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UNIVERSITY OF WOLLONGONG

SIR RICHARD KIRBY LECTURE 2001

TUESDAY, 16 OCTOBER 2001

**SIR RICHARD KIRBY AND A CENTURY OF FEDERAL INDUSTRIAL
ARBITRATION**

The Hon Justice Michael Kirby AC CMG

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THINGS IN COMMON

It is a great honour to be invited to deliver the annual lecture named for Sir Richard Kirby. It is a special privilege to do so in his presence.

The list of those who have delivered the lecture reads like a Who's Who of Australia's industrial relations over the past twenty-two years. The first lecture was given by Sir Richard himself. He was followed by Jim Staples, then a Deputy President of the Australian Conciliation and Arbitration Commission which Sir Richard had helped to establish. A couple of years later Blanche D'Alpuget, biographer of our hero, gave the lecture. There followed many

* Justice of the High Court of Australia.

distinguished speakers, most of whom I have known as colleagues and friends.

In the tradition of industrial relations, there has been a good mix of those whose background has been on the union side, those on the employers' side, those from academe and those, like me, who have wandered all over the place. The former Prime Minister, Bob Hawke, an unapologetic admirer of Sir Richard Kirby, gave the lecture in 1998, sixteen years after Blanche D'Alpuget. He spoke of the links between his own distinguished career in industrial relations and public life and the career of Sir Richard Kirby. He spoke with knowledge and obvious affection¹. I can also do this. But I cannot call on the reservoirs of personal interaction before the national industrial tribunal that Bob Hawke brought to bear in his lecture.

Yet my links - or at least those of my family - go back many years before even Bob Hawke met Dick Kirby. When in about 1930, Sir Richard was a young barrister, my father's mother, my grandmother, decided for a divorce. They were hard times. It was harder still for women to go it alone. I am not sure whether she chose Dick Kirby because of his name - thinking that one Kirby would be the best means to get rid of another. Perhaps he was just

¹ R J L Hawke, "The Life and Work of Sir Richard Kirby - What Does it Tell Us for the Issues of Today?", 20th Sir Richard Kirby Lecture, University of Wollongong (1999).

recommended by the solicitors. But although we are not related (so far as I am aware, and we have not submitted to a DNA test), he appeared on the brief. The marital bond was severed. But a new link with the Kirby name was forged. At our family table, my grandmother would tell us about her barrister, Mr Kirby. He was a perfect gentleman, she would say. He treated me with complete respect. He listened to my story. He filled me with confidence. And he won the case. In a lawyer you cannot ask much more than that.

My grandmother was a highly intelligent, well read, perceptive and literate woman. She worked as a cashier in a busy city hotel, since demolished. In the hard times of the Depression, she looked after her only child, my father, and other members of the family who depended on her income for survival. "He never pressed me for his fee. He was very patient", she said. I am sure that she would have paid the fee, for that was the kind of person she was. But her story of her barrister inculcated in me an attitude to litigants that I have never forgotten, as advocate or judge. Respect their human dignity. Never be too impatient. They will talk about you at their family table years and decades later. Instinctively, Dick Kirby knew all these things. Over and beyond all his worldly achievements and honours, he was, and is, a decent, kind and loving human being. In the end, that is what matters most. Smart alics abound. The clever are legion. But kind and generous hearts sometimes seem thin on the ground.

When I was a young barrister, I received more than a few industrial briefs, generally on the union side, before the old Commonwealth Industrial Court, established in 1956. I was admitted to the Bar in 1967. Dick Kirby was still the President of the Commission until 1973. For some reason I did not get a brief in that place until after his retirement. Yet, often enough to be embarrassing, I would turn up in the transcripts in my appearances before the Court not as the humble "Mr Kirby", junior counsel of no great distinction. But as "Kirby CJ". It whetted my appetite for an office which, alas, I have never held. "P", "ACJ", "JA" and "J" have followed me around. But never "CJ".

On one occasion I apologised to the Chief Judge of the Commonwealth Industrial Court, Sir John Spicer, for this mistake. "Never mind", he said. "I am sure that it is just an indication of what is to come". Spicer, like Dick Kirby, was always a gentleman, something I regret to say that was not a description that could be given to every member of that Court at the time.

In December 1974, I was myself appointed to the Arbitration Commission as a Deputy President. I was 35 years old at the time. Many people assumed that I was Sir Richard's son. Nepotism in judicial appointments is not unknown. Amongst the presidents of republics, it has become almost compulsory. I spent much of my time in those early years denying that I was Sir Richard's son. This

was not because I would have been unhappy at that prospect but because I had a perfectly good father of my own. Sir Richard, I am sure, repeatedly denied that I was his son. As the years wore on and I became more involved in controversial projects of the Australian Law Reform Commission, his denials of paternity became more vehement - even expletive! Now we have settled into a comfortable relationship in which we are willing to accept that we may be distant cousins. Just the same, we are still refusing the DNA tests.

According to Bob Hawke, in his lecture in this series, when Dick Kirby first gave up his life as a barrister to accept appointment at the age of 39 as a judge of the New South Wales District Court, his colleague, the young John Kerr asked him "why he had taken 'such a dead-end job'. With considerable prescience Kirby replied 'I think something else will turn up'"².

Actually, the life of a District Court judge, like that of a Justice of the High Court, is very interesting, varied and significant. But when I read these words, they reminded me of the observations to me by my now colleague Michael McHugh when I told him of my appointment as a Deputy President of the Commission. He said

² Hawke, 2.

"Michael, why would you do this? You will sink like a stone out of sight without a trace".

I did not regard my appointment to the Arbitration Commission in 1974 as taking a "dead-end job". On the contrary, at that time, the Conciliation and Arbitration Commission was a great national body. Its influence on the social and industrial mores of Australia was profound. I knew something of its history. Its prestige had been cemented, after a rather rocky start, by the integrity and skill with which Sir Richard Kirby led it after the division of the judicial and arbitral powers following the High Court's decision in 1956 in the case that bears his name³.

Reading the stories of Dick Kirby's life, including in Bob Hawke's lecture in this series, I have been brought quite powerfully to see a number of similarities to my own interests, attitudes and career.

First, like him, I loved industrial relations. I still do, although it is rare nowadays for it to visit the High Court. It is an area of the law about people - ordinary Australians. It is also about power and law. That is a heady combination. It is infinitely more interesting and generally more important than a day puzzling about the problems

³ *The Queen v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254.

of commercial law. In the opinion of many members of the legal profession, such law is the most prestigious corner of practice. But I always tell my clerks that that body of the law usually amounts to no more than glorified debt recovery. If you want the stuff of life and of conflict, passion and power, you have to look to industrial law, criminal law and family law.

Secondly, well in advance of his time, Dick Kirby was interested in international affairs, and specifically in our relations with our region. In 1945, he was appointed to the Australian War Crimes Commission that helped prosecute the war criminals from our war with Japan. Although the military tribunals in Asia were not generally of the same calibre as that at Nuremberg and those in Germany after the Second World War, there is no doubt that they helped to plant the idea of an international criminal order in which tyrants and oppressors would be brought to account.

Recent events in the world have shown how important it is that we built global institutions that can respond to wrongs through the instruments of law and not just through the instruments of violence, power and war. Dick Kirby was one of the early pioneers in the movement for law not war.

One day we will see an International Criminal Court established. Ironically, the chief opponent of this instrument of international law is the United States of America. I suppose it is in

the nature of things that if you are the greatest power on earth, you resist submitting your power to the controls of law. But one day the movement that Dick Kirby helped to establish after the Second World War will come to fruition in an effective international regime. Already, in the tribunal in the Hague, a start has been made⁴.

Thirdly, Dick Kirby took a leading role in the moves of Indonesia towards independence and self-respect. He was nominated by Mr Chifley in 1947 to the Committee of Good Offices on the Indonesian Question established by the Security Council. Lately, I too have become involved in many international activities. One was as Special Representative of the Secretary-General for Human Rights in Cambodia. Like Dick Kirby's post, mine required a mixture of conciliation and compromise with steady adherence to principle. I am sure that he would say of his work in Indonesia, as I do of mine in Cambodia, that the abiding memory is of people. Strong, brave and long suffering people. Most people only want to get on with their lives in peace with their families in a modicum of human dignity and economic sustenance. Indonesia in 1947 was probably like Cambodia in 1993. It is a great privilege for Australians to be trusted to play a part in the rebuilding of institutions, of constitutionalism and of independent courts in the countries of our region. Dick Kirby was one of the first to be so

⁴ cf R May and Ors (eds), *Essays on ICTY Procedure and Evidence* (2001).

engaged. He saw the importance of these issues. For him, Asia was never just a place to fly over on the way to the "civilised" world. I recent days Justice Alan Boulton, Senior Deputy President of the Australian Industrial Relations Commission has been appointed for two years to head the International Labour Organisation Office in Jakarta. He will be helping Indonesia to establish an effective and just industrial relations system. I am sure that this new link between the Commission and Indonesia will be a source of great pleasure for Sir Richard Kirby.

Fourthly, Dick Kirby saw the importance of industrial relations and of the role that the law could play in affording a venue for the settlement of disputes. He understood how, sometimes, arbitration of those disputes could be useful where the parties could not solve them unaided. Mary Gaudron and I both agree that our respective times in the old Commission were amongst the happiest and most fulfilling of our lives. Mine were mostly at the Bar table. My appointment in 1975 to the Law Reform Commission followed quickly after my appointment to the Arbitration Commission. Forty days and forty nights, I served actively in the Arbitration Commission. I was the Deputy President in charge of the maritime industry. I reached the age of 36 there - Justice H V Evatt's age on his appointment to the High Court. Mary Gaudron, on the other hand, was in charge of the meat industry. She rejoiced in her time stomping around the abattoirs of Australia in gumboots covered in blood and gore. We sometimes see lingering reminders of those

days when she gets cross with counsel before the High Court. Come to think of it, we sometimes see reminders of those days when she gets cross with the rest of us.

Fifthly, we have it on the authority of Bob Hawke that Dick Kirby was always willing to change his mind if he could be persuaded to a different point of view by the evidence and arguments placed before him. In his lecture in this series, Bob Hawke says⁵:

"... Kirby led a Bench of three in 1961 which unanimously overturned the 1953 decision and reinstated price movements as a central element to be considered by the Tribunal in future cases. My assessment of Kirby at that time recorded by his biographer, could not have been more different from Treasury [which regarded him as 'a menace'] and I have never had reason to resile from it: 'Kirby showed a tremendous integrity - he is one of the only public figures since federation willing to de-feather himself publicly, to admit that he had been wrong and to accept a fantastic amount of criticism from the Establishment for it. Personally, he was at comfort stations; the Establishment had got him. It took real courage to do what he did'".

I take that as an example of what we should all do who hold judicial or similar independent decision-making office. Courage is the badge of such an office. And we need exemplars like Dick Kirby.

⁵ Hawke, 11.

It so happens that I am now one of the longest serving judges in Australia. But if Dick Kirby had not resigned his commission as a judge of the Commonwealth Court of Conciliation and Arbitration, he would certainly be the longest serving judge in the nation's history - even outstripping Sir Edward McTiernan. He was appointed to the Commonwealth Court for life, it being established as a federal court under Chapter III of the Constitution. Despite the decision in the *Boilermakers' Case*, the old court was never disbanded. Nor was its legislation repealed, until Dick Kirby, the last of its members, resigned. This was not a convention that was followed when the Arbitration Commission was abolished and the occasion was taken effectively to dismiss Jim Staples from office⁶.

But whether you are a 'lifer' or the newest member of a court or tribunal matters not. Those who hold independent office must follow Dick Kirby's example. I strive to do so. Of course, doing so imposes some burdens. Life can sometimes be easier if you "go with the flow" and agree with your colleagues. Sticking to your principles, even in minority as Dick Kirby did in 1965 in the *National Wage Case* decision of that year, is the price of integrity and

⁶ The story is told in M D Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) *Journal of Industrial Relations* 334 at 342; M D Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 *University of New South Wales Law Journal* 187; M D Kirby, "The Removal of Justice Staples - Contrived Nonsense or Matter of Principle?" (1990) 6 *Australian Bar Review* 1.

independent judgment. People may, or may not, agree with your opinion. History may, or may not, vindicate it. People may, or may not, even read it. Citizens may, or may not, care. But so long as those who hold public office act with integrity, according to conscience and are immune from pressure (including the subtle pressures of collegiate and institutional life) our institutions in Australia will rest on a firm foundation. This is why judges and mediators like Sir Richard Kirby are so important, symbolically, for the good of our Commonwealth. It is the duty of us, who come later, all of us, to strive to do likewise.

THE COMING CENTENARY

As is often remarked, Dick Kirby's life has virtually spanned the entire history of the federal legislation on conciliation and arbitration. He was born in September 1904. The *Conciliation and Arbitration Act* was passed a little earlier that year.

In recent days, I have had the privilege to read an essay titled "Parliament and the Industrial Power" written by Dr Andrew Frazer, Senior Lecturer in Law of the University of Wollongong. Dr Frazer was commissioned to write his essay by the Commonwealth Parliamentary Library. It will be included in a book that will commemorate the centenary of federation⁷. If the other essays in

⁷ Editor, Geoffrey Lindell, Federation Press (2001).

the book are of the same calibre, it will be well worth buying. I hope that Dr Frazer may give a future lecture in this series. His close study of the origins, history and prospects of para (xxxv) of section 51 of the Constitution would itself provide a wonderful source for an insightful story. Those who know the detail can stand back from it. They can sketch where we have come from, where we are, and where we seem to be going.

Every lawyer has a general idea of how the restricted power to deal with industrial disputes found its way into the Constitution. But Dr Frazer traces the hard-headed negotiations at the Constitutional Conventions. It was not just the Australian waterfront disputes of the 1890s that stimulated the perceived necessity for a federal power in respect of industrial relations. Strife in the wool industry, stoppages by coalminers in New South Wales producing scarcity of coal and gas in Melbourne and a big pastoral strike in Queensland helped to set the agenda for the debates that unfolded in the run up to federation.

What had begun as a bright idea of Charles Kingston from South Australia had, by the Adelaide Convention in 1897, developed into a working system of conciliation and arbitration in New Zealand⁸. Yet still the idea would probably not have got off the

⁸ A Frazer, "Parliament and the Industrial Power", unpublished manuscript to be published in G Lindell (ed), *Parliament, Powers*

ground if it had not been embraced by the Victorian Liberal, Henry Bournes Higgins. The problem which concerned Alfred Deakin was how it would be possible to distinguish "interstate" from purely local disputes. Certainly, most of those present in the conventions never conceived of a large and busy national arbitral tribunal. They thought that this would be a reserve power, confined to the truly terrible conflicts that defied piecemeal solutions in the newly emerging local industrial bodies⁹. Just the same, it was a close run thing. The ultimate proposal put by Higgins passed by a vote of only 22 to 19.

Dr Frazer describes the difficulties that then ensued in obtaining the passage of the legislation to set up the proposed Commonwealth Court of Conciliation and Arbitration. Alfred Deakin introduced the Bill in July 1903. It ran into violent opposition, especially in Victoria. The failure of the Bill to define those disputes that were "interstate" was a source of great concern¹⁰. Little did anyone dream of the felicitous invention of logs of claim that, upheld by the High Court, would expand beyond all recognition the jurisdiction of the federal body once it was established¹¹.

and Processes: The Vision in Hindsight, Federation Press, Sydney (2001), ms at p 2.

⁹ Frazer, at p 4.

¹⁰ Frazer, at p 8.

¹¹ The story is told in *Attorney General (Queensland) v Riordan* (1997) 192 CLR 1 at 39-46.

As Dr Frazer points out, when the Act was proclaimed it was anticipated that the President of the new Court of Arbitration would be a Justice of the High Court who would offer services part-time because they would only be activated when a pressing dispute arose¹². Mr Justice O'Connor, the first President from 1905 to 1907 had little to do. But it was Mr Justice Higgins, President from 1907 to 1920 who breathed life into this invention of the Constitution for which he had been the midwife.

An early idea for making the arbitration system work sought to fuse this foundation stone of the federation with another, namely federal excises to protect Australian industry. Thus the *Excise Tariff (Agricultural Machinery) Act* 1906 (Cth) provided local manufacturers with exemption from excise duty if the wages they paid were "fair and reasonable". But the standard that would be "fair and reasonable" involved a mechanism that, looked at with today's eyes, seems extraordinary. Wages would be so treated if a resolution of both Houses of the Parliament so specified or if a decision of the President of the Commonwealth Court of Conciliation and Arbitration so determined¹³. If the *Boilermakers' Case* of 1956 was thought to reveal an impermissible invasion of arbitral functions

¹² Frazer, at p 8.

¹³ Frazer, at p 9.

into the work of a court created within Chapter III of the Constitution, here was an invasion of the Parliament, by resolution, into the determination of the rights and liabilities of individuals under a law of general application.

Yet the provision in relation to the powers of the President of the Court became the foundation of the *Harvester* judgment of Justice Higgins¹⁴. Thus began the long journey towards the basic wage, the national wage and fair and equitable remuneration for Australian workers. Soon afterwards, this part of the legislative scheme was struck down by the High Court¹⁵. Higgins, never dismayed, found new ways to fix a basic wage under the Act on a needs-based approach.

The tensions that emerged between Higgins and the other members of the High Court bench are well described by Dr Frazer. Higgins declared that the Court was leading the arbitration system into a "veritable Serbonian bog of technicalities"¹⁶. This led to the efforts of William Morris Hughes, Attorney-General in the Fisher Labor Government, to secure, by referendum, a formal change to the

¹⁴ *Ex parte H V McKay* (1907) 2 CAR 1; cf *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union* (1967) 118 CLR 219.

¹⁵ *The King v Barger* (1908) 6 CLR 41.

¹⁶ *Australian Boot Trade Employees Federation v Wybrow and Co* (1910) 4 CAR 1 at 42.

provisions of s 51(xxxv) of the Constitution. Hughes proposed an expansion of industrial power for the Federal Parliament. Like many other such proposals that were to follow, it founded on the rock of the reluctance of the Australian electors to approve amendments to the Constitution.

So frustrated did Prime Minister Bruce become in 1929 that he issued an ultimatum to the State Premiers. Unless they would agree to refer the States' industrial powers to the Commonwealth, he would repeal the 1904 Act. He would abandon the field completely to the States, apart from interstate shipping. As is notorious, the Premiers declined to cooperate. Bruce's scheme drew opposition from within his own party's ranks. The government was defeated on the floor of the House of Representatives. The Parliament was dissolved. The ensuing campaign was fought over industrial arbitration. It became, in effect, a plebiscite on the continuation of the system that had evolved from the constitutional language. The voting swing to the Labor Party led by Mr Scullin was small (about 4%). But it produced a landslide in seats. Bruce and four of his Ministers were defeated in their own electorates. This is the only time that the Australian people have been asked quite explicitly to judge their peculiarly Australian system of industrial justice. Dr Frazer concludes that "while other factors were at play, there can be

little doubt that the result showed widespread support for the existing industrial relations system"¹⁷.

A good part of the industrial history of Australia has been taken up in parliamentary debates about the inadequacies and limitations of the constitutional head of power over industrial relations, over referendum proposals, failure and temporary disillusionment and frustration. All of these are traced by Dr Frazer. Over the course of the first century of federation there have been no fewer than seven attempts to expand the federal industrial power. Only one of them, put by Dr Evatt in 1946, came close to acceptance. It secured 50.30% of the national vote and succeeded in three States. But it fell short of the majority of States requirement of s 128 of the Constitution¹⁸.

BACKWARDS TO THE FUTURE

In a recent talk in Melbourne at the launch of the Australian Labour Law Association, I traced the way in which, taken on the whole, the High Court had supported most of the innovations of the national arbitration body over the past hundred years:

¹⁷ Frazer, at p 30.

¹⁸ Frazer, at p 19.

"It upheld the log of claims procedure¹⁹. It expanded the notions of what could constitute an industrial dispute²⁰. It narrowed the exclusive prerogatives of employers²¹. Occasionally, it slapped its rival upstart down as when in 1956 it declared that Arbitration Court an unconstitutional mixture of judicial and non-judicial functions²². This led to the divided Commonwealth Industrial Court and the Arbitration Commission²³. These have now emerged as the Federal Court²⁴ and the Australian Industrial Relations Commission²⁵. The latter maintains its tradition of 'innovation'. For example in May 2001 it expanded parental leave to apply to casual employees²⁶. But gone are the days of the national wage decisions that, up to the 1980s, affected just about everybody's wages. In fact, some observers have suggested that the network of industrial relations law, that once ruled the Australian economy from Melbourne, is dead and the Commission that was its vehicle is now sidelined as a 'bit player' in today's system"²⁷.

¹⁹ The acceptance of "paper disputes" can be traced back to *Holyman's Case* (1914) 18 CLR 273 at 285.

²⁰ *Federal Clothing Trades of the Commonwealth of Australia v Archer* (1919) 27 CLR 207; *The Queen v Hamilton Knight; Ex parte CSOA* (1952) 86 CLR 283; *The Queen v Portus; Ex parte Transport Workers' Union* (1977) 141 CLR 1.

²¹ For example *The Queen v Hamilton Knight; Ex parte CSOA* (1952) 86 CLR 283.

²² *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

²³ *Conciliation and Arbitration (Amendment) Act* 1956 (Cth).

²⁴ *Federal Court of Australia Act* 1976 (Cth), s 5.

²⁵ *Industrial Relations Act* 1988 (Cth), s 8(1) - now *Workplace Relations Act* 1996 (Cth), s 8(1).

²⁶ Parental Leave Test Case Standard noted: *CCH Australian Industrial Law* (June 2001), Newsletter 6/2001, 1 at 16.

²⁷ M Steketee, "Still the Independent Umpire", *The Age* (Melbourne), 4 June 2001, 11.

In my commentary on these contemporary assessments, I acknowledged that there was evidence to support them. The old arbitration system worked through trade unions and employer organisations²⁸. The proportion of Australian employees who are now members of unions has been steadily falling over many years. In 1996 it was 31%. Last year it was only 25% and still dropping²⁹. In part, this change has been reinforced by the moves of successive federal governments, Labor and Coalition, to alter the focus of industrial law from industry-wide awards to workplace agreements³⁰.

In my remarks in Melbourne I also suggested that it was unlikely that there would be a return to the so-called "glory days". Whilst sometimes the Australian arbitral bodies may not have rewarded the economically efficient, there was still a need for a national institution of some kind. It alone could afford a venue for mediation and dispute resolution; provide a rapid response to bringing people around the table; and offer a trusted mediator when

²⁸ H B Higgins, "A New Province for Law and Order" (1915) 29 *Harvard Law Review* 13 at 23.

²⁹ B Ellem, "Trade Unionism in 2000" (2001) 43 *The Journal of Industrial Relations* 196 at 198.

³⁰ Amendments to the Industrial Relations Act 1988 (Cth) in 1993 introduced "Enterprise Flexibility Agreements" (ss 170 NC-170 QG). See B Creighton, "One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?" (2000) 24 *Melbourne University Law Review* 839 at 849. Australian Workplace Agreements were introduced by the *Workplace Relations Act* 1996 (Cth), Pt VID.

the resolution of the industrial dispute seemed impossible. For these reasons it was my opinion that a national industrial relations body was unlikely to disappear in the near future³¹. I offered a few thoughts about the possible future rôle of the Australian Industrial Relations Commission and, in particular, in translating the increasingly important global standards, reflected in International Labour Organisation resolutions and conventions, into Australian workplace practices.

Imagine my surprise to read, soon after in the media, an assertion that these comments amounted to a partisan intervention in the debates about industrial relations law and policy. The commentator appears to have attributed to me the extreme partisan position that he exhibited for himself. His was yet another instance of the intolerance that is creeping into public discourse in this country when points of view are expressed with which one does not immediately agree. This is an intolerance of which we should be intolerant. In a free community, discourse about our constitutional arrangements, our laws and the future of important national institutions should be encouraged, not repressed. I have nothing but contempt for those who would silence such debates.

³¹ M D Kirby, "Industrial Relations Law - Call Off the Funeral" (2001) 6 *Deakin Law Review* 1 at 4.

No one doubts that industrial relations law has altered dramatically in our country in the past decade. The change to workplace arrangements began during the Keating government³² and has gathered place under the Howard government³³. But three relevant considerations do not seem to have been taken into account.

First, there is the small matter of the present provisions of the *Workplace Relations Act* 1996 (Cth) itself. Under that Act of the Federal Parliament, the jurisdiction of the Australian Industrial Relations Commission can still be invoked, including by notification of the existence of an alleged dispute, under s 99 of that Act. This section enlivens powers of conciliation under the succeeding sections of the Act³⁴. Furthermore, the Commission has powers under the Act³⁵ to make orders to stop or prevent industrial action. Such powers are regularly invoked. They have the advantage of bringing parties together who might otherwise pursue protracted strike or lockout action and other tactics with consequent disruption and loss. Neither side in national politics contemplates, or proposes, the abolition or curtailment of the Industrial Relations Commission.

³² *Industrial Relations Act* 1988 (Cth), ss 170NC-170QG introduced in 1993.

³³ *Workplace Relations Act* 1996 (Cth), Pt VID.

³⁴ *Workplace Relations Act* 1996 (Cth), ss 100-103.

³⁵ *Ibid*, s 127.

The recent appointments to the Australian Industrial Relations Commission by the Federal Government of four Deputy Presidents and two Commissioners in Melbourne, Brisbane, Perth and Sydney represent a great boost to the Commission. It is a vote of confidence in its future. It is therefore proper to consider exactly what its role will be in five, ten or thirty years time.

Secondly, between 1991-1992 I took part in a mission of the International Labour Organisation (ILO) to South Africa. That mission, saw at first hand, the chaos that could arise in a country which relied exclusively on the general courts to solve industrial relations problems. South Africa afforded no venue, even as an occasional short term alternative, to bring parties together where what was needed was a place for discussion and conciliation. Of course, such facilities will not always work. The law of the land remains in place. But experience has taught us in Australia (and was manifest in South Africa) that the general law is often a most imperfect instrument for solving serious industrial conflicts. The South African Parliament enacted laws to give effect to the recommendations of the ILO mission. In essence, they copied the best of our rapid response system. Now it is also being copied in Lesotho and Namibia and elsewhere in Southern Africa.

Thirdly, my opinion about the occasional weaknesses of the general courts system in this area is not one that I hold alone. One of the greatest judges of the last century was Lord Diplock. As

senior Law Lord he presided over the case of *MWL Limited v Woods*³⁶. That case concerned a trade dispute in which an interlocutory injunction had been sought under the general law to restrain a union from interfering with the operation of a ship sailing under a flag of convenience. The object of the union was to make the owners increase their rates of pay to the crew who came from developing countries. They were paid wages very low by European standards. They were flown to Europe to man the ship under a European crew who were paid at full rates. In his judgment, Lord Diplock said³⁷:

"In the normal cases threatened industrial action against an employer, the damage that he will sustain if the action is carried out is likely to be difficult to assess in money and may well be irreparable. ... To grant the injunction will maintain the status quo until the trial; and this too is a factor which, in evenly balanced cases generally operates in favour of granting an interlocutory injunction. So on the face of the proceedings in an action of this kind the balance of convenience as to the grant of an interlocutory injunction would appear to be heavily weighted in favour of the employer.

To take this view, however, would be to blind oneself to the practical realities:

- (1) That the real dispute is not between the employer and the nominal defendant but between the employer and the trade union that is threatening industrial action;
- (2) That the threat of blacking or other industrial action is being used as a bargaining counter in

³⁶ [1979] ICR 867.

³⁷ [1979] ICR 867 at 879.

negotiations either existing or anticipated to obtain agreement by the employer to do whatever it is that the union requires of him;

- (3) That it is in the nature of industrial action that it can be promoted effectively only so long as it is possible to strike while the iron is still hot; once postponed it is unlikely that it can be revived;
- (4) That, in consequence of these three characteristics, the grant or refusal of an interlocutory injunction generally disposes finally of the action; in practice actions of this kind seldom, if ever, come to actual trial".

The House of Lords thus confirmed the decision of the trial judge to refuse an injunction. The matter turned, in part, on immunities granted under English legislation³⁸. But the Law Lords refused to interfere. The point of the case is that these senior judges recognised the "practical realities" of the interface of the general law and industrial relations problems which life in the general courts teaches every experienced lawyer who keeps a mind open to experience. No one is above the law, including employers, employees and trade unions. But sometimes (not always) conciliation will solve an industrial problem where resort to strikes, lockouts and injunctions give only temporary respite to one side. The fact is that employers and employees, and their representative bodies, usually need each other. That is why, more than occasionally, institutional help is needed that faces up to these realities.

³⁸ *Trade Union and Labour Relations Act 1976 (UK), s 3(2) and Employment Protection Act 1975 (UK), s 125(1).*

Just as industrial circumstances have changed significantly in Australia, so it is inevitable that industrial relations law will change. The directions of future change may be found by examining present realities. Union membership has declined. A workplace focus rather than an industry wide one is likely to be maintained. Referral of powers to the Commonwealth is one option. Use of the corporations power for direct legislation on industrial matters may be another³⁹.

For all that, in my view it is most unlikely that the overall pattern of Australia's national industrial relations laws will alter greatly in the foreseeable future. Dr Frazer, in his conclusion, states⁴⁰:

"Adherence to the arbitral model provided a high degree of institutional and procedural stability but with restricted flexibility. This focus on conciliation and arbitration has been due not to inertia but to the vision contained in the industrial power itself".

Dr Frazer too thinks it unlikely that there will be radical alteration from the current arrangements that rest squarely upon s 51(xxxv) of the Constitution⁴¹:

³⁹ Frazer, above n 8, 53.

⁴⁰ *Ibid*, 51.

⁴¹ *Ibid*, 54.

"Indirect regulation through an independent tribunal remains a useful means of delegating power and responsibility, and an effective way to limit politicisation of industrial relations issues. It is also unlikely that government will totally abrogate the economic policy and regulatory functions of the Commission, although the dispute resolution role may decline further under the decentralised bargaining regime. Besides this, it does seem that arbitration as an institution still has a large measure of popular legitimacy as well as political support. The progress of the 1996 legislation suggests that any major legislative proposal, if it is to succeed, will need to retain an independent arbitral body to set minimum conditions, oversee fairness and bargaining and settle more serious disputes. In this respect the original vision of Kingston, Higgins and Deakin continues to exert influence".

I would say, in conclusion, that the vision of Sir Richard Kirby, as an independent and impartial mediator, respected by all sides, is one of the reasons why the national industrial system retains general popular legitimacy. Indeed it does so despite so many other changes in our nation, its economy and institutions. We are a free people who often disagree strongly on matters of detail. That is not only our democratic right. It is precisely the way in which our century-old Constitution was intended to operate. Yet, in matters of basic dignity, fairness to each other and the principle of a "fair go" we tend to share values in common. Sir Richard Kirby can be proud of his contribution to these values and to the popular legitimacy that they still enjoy throughout the country in the institutions of industrial relations.

I congratulate the organisers of the Kirby Lecture series. I congratulate the University of Wollongong for maintaining its link with this most precious son of Australia. I am proud that I am the latest of the Kirby lecturers. Above all, I congratulate Sir Richard Kirby for his contribution to our national life which his still continuing.