostly trained is essentially an apprenticeship system. It is therefore well understood by industrial organisations. Future decision-makers learn their craft, for the most part, on the job. They watch earlier leaders, observing the pitfalls to be avoided, digesting the skills to be deployed and the foibles to be resisted. So it was for me in the AMWU litigation.

Roy F. Turner was a conscientious and dedicated legal practitioner, as I had earlier tried to be when I was a solicitor and later when an advocate. He insisted on personal loyalty by his staff and counsel. He returned that quality to those he worked with and for. He set high standards for himself and for those who worked with him. Probably he was, by today's standards, a little straight laced. He was somewhat prudish about matters sexual. I never heard him swear. This was not the universal temperament of lawyers at that time acting for trade unionists or indeed others. Roy Turner was affable but demanding and just a little obsessive about his cases. He kept painstaking notes throughout the litigation. They are in evidence in the AMWU files and in his Firm's files. Keeping a contemporary record of proceedings was then, and is now, a prudent course for lawyers who value success. Human memory, including of old advocates and judges, is fallible. Bernie Gaynor the solicitor for the objectors, was also a fine and conscientious lawyer. I came to

[31] *Electrolux Home Products Pty Limited v Australian Workers' Union* (2005) 221 CLR 309 may be an illustration.

know him in late 1974 when he briefed me to appear for all the unions in a large industrial dispute in the Victorian power industry that we managed to bring to a successful conclusion before the Full Bench of the Australian Conciliation and Arbitration Commission, so renamed in 1973. It was to be my last appearance as a barrister.

Roy Turner briefed talented barristers. Neville Wran, Harold Glass and Frank Hutley were good examples. Wran, even then, was swift, practical and a master strategist. Glass was meticulous, fastidious, consciously precise, erudite and elegant in both his written and oral expression. In his chambers, on his desk, was only ever one brief or matter: that on which he was currently working. All other briefs were put out of sight. This symbolised the fact that he was giving the matter in hand his entire attention. What a contrast to the world of today where cell phones, i-Pads, social networks and computers present an endless stream of tantalising distractions and mental diversions.

Frank Hutley, a university medallist, was a quirky but brilliant lawyer. His personal political inclinations were worn on his sleeve. He was a conservative but a libertarian. He would ordinarily have had little truck for “radical” trade unionists. However, Roy Turner had great admiration for him. Hutley had been a long-time law teacher at Sydney University Law School. In 1960, he had taught Murray Gleeson and me the law of succession, probate and wills. He had a first class legal mind. That was the talent for which Roy Turner engaged him. We all worked well together, as a team. It would have been interesting to hear the running commentary upon the lawyers by the “Three Jacks”; the chief executives of the amalgamating organisations who attended the many conferences in the case. None of us, (unlike Murphy, Wran and Mary Gaudron, who had been earlier briefed) was of an affable ‘hale fellow well met’ disposition. But we were winners. That was what the organisations wanted, paid for and secured.

It was an adventure for me, barely 30, to work as part of such a legal team. As chance would have it, our successes were achieved just before the election of the Federal Labor Government of Mr Gough Whitlam QC. By that election, it fell to that

government to appoint many of the legal participants to judicial offices: including Murphy, Gaudron and myself. Later still, several of the team were appointed to judicial and other offices when, somewhat unexpectedly in 1976, Neville Wran scraped home as the new ALP Premier of New South Wales. His government appointed Gaudron and myself to State office. Hutley, Glass and Macken were appointed judges by Coalition governments.

Some critics of judicial appointment by politicians urge the substitution of a judicial commission to control such decisions, so as to remove entirely any risks of political patronage. I do not agree with that view. The work of decision-makers in Australia's independent courts and tribunals (not least in matters of industrial relations) is not simply technical, although it often addresses technicalities. Always it involves values and creativity. The elected representatives of the people are generally much more likely to make wise decisions in filling such posts than are members of the legal or judicial elite. Every living organism must have grafted onto it elements of change that permit the organisation to change and to evolve. This was the lesson Charles Darwin taught in biology. It is critical to the institutions of government of a democratic society, including in the courts and tribunals.

The players: Most of the legal players in the AMWU litigation were eventually appointed to high office. Mary Gaudron and I were appointed to the High Court of Australia.[32] Earlier she was appointed as a Deputy President of the Arbitration Commission and subsequently as Solicitor-General for New South Wales. I was earlier appointed a Deputy President of the same Commission; Chairman of the Australian Law Reform Commission; Judge of the Federal Court of Australia; and President of the New South Wales Court of Appeal.

Dennis Mahoney became a Judge of the Supreme Court of New South Wales and, Judge of Appeal. Later he became President of the Court of Appeal in succession to me. Harold Glass became a Judge of Appeal with whom I served, as did Frank Hutley, although in Hutley's case our terms of judicial service overlapped by little

[32] The Hon. Mary Gaudron QC was appointed to the High Court of Australia on 6 February 1987. I was appointed on 6 February 1996.

more than a month. Ken Handley became a Judge of Appeal in New South Wales in 1990 during my time as President and only recently reached a reluctant end to his service. Hal Wootten became inaugural Dean of the then new Law School at the University of New South Wales in 1969. He was serving in that post when appearing in the proceedings. In 1973, he was appointed to the Supreme Court of New South Wales, holding that post until 1983. He was a fine innovator in the law. Neville Wran became Premier of New South Wales 1976 and served until 1986. Lionel Murphy was appointed the Attorney-General of the Commonwealth in 1973 and later served a Justice of the High Court from 1975 until his death in 1986. In both posts he was highly creative. James Macken, Terry Ludeke and other players in early stages of the amalgamation drama were appointed judges. Roy Turner was elected to the Legislative Council of New South Wales in 1976 in the interests of the ALP.

We were a group blessed by fortune. Most of us, despite comparatively humble origins, finished our professional service with various honours and many of us with honorary university degrees and other distinctions. None of us would have denied the influence in the development of our thinking of long hours labouring over the AMWU and like cases. They taught us the importance of high particularity and detail in the law. They also taught that industrial law and industrial relations are important parts of the law's domain. The best training for high public office is not necessarily, or always, in the fashionable fields of commercial law, insolvency or wills – as even Frank Hutley witnessed in the AMWU case.

Unions and arbitration: I believe that every participant in the AMWU cases came away with a heightened respect for the officials of the industrial organisations, including on both sides. More importantly, we came to see close up the operation of the unique system of industrial relations that had followed Australian federation. By that system, the Constitution had assigned to independent decision-makers the resolution of industrial conflict in the federal sphere. For more than a century in countless cases it was held, or assumed, in lower courts and before the High Court, that it was not open for the Federal Parliament to enact general laws with respect to industrial relations. Such laws as it enacted had ordinarily to invoke the existence of a "dispute" of a particular kind that attracted the designated constitutional processes

of "conciliation and arbitration". This methodology injected into dispute resolution a rational process. Well in advance of the later and recent expansion of systems of mediation and arbitration (alternative dispute resolution) in the general courts, the Australian Constitution came upon that mode of decision-making in industrial matters through s51(xxxv).

In earlier writing, after I had departed association with industrial arbitration, I praised the value of the independent decision-maker and the peculiarly Australian features of that value, with its emphasis on meeting, step-by-step progress, candid dialogue, conciliation, rational argument, reasoned determinations and a "fair go all round".[33] In my writings I even suggested that this system was constitutionally "entrenched", simply because of the language of s51(xxxv).[34] When, during the Howard Government, steps were taken, by legislation enacted by the Federal Parliament, to bypass para. (xxxv) and to invoke para. (xx), of the Constitution, permitting laws with respect to industrial relations to be made under the head of laws power and enact laws with respect to corporations, I disagreed. Applying long established constitutional principles, I acknowledged that since the *Engineers* Case in 1921, the High Court had emphasised the amplitude of the grants of federal legislative power. Those powers were not to be construed restrictively by reference to other provisions of the Constitution.[35] However, to that rule there was one exception.[36] That exception related to where the power in question had been granted to the Federal Parliament subject to a condition. In such cases, the Parliament could not invoke another specific head of power to circumvent and nullify the condition imposed on the grant of the general power. It was this seemingly entrenched doctrine that I invoked in reaching my conclusion in *New South Wales v The Commonwealth* [37] that the *WorkChoices* legislation of the Howard Government was constitutionally invalid.

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[33] *Re Loty and Holloway and Australian Workers' Union* [1971] AR (NSW 95 per Sheldon J; see also *Blackadder Ramsey Butchering Services* (2005 221 CLR 539 at 549 [30]

[34] M.D. Kirby, 2006, "Human Rights and Industrial Relations" (2002) 44 *Journal of Industrial Relations* 562; and M.D. Kirby "Industrial Conciliation and Arbitration in Australia: A Centenary Reflection" (2004) 17 *Australian Journal of Labour Law* 229.

[35] *The Amalgamated Society of Engineers v Adelaide Steamship Company (the Engineers Case)* (1920) 28 CLR 129 (HCA) (1921) 29 CLR 406 (JC).

[36] *Bourke v State Bank of New South Wales* (1990) 17 CLR 276 at 285 and cases cited.

[37] *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 205 [483] – 209 [497].

My opinion in the *Work Choices Case*, however, was a minority one. The majority of the High Court of Australia upheld the constitutional validity of the legislation, swept aside a century of s51(xxxv) jurisprudence and shifted the focus of industrial relations law in Australia in the direction of direct legislation with respect to corporations.[38] This rendered the use of independent conciliation and arbitration, largely an optional, alternative, head of federal power. In my view, for the reasons that I explained in the *WorkChoices* case, this was legally wrong, constitutionally undesirable and socially regressive.[39]

The union movement and the national system of third party determination suffered a blow. Whilst some critics decried the conciliation and arbitration system as a "club", committed to inefficient, market-defying deals, it had values that transcended the purely economic. It brought in its train important decisions favouring women's rights in employment;[40] the equal rights of indigenous workers;[41] and creative entitlements adapted to the rapidly changing nature of work.[42] Apart from everything else, the conciliation and arbitration system called upon the skills of repeat players. It thus gave an important institutional role in Australia to industrial organisations, including industrial organisations of employers and employees. Destroying that role was a politically understandable objective for a conservative government. However, the shift to the use of other heads of federal constitutional power (notably the external affairs power in s51 (xxix)), probably began earlier under the immediately preceding ALP government, despite the long association of the ALP with the industrial labour movement.[43]

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[38] *Ibid* (2006) 229 CLR 1 at 217 [520] ff.

[39] *Ibid* (2006) 229 CLR 1 at 220-222 [526]-[530].

[40] *Ibid National Wage Case* 1974. See Gillian Whitehouse, "Justice and Equity: Women and Indigenous Workers" in Isaac and McIntyre, above n1, 207 at 226-237.

[41] Ibid *loc cit* referring to *The Cattle Station Industry (Northern Territory) Award* 1951, (varied 1965) at 210-216.

[42] Mills and Sorrell, above n8 at 204-205 [230] referring to *Engine Drivers' and Firemen's General Award* (1955) 80 CAR 606 at 624. .

[43] See *Industrial Relations Reform Act* 1993 (Cth) inserting provisions in the Act reliant upon the external affairs power in the *Australian Constitution* following ratification by Australia of the ILO Convention 100 (Equal

Improving amalgamation laws: In 1972, following the AMWU merger, the *Conciliation and Arbitration Act 1904* was amended[44] to include provisions dealing explicitly with amalgamations of industrial organisations (Part VIIIA, ss 158A-158U). The essential process envisaged by the Part was that a committee of each amalgamating organisation would first pass a resolution in favour of the amalgamation. A scheme of amalgamation would then be submitted to the Industrial Registrar. If all procedural requirements had been followed, the Registrar would gazette the amalgamation proposal as a proposal. The Industrial Registrar would allow for objections to be made. If there were no objections, or if the objections were disposed of and the relevant period of time had elapsed, the Industrial Registrar would approve ballots of the amalgamating unions' members. Once approved at the ballot, the Industrial Registrar would then fix a date for the amalgamation to take effect.

Unfortunately, in the result, these amendments appear to have actually made it more difficult for industrial organisations of employees to amalgamate. They did so by imposing more detailed procedural requirements (for example, requiring that at least half of the eligible persons on the roll of member of each union to participate in the ballot. (s 158N) and allowing broad scope for objections (s 158H). The notice periods and the other periods of time involved also made amalgamation a lengthy process.

In the 1983 Accord between the newly elected Hawke ALP Government and the ACTU, it was noted that "[t]he restrictive laws inhibiting the amalgamation of unions should be reformed". Part VIIIA of the *Conciliation and Arbitration Act* was then amended in fairly minor ways during the 1980s. A more significant change occurred later with the complete repeal of the previous Act and its replacement by the *Industrial Relations Act* 1988 (Cth). The amalgamation provisions of the new Act (Part 7) gave far fewer opportunities for objection to amalgamations of industrial

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Remuneration) and ILO Convention 156 (Workers with Family Responsibilities). See Whitehouse, above, 207 at 237.

[44] By the *Conciliation and Arbitration Act 1972* (Cth).

organisations. Such objections could only be brought, in substance, if the amalgamation involved an extension of eligibility rules.[45] This restriction led to a much quicker process.

The new Act effectively encouraged amalgamations. The minimum number of members for federally registered unions increased from 100, (under the *Conciliation and Arbitration Act* s 132) to an initial minimum of 1000 and later 10,000 (under the *Industrial Relations Act 1988* s 189). Amendments in the early 1990s created a two-stage process[46] by which unions, with fewer than 10,000 members, would be deregistered by a given date unless they could demonstrate special circumstances justifying their continued existence. This essentially gave a number of small unions a choice between amalgamation with others or deregistration. The other main innovation in the *Industrial Relations Act* was that it conferred on the Industrial Relations Commission power to issue a "community of interest declaration".[47] Such an instrument declared that unions, which proposed to amalgamate, had a "community of interest". Such a declaration effectively conferred on the unions' proposed amalgamation a kind of official blessing. But they still had to conform to legislation and study of the process of amalgamation has concluded that the legislation was more a backdrop to the acceleration of amalgamations than a cause of their initiation.[48]

The union amalgamation provisions in the *Workplace Relations Act 1996* (Cth), Sch 1, Chapter 3, followed a scheme similar to those of the *Industrial Relations Act 1988*. The scheme in the *Fair Work (Registered Organisations) Act 2009* (Cth) Chapter 3 does not depart significantly from the *Workplace Relations Act*.

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[45] *Industrial Relations Act 1988* ss 252-253.

[46] *Ibid* ss 193-193A. The amalgamation process gained a momentum from the foregoing legislation but the outcomes are "completed and not uniform". See K. Hose and M. Rimmer, "The Australian Union Merger Wave Revisited" (2002) 44 *Journal of Industrial Relations* 525 at 540-541.

[47] *Ibid* s 241.

[48] Hose and Rimmer *ibid*, at 540

In the result, a positive legacy of the conflicts and difficulties in the AMWU amalgamation, that became legendary in union circles, was a gradual improvement in the machinery providing for the amalgamation of industrial organisations under federal law. The trauma of the highly technical objections and time delays, to which the AEU, BBS and SMWU were subjected in 1972-3, left the ACTU determined to secure change of the law so as to facilitate the process of amalgamation. After a few false starts, the ACTU's objective was achieved. The path of amalgamation was eased. Still, the ACTU objective of amalgamating more such organisations slowed and did not go ahead as it might have done. Meantime, union membership has dropped and the role of unions in Australian society has not attained the significance that in the 1970 was both hoped for and expected.

Union effort and union abuse: The Australian industrial scene affecting registered organisations of employees is very different today from what it was in 1972 when the amalgamation of the AMWU as achieved against dedicated opposition. In part, the story of the amalgamation leading to the AMWU is itself one of lethargy on the part of the labour movement. This was, possibly, the consequence of the generally comfortable relationship that the unions enjoyed with politics and the economic and political power enjoyed by union officials and union members, without the need to remain vigilant to the substantial forces for change that were happening in the market and society.

These changes include the dramatic decline in membership of industrial organisations of employees that escalated after 1973 because of the altered nature of work; the diminishing size of the manufacturing and rural industries in Australia; the advent of new and specialised technologies with lower manpower needs; shifts in the nation's terms of trade; higher general education of employees; and the failure on the part of many unions to convince members of the utility of union membership.

There has, of course, been another consideration. I refer to highly publicised instances of abuse of union office; the high factionalism of sectors of the labour movement; and the rewards occasionally handed out to committed warriors and friends, with industrial and political appointments that they did not otherwise deserve.

Additionally, instances of family inheritance of union and political office, because of factional alignments, and the imposition upon some unions of the personal moral and religious convictions of union bosses has led to much disaffection that has undermined the conviction amongst the membership generally that industrial organisations of employees still adhered to the idealism of earlier generations of union leaders. I know this because I met, worked with and admired the leaders of the amalgamating organisations that formed the AMWU in the 1970s. They were people of complete integrity and unchallengeable devotion to the interests of their members. I also knew and worked for other fine union officials. One such officer was Ray Gietzelt AO, long-time secretary of the then Miscellaneous Workers' Union, who died in 2012. At his funeral I listened to the tribute by Bob Hawke AC to Ray Gietzelt's sterling service to the labour movement. This resonated with my own recollections of him and of the leaders of the AMWU who achieved the amalgamation for which I provided legal advice.

When I contrast the qualities of the "three Jacks": Jack Bevan (BBS), Jack Heffernan (SMWU) and Jack Garland (AEU), with other names of a number of union officials today, they make a sorry contrast. For example, it is a source of puzzlement to me and many others why the Shop Distributive and Allied Union (SDA), under the leadership of Mr Joe de Bruyn, should devote itself so vehemently to opposing equality rights of homosexual citizens in Australia, save for the personal religious opinions of the de Bruyn family. What have gay citizens, including gay workers, ever done to so deeply alienate the SDA? Why should the SDA be taking such a leading and influential role on such a topic? What is the special interest of officials of the SDA? Walking through large retail stores, inferentially containing SDA members, I question whether these good people have such a hostility and hatred towards this new cause of equality and this particular disadvantaged group. There was a time when leaders of the union movement could be counted on to be advocates for equality of justice. No so, it seems, today. This is a sad indictment of the intense religious conservatism that has seized control of parts of the union and labour movement today.

Contrast this development in Australia with changes elsewhere in the world. Consider the advances in equal rights to marriage for gay citizens and unionists in Spain, Argentina, Portugal, parts of Mexico, Canada, South Africa, Scandinavia, parts of the United States, Uruguay, France, New Zealand and shortly the United Kingdom. Contrast also the election results achieved in the United States, of America in 2012 where the tide of popular opinion on these and related topics is clearly shifting. In the State of the United States where an attempt was made to insert a ban on marriage equality (Minnesota), the attempt failed. In the State where a proposal was made to legalise marriage equality (Maine), it was upheld. In the States were the electors where asked to approve a law permitting marriage equality (Maryland and Washington), they did so. In one State where an attempt was made to unseat a Supreme Court judge who had decided in favour of marriage equality two years earlier (Iowa), it failed whereas a like effort had succeeded four years ago. In one State, for the first time (Wisconsin), an openly homosexual senator, Tammy Baldwin, was elected to the United States Senate. So the times are changing.[49] But not, it seems, the attitude of the officials of the SDA in Australia. It is the engagement of officials of this kind, in an area of no direct relevance to their industrial interests, but merely as an abuse of power for personal religious or moral convictions, that has given industrial organisations and sections of the labour movement a bad name. Sadly, as the recent vote on marriage equality in the Australian Parliament shows, such industrial muscle still has clout within the ALP.[50]

I hope to see the time when such inappropriate and divisive deployment of personal and religious opinions in industrial organisations is ended. The time when the union movement, and the wider political alignments of both sides of politics, embrace notions of civic equality, secularism in politics and justice for all people without discrimination. These were once certainly the usual inspirations of the industrial labour movement. They were surely the aspirations of the leaders of the amalgamating organisations that formed the AMWU.

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[49] M.D. Kirby "Judicial Independence: The United States Electoral Systems and Judicial Removals in Iowa" (2013) *Australian Bar Review* , 270.

[50] Bills to amend the *Marriage Act* 1961 (Cth) to permit marriage between persons of the same sex were defeated both in the House of Representatives and in the Senate of the Federal Parliament in 2012.

Misuse and distortion of industrial power for personal purposes is not confined to those who are said to have wrongly expended union funds for personal gain. Or used union resources or political power inappropriately. It extends to those who misuse the power that belongs to their members to exert their influence to further their personal or family religious or moral convictions. So long as this happens, the good name of industrial organisations of employees will be damaged. What is needed is a restoration of the integrity, devotion, idealism and principles so evident in the leaders of the organisations that proposed amalgamation in the AMWU; in 1972 achieved that objective; and in 1973 completed it with the adoption of the AMWU name.

I honour the labours and example of the officials who planned and achieved the amalgamation of the AMWU. I celebrate the successes that the law delivered to them and to their members. I was glad to be one of those who helped. I honour all the actors in the drama, and especially Roy F. Turner who orchestrated the outcome.