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**THE CENTENARY CONVENTION
CONCILIATION AND ARBITRATION IN AUSTRALIA
OPENING PLENARY SESSION
MELBOURNE, FRIDAY 22 OCTOBER 2004**

**INDUSTRIAL CONCILIATION AND ARBITRATION IN AUSTRALIA - A
CENTENARY REFLECTION**

The Hon Justice Michael Kirby AC CMG

ABSTRACT

This paper celebrates the centenary of industrial conciliation and arbitration in Australia. It describes the ideas that eventually led to the incorporation of s 51(xxxv) in the Australian Constitution - a mixture of common law notions of fairness and the moral imperatives of Catholic social thought. It traces the "close run thing" that preceded the adoption of the constitutional power and the *Conciliation and Arbitration Act* 1904 (Cth) that gave it effect. It then explores contemporary and future issues for labour law in Australia. The author suggests that institutional factors and national characteristics are likely to protect the federal industrial tribunal from extinction or unrecognisable change. He finishes with a personal commentary based on his own experience in the national industrial institution and a description of the way the system delivered justice to his niece, where the economic market or mediation alone would not have done.

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ANOTHER NOTABLE CENTENARY

From the High Court of Australia, the other independent national decision-maker expressly envisaged by the Constitution¹, I offer words of praise on the centenary of industrial conciliation and arbitration in Australia.

* Text on which was based an address to the conference of the Australian Industrial Relations Commission and the Industrial Relations Society of Australia marking the centenary of industrial conciliation and arbitration in Australia.

** Justice of the High Court of Australia. One-time Deputy President of the Australian Conciliation and Arbitration Commission (1975-1983). The author acknowledges the assistance of Mr Alex de Costa, Legal Research Officer to the High Court of Australia, in the preparation of this paper.

¹ Australian Constitution, s 71; cf s 51(xxxv).

Let there be no doubt that the national conciliation and arbitration tribunal was expressed in our Constitution. In the words of Justice Isaacs, one of the founders of the Commonwealth, it was "conspicuously on the face of the Constitution, the third party to every significant industrial dispute"².

Each of the constitutional bodies, the High Court and now the Australian Industrial Relations Commission, required legislation to set them up so as to perform the functions envisaged at the creation. Each of the bodies has celebrated, within a year of the other, their centenary which accompanied, in turn, the centenary of the Commonwealth. Each of the national bodies has played an influential, even pivotal, role in the history and culture of this continental country. Each has been an exemplar of good governance and the rule of law. Each has been an instrument for the defence of fundamental human rights and dignity. The overlap of personnel between the two bodies has existed over much of the century. Nine of the forty-three Justices of the High Court of Australia, including me, served as presidential members of the conciliation and arbitration tribunal. Our two institutions are therefore locked together in a yoke devised by the Constitution. Sometimes the

² *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Merchant Service Guild* (1913) 15 CLR 586 at 609-610. See also *J C Williamson Ltd v Musicians' Union of Australia* (1912) 15 CLR 636 at 654.

burden has been easy; but not infrequently (as the recent decision in the *Electrolux* case shows³), it is heavier and, from time to time, dictates a change of course.

These remarks, which honour the Australian Industrial Relations Commission and its predecessors, their members, other personnel and their achievements, are divided, like Caesar's Gaul, into three parts.

The first, as befits the moment, will remember the history of the creation of the tribunal a hundred years ago. As I shall demonstrate, many of the issues that were debated at that time remain important today. It is as if the process of creation and renewal has, like a human life, been one of constant rediscovery of things that are fundamental.

Then, I will say something of the future; but I can be briefer about that for reflections on the centenary of conciliation and arbitration ensures that many whose knowledge, opportunity to influence events and freedom to speak their minds is greater than my own, will predict the future with better chances of accuracy than I can offer.

³ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116.

Finally, I will venture a few personal remarks. Many who took part in the history feel a close personal involvement in the story of conciliation and arbitration in Australia - and in its social justification. Critics have more than enough bully pulpits to express their views. At a time of centenary, it is proper to rekindle the essential moral foundation of the idea behind the inclusion of the provision for conciliation and arbitration in the Constitution. It is an idea that I believe is still in tune with Australia's notions of good governance and human rights. These are the notions that, with global economics, represent the most powerful engines for progress in the world. By our Constitution, and by our efforts, Australians got there earlier than the people of most other countries.

LOOKING BACK: ESTABLISHMENT OF THE NEW PROVINCE

The adoption of s 51(xxxv): In a recent talk, claiming that a hundred years of conciliation and arbitration was "more than enough"⁴ (and in curiously excited language) a critic linked me and my "present-day absurd perspectives" with Justice Henry Bournes Higgins. Little did he know that I could not have been more flattered.

⁴ D Moore, "Over Mighty Judges - 100 Years of Holy Grail is Enough", unpublished talk to the H R Nichols Society, XXV Conference, 6 August 2004, 16.

In fact Higgins, like myself, traced his origins to Protestant Ireland. He was brought up in the Church of Ireland and educated by the Wesleyans. But he was greatly influenced (doubtless through his religious upbringing) by notions that we would now describe as founded in fundamental human rights. In the 1890s Higgins embraced ideas that had been propounded in 1891 by Pope Leo XIII in his encyclical *Rerum Novarum*⁵. As you will understand, it is no small thing for a person with such an Ulster background to adopt papal ideas.

Throughout his life, Higgins was a true liberal. Thus, he supported home rule for Ireland. He would not have disclaimed the reputation, at the constitutional conventions of the 1890s, as a "radical" and an idealist⁶. As a Justice of the High Court of Australia, he lived long enough to see many of his constitutional and other notions (frequently first stated in dissent) vindicated: a pleasure that sadly will not be given to me in the time that is left. Higgins saw conciliation and arbitration of industrial disputes as an idea inextricably linked to concepts of civil rights and basic human

⁵ Leo XIII, Pope, *Encyclical Letter of The Holy Father, By Providence Pope Leo XIII on the Condition of Labour* (Official Translation). Full text available at: <http://www.papalencyclicals.net/Leo13/113rerum.htm>; cf K Hancock and S Richardson, "Economic and Social Effects" in J Isaac and S Macintyre, *The New Province for Law and Order* (Cambridge, 2004), 145.

⁶ J Rickard, entry on Henry Bournes Higgins in *Australian Dictionary of Biography*, Vol 9 (Melbourne, 1983), 285.

dignity. Civil rights was the language of the English common law. Basic human dignity was the language of *Rerum Novarum*⁷.

Higgins' considerable intellect and sense of history⁸ helped him and his supporters to brew what was described as "... an antipodean amalgam of Catholic social thought, the ideas of the Fabians, Sidney and Beatrice Webb and North American progressivism"⁹. It was this potent mixture that was to provide the intellectual under-pinning of the movement towards federal conciliation and arbitration in Australia¹⁰. We forget our roots when we pretend that the national arbitral tribunal of this country was a mere agency of economics. From conception down to the present, it has been an agency of something more important - industrial equity, a "fair go all round" or, as we would now usually describe it, human rights.

The past is another country. It is a place safer for people like me to dwell than in the industrial present or the future. Judges live

⁷ H Higgins, *Another Isthmus in History: A Lecture Delivered Before the University Historical Society*, Melbourne, 13 July 1896; cf J Rickard, *H B Higgins: The Rebel as Judge* (1984) at 79, 173.

⁸ J Richard, *H B Higgins: The Rebel as Judge* (1984) at 80.

⁹ D Dabscheck, *The Struggle for Australian Industrial Relations* (1995) at xi.

¹⁰ See B Creighton, "One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?" (2001) 24 *Melbourne University Law Review* 839 at 843-847.

with the past, surrounded by its stories in their books, from which they seek to derive logical analogies and the great streams of principle that will promote consistency and predicability in decision-making. So let me take you back to the highly chancy circumstances by which paragraph (xxxv) of s 51 of the Constitution came to be adopted. Let me remind you of the Act that gave that paragraph life and how it came to be accepted by the Federal Parliament. It is an interesting tale. Like Wellington's description of the outcome of the Battle of Waterloo, each legal accomplishment, so pregnant with consequences for Australia, was to prove a "close run thing".

All events have multiple causes. It is an over-simplification to suggest that s 51(xxxv) came about simply as a "reaction to the nation-wide strikes in the maritime and pastoral industries of the early 1890s"¹¹. Yet those disruptions to the societies of the fledgling colonies undoubtedly contributed to the sense that something should be done in the new Commonwealth to prevent a recurrence¹². They demonstrated that a national approach to inter-jurisdictional industrial conflict was sometimes necessary. That idea was never to be lost.

¹¹ D Solomon, *The Political High Court* (1999) at 131.

¹² See eg C Kingston, *Official Record of the Debates of the Australasian Federal Conventions*, 3 April 1891, at 688.

Other legal developments presented precedents that could be adapted to systems of industrial arbitration. In the latter half of the nineteenth century, legislation gained favour in the British Parliament permitting judges, in some circumstances, to determine the reasonableness of railway and canal rates. Experienced judges might protest their unsuitability for that task¹³. But the precedent spread. It caught hold in New Zealand and then Australia, as a means of settling colonial industrial disputes in a way that seemed rational to the highly unionised workforce in the new lands. Judges, after all, have a lot of experience in saying "what is just and what is unjust and what is fair and what is unfair, because this is their daily task"¹⁴. But how should such ideas be embraced by the new Australian Commonwealth? That was the challenge for Henry Higgins from Victoria and his co-enthusiast, Charles Kingston, Colonial Premier of South Australia.

It was Kingston who took to the floor of the first Australasian Federal Convention in April 1891 and spoke of the introduction of industrial relations tribunals in a number of the colonies. For Kingston, it was necessary to recognise that "it is impossible of any one colony to legislate for the creation of a tribunal which can deal

¹³ *Manchester, Sheffield and Lincolnshire Railway Co v Brown* (1883) LR 8 AC 703 at 716 noted by H Wootten, Foreword, G D Woods and P Stein, *Harsh and Unconscionable Contracts of Work in New South Wales*.

¹⁴ Wootten, above n 13, at vii.

satisfactorily with [interstate disputes]"¹⁵. Samuel Griffith, later to be Chief Justice of the High Court of Australia, immediately voiced his resistance to the idea. His objection was grounded in his notion of the reserve powers of the States - a doctrine that was to mark the early decades of the constitutional jurisprudence of the High Court. According to Griffith, "property and civil rights are left to the States"¹⁶. The danger of Kingston's proposal, as Griffith saw it, was that a national arbitral tribunal could cut across such rights. Because of Griffith's influence in the Convention, Kingston's proposal was stillborn; it was defeated by a majority of 13 votes¹⁷. The battle over this issue at the 1891 Convention had lasted three months¹⁸. Yet if Griffith had hoped to administer the *quietus*, he did not count on the determination and moral impetus of Higgins, to whom the baton passed.

The 1897 Convention in Adelaide was full of optimism because the delegates had been popularly elected in "a deliberate attempt to engage the people of the colonies in the federal

¹⁵ C Kingston, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 April 1891, at 780.

¹⁶ S Griffith, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 April 1891, at 782.

¹⁷ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 April 1891.

¹⁸ S Griffith, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 April 1891, at 781.

movement"¹⁹. Higgins, a delegate, set about reincarnating Kingston's conciliation and arbitration proposal. At first, he could obtain only occasional interest amongst the Adelaide delegates. On 17 April 1897 he moved that the Federal Parliament be empowered to make laws with respect to interstate industrial disputes²⁰. Alfred Deakin, who had supported Kingston's proposal of 1891 and was prepared to vote for Higgins' amendment, nevertheless outlined the practical difficulties of defining the "moment of overflow" from an intrastate to an interstate dispute²¹. Higgins conceded this difficulty but urged that it be left to the Federal Parliament to provide for its solution. One amendment that Higgins accepted introduced the mechanism of conciliation and arbitration as the obligatory means for settling such industrial disputes²². This notwithstanding, the amendment went down by a majority of 10.

Higgins was never a quitter. When the Convention moved to Melbourne in 1898, he again proposed the insertion of a more

¹⁹ N Palmer, *Henry Bournes Higgins: A Memoir* (1931) at 142-143.

²⁰ H Higgins, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, at 782.

²¹ A Deakin, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, at 784-785.

²² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, at 793.

confined clause in the language now familiar in par (xxxv) of s 51²³. Mr Josiah Symon attacked the proposal as an attempt to legislate for sentiments of "kindliness and good-will"²⁴. Edmund Barton was not put off by this thought but by his belief that "questions of industrialism" were best handled by "local authorities"²⁵.

It was at this point that the Red Sea of the Convention parted. Sir Joseph Abbott from New South Wales, who had opposed the Higgins proposal in Adelaide, changed his mind²⁶. He concluded that there was "no harm" done by giving power to deal with the question²⁷. Mr George Reid made the prophetic observation that the proposed clause could enlarge the area of an industrial dispute because employees and employers alike might wish to have it determined by a federal tribunal²⁸. At this stage, Higgins stood back

²³ H Higgins, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 182.

²⁴ J Symon, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 189.

²⁵ E Barton, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 190-191.

²⁶ He had apparently changed his mind based upon his personal observations of conciliation courts operating in New Zealand: J Rickard, *H B Higgins: The Rebel as Judge* (1984) at 97.

²⁷ J Abbott, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 197.

²⁸ G Reid, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 208-209.

and left it to Kingston to remind the delegates of the lockouts and strikes of the early 1890s²⁹.

No one knew how the Western Australian delegates would react to the proposal. They had returned home from the Adelaide Convention before the critical vote had been taken. It was therefore a "dramatic moment"³⁰ when Sir John Forrest rose in Melbourne on 27 January 1898 to announce that, whilst he was "not generally in sympathy with the proposals" that Higgins had advanced throughout the Convention, he would nevertheless vote for this measure. For Forrest, the clincher was that the Federal Parliament would be more likely to deal with such issues moderately than local parliaments might do³¹. The 1890 maritime strike had severely affected isolated Western Australia. No doubt this was in Forrest's mind when leading most of his contingent to support Higgins' proposal.

Notwithstanding that support, para (xxxv) of the proposed s 51 of the Constitution passed into the document only by the slender margin of 22 votes to 19³². There is comparatively little

²⁹ C Kingston, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 186.

³⁰ J Macken, *Australian Industrial Laws* (2nd edition, 1980) at 13.

³¹ J Forrest, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 210.

³² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 215.

recognition in the debates of the importance for federal Australia of the step that was thus taken³³. Most of the delegates seemed to think that the power, thereby adopted, was unlikely to be exercised, as Deakin put it, "for many years to come"³⁴. Historians have suggested that many delegates, who ultimately gave way, did so only to placate Higgins³⁵, the liberal who, on most matters in the Convention had been relegated to the margins of debate³⁶. In matters of constitutional design and interpretation, the biggest influence over the long haul in law and institutions belongs to the intrepid and the determined who are not put off by momentary reversals but keep their eyes fixed firmly on the prize of intellectual acceptance³⁷. Following lunch on 27 January 1898, the founders of the Australian Commonwealth gave the Parliament a power which, with the passage of time, was to "grow until it covered the industrial sky"³⁸.

³³ J Macken, *Australian Industrial Laws* (2nd edition, 1980) at 13; J Rickard, *H B Higgins: The Rebel as Judge* (1984) at 98; N Palmer, *Henry Bournes Higgins: A Memoir* (1931) at 150.

³⁴ A Deakin, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, at 203.

³⁵ J Richard, *H B Higgins: The Rebel as Judge* (1984) at 98.

³⁶ Palmer wrote that "Higgins was usually among a hopeless minority in the Convention sessions": N Palmer, *Henry Bournes Higgins: A Memoir* (1931) at 149.

³⁷ M D Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1.

³⁸ J La Nauze, *The Making of the Australian Constitution* (1982) at 285.

The passage of the 1904 Act: The empowerment of the Parliament was one thing. The passage of the Act to breathe life into that power proved quite another. The enactment of the *Conciliation and Arbitration Act 1904* (Cth), whose centenary we celebrate, occasioned the fall of three federal governments in the first four years of federation. The Bill which was to become "a wrecker of governments"³⁹ began its passage in the first Federal Parliament which met in Melbourne in May 1901.

Higgins had been elected to the new Parliament for the seat of North Melbourne. A sometimes difficult individualist, he set out in Parliament to win back ground he had conceded in the Convention debates. He tabled a Private Members' Bill designed to permit the States to refer their industrial relations powers to the Federal Parliament⁴⁰. The Bill passed the House of Representatives but was ignored in the Senate. The first version of the Bill that became the 1904 Act was presented to the House of Representatives, suitably enough, by Kingston who had been appointed the first Minister of

³⁹ G Sawyer, *Australian Federal Politics and Law 1901-1929* (1972) at 20.

⁴⁰ H Higgins, *Commonwealth Parliamentary Debates*, Vol 1, 14 June 1901, at 1191.

Trade and Customs. It was introduced on 5 June 1901⁴¹. However, it lapsed at the end of the Parliament's first session⁴².

Nevertheless, the Bill was revived by Attorney-General Deakin in July 1903⁴³. A point of controversy was the provision in clause 3 stipulating that the Bill would not apply to disputes involving employees of the public service, federal or State, or of any public authority constituted by them. The nascent Australian Labor Party wished to ensure the opportunity of covering railway workers in federal awards. Its members opposed this exception⁴⁴. There followed acrimonious debates in which Deakin warned against the risks of destroying "the self-governing powers of the States by depriving their legislatures and executives of the control of their own servants"⁴⁵. This issue was to occasion a recurring debate. It has had contemporary resonances⁴⁶.

⁴¹ C Kingston, *Commonwealth Parliamentary Debates*, Vol 1, 5 June 1901, at 745.

⁴² E Barton, *Commonwealth Parliamentary Debates*, Vol 9, 26 March 1902, at 1123.

⁴³ A Deakin, *Commonwealth Parliamentary Debates*, Vol 15, 30 July 1903 at 2858.

⁴⁴ J Macken, *Australian Industrial Laws* (2nd edition, 1980) at 83.

⁴⁵ A Deakin, *Commonwealth Parliamentary Debates*, Vol 16, 9 September 1903, at 4785.

⁴⁶ *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; cf *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

The Bill secured a Second Reading. In September 1903 the Labor Party successfully sought an amendment to extend the Bill to allow coverage of State railway employees⁴⁷. Prime Minister Barton immediately announced that the government would not proceed with the Bill as so amended⁴⁸. Kingston then resigned from the Cabinet when it refused to accommodate his demand that the federal tribunal have power over the shipping industries engaged in the Australian coastal trade⁴⁹. This is another issue with distinctly contemporary resonances⁵⁰.

Following the second general election in December 1903, Barton had departed the Parliament to become one of the original Justices of the High Court. Deakin formed the first of his three administrations. It was Deakin himself, as Prime Minister, who reintroduced the Bill, designed to fulfil the promise of s 51(xxxv) of the Constitution. He did so in the House of Representatives on 22 March 1904⁵¹. Deakin refused to accede to the Labor Party's

⁴⁷ *Commonwealth Parliamentary Debates*, Vol 16, 9 September 1903, at 4788.

⁴⁸ E Barton, *Commonwealth Parliamentary Debates*, Vol 16, 9 September 1903, at 4788.

⁴⁹ D Solomon, *The Political High Court* (1999) at 135.

⁵⁰ *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397.

⁵¹ A Deakin, *Commonwealth Parliamentary Debates*, Vol 18, 22 March 1904, at 762.

proposal to expand coverage to State public servants. He relied on a constitutional argument that such regulation belonged to the States and that there was "no word in our Constitution which implies that the States parted with their power" in this respect⁵². Deakin also embraced the implied immunities doctrine and his opinion in this respect was shortly to appear vindicated by one of the earliest decisions of the High Court⁵³. As we now know, two unsuccessful constitutional referenda were conducted in 1913 and in 1919⁵⁴ to permit State railway employees to be brought within the ambit of the federal arbitral power. This was one of those issues that strongly motivated the politicians in the early years of federation.

By March, 1904, it was Andrew Fisher who introduced into the Parliament the Labor Party's amendment to permit coverage of State public servants⁵⁵. He urged that the law-makers deal with the question as a matter of principle and leave possible invalidation to its fate in future litigation in the High Court⁵⁶. Higgins supported the

⁵² A Deakin, *Commonwealth Parliamentary Debates*, Vol 18, 22 March 1904, at 781.

⁵³ *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488.

⁵⁴ See J Macken, *Australian Industrial Laws* (2nd edition, 1980) at 85.

⁵⁵ A Fisher, *Commonwealth Parliamentary Debates*, Vol 18, 22 March 1904, at 1043.

⁵⁶ A Fisher, *Commonwealth Parliamentary Debates*, Vol 18, 22 March 1904, at 1043.

Bill and the Labor amendments. He urged that it be passed and he expressed his support in terms that we would now regard as couched in human rights language. It was, he said, "part of a system of legislation based upon the feeling that if human life is to be used for the purpose of profit it must not be used to its degradation" [but] to ensure that "the health and vitality of the community are not lowered"⁵⁷. Deakin pinned the fate of his government on the passage of the Bill in the form he favoured. When, in April 1904, the Labor amendment was carried by a majority of nine⁵⁸, Deakin resigned office as Prime Minister. It was in these circumstances, on 27 April 1904, that John Watson formed the first federal government led by the Australian Labor Party. Higgins, who was never a member of that Party, consented to be Attorney-General; but only once Kingston's ill-health had ruled him out⁵⁹.

Meantime, the High Court's decision in *D'Emden v Pedder*⁶⁰, later in 1904, presented a new obstacle to the validity of the amended Bill. That case represented the high water mark of the

⁵⁷ H Higgins, *Commonwealth Parliamentary Debates*, Vol 18, 14 April 1904, at 1027.

⁵⁸ *Commonwealth Parliamentary Debates*, Vol 19, 27 April 1904, at 1243-1244.

⁵⁹ N Palmer, *Henry Bournes Higgins: A Memoir* (1931) at 173.

⁶⁰ (1904) 1 CLR 91.

implied immunities doctrine in the High Court. Higgins would not be deterred. Indeed, he turned the decision against the opponents and waverers. He said that they could vote for the Bill and safely leave it to the High Court to uphold their view of its constitutionality⁶¹. The debate was a long and bitter one. There was a great deal of resentment at the sight of the *parvenu* Labor Party on the Treasury benches. The central point of contention was the complaint of political opponents that trade unions, because of their donations to the Labor Party, were "political". That association led to bitter opposition over the provision of preference to union members in federal awards. The politicians of conservative leanings wanted to do nothing to strengthen the unions who were friends and supporters of their political opponents. Another contemporary theme can be seen.

Uncharacteristically, Higgins left it to the young William Morris Hughes of the Labor Party to defend the preference facility in the Bill⁶². Hughes urged that such preference was the *quid pro quo* for taking away the unions' right to strike⁶³. George Reid attacked the Bill, expressing his "intense repugnance ... to proposals for

⁶¹ H Higgins, *Commonwealth Parliamentary Debates*, Vol 19, 31 May 1904, at 1699 and 1703.

⁶² W Hughes, *Commonwealth Parliamentary Debates*, Vol 20, 21 June 1904, at 2501-2504.

⁶³ W Hughes, *Commonwealth Parliamentary Debates*, Vol 20, 21 June 1904, at 2505.

compulsory arbitration"⁶⁴. Despite Hughes' best efforts, in June 1904, the provision permitting the tribunal to protect union membership of Australian workers was amended. After fierce contest and further attempts to provide privileges for unions as the inducement for their participation in the new national system, Watson in August 1904 resigned⁶⁵. George Reid became Prime Minister. For a time it looked as if the Bill was dead.

Not so. Attorney-General Josiah Symon reintroduced the Bill into the Parliament in September 1904. After a few skirmishes in the Senate, it was passed on 9 December 1904⁶⁶. In this way, after three years of debate, much of it over issues that we can recognise in contemporary Australia, the *Conciliation and Arbitration Act* was enacted and received the Royal Assent on 15 December 1904.

The contents of the 1904 Act: The aims of the 1904 Act were those stated by Deakin: to prevent lockouts and strikes; to constitute a court of conciliation and arbitration; to promote amicable agreement between parties; to enable reference of State powers to the federal body; to facilitate and encourage the

⁶⁴ G Reid, *Commonwealth Parliamentary Debates*, Vol 20, 24 June 1904, at 2685.

⁶⁵ J Watson, *Commonwealth Parliamentary Debates*, Vol 21, 17 August 1904, at 4265.

⁶⁶ *Commonwealth Parliamentary Debates*, Vol 24, 9 December 1904, at 8200.

organisation of representative bodies of employers and employees; and to provide for the making and enforcement of industrial agreements⁶⁷. Although the emphasis and mixture of these functions has changed over a century and new and different responsibilities have been added, the basic design of Australia's national labour law was put in place. In effect, it was a design inherent in the words of par (xxxv) of s 51 of the Constitution. The inspiration of Kingston and the single-minded determination of Higgins procured the new province of law and order for the infant Commonwealth's industrial relations.

Consistently with provisions that remain in force to this day⁶⁸, the new tribunal was not to be bound by legal forms of the rules of evidence. It was required to act in accordance with equity, good conscience and the substantial merits of the case. Procedures for registration of representative organisations, still substantially in force, can be traced directly to the 1904 Act⁶⁹. Although for a time such organisations were treated as mere agents of their members⁷⁰, subsequent decisions of the High Court made clear the fully

⁶⁷ *Conciliation and Arbitration Act* 1904 (Cth), s 2.

⁶⁸ *Workplace Relations Act* 1996 (Cth), s 110(2).

⁶⁹ Part V of the *Conciliation and Arbitration Act*, (1904 (Cth) and Schedule 1B to *Workplace Relations Act*, 1996 (Cth).

⁷⁰ *Burwood Cinema Ltd v Australian Theatrical and amusement Employees Association* (1925) 35 CLR 528; *federated Ironworkers' of Australia v Commonwealth* (1951) 84 CLR 265.

representative role of such organisations in the working of the federal conciliation and arbitration system⁷¹. Over the ensuing century, every word in par (xxxv) of s 51 of the Constitution has been examined and re-examined by the High Court⁷². The theories of interpretation of the constitutional power have waxed and waned. Expansive and narrow interpretations have been adopted, depending, in part, upon the composition of the High Court and the views of its members. This is an inescapable feature of any federal supreme court as, indeed, of any decision-making body acting after the independent judicial model.

In the matter of constitutional elaboration, nothing can ever be taken as finally written. Even the decision with the most dramatic impact on the arbitral tribunal itself, the *Boilermakers' Case* of 1956⁷³, can scarcely be called the last word on the separation of powers required by the Australian Constitution. One day, when the time is ripe, that ruling, with its highly inconvenient practical consequences, may be reopened⁷⁴. Views that are taken in one

⁷¹ R Buchanan & I Neil, "Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power" (2001) 20 *Australian Bar Review* 256 at 259.

⁷² cf M D Kirby and B Creighton, "The Law of Conciliation and Arbitration", Ch 3 in Isaac and Macintyre, above n 5, at 98.

⁷³ *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁷⁴ *The Queen v Joske; Ex parte Australian Building Contractors Employees and Builders' Labourers' Federation* (1974) 130 CLR

decade about the ambit of "industrial disputes" under the statute and the Constitution are narrowed or broadened a decade later with the flux of judicial opinions⁷⁵. Doubtless, these opinions are, in turn, influenced by national and international realities. In law, context is always critical⁷⁶.

Just as the 1904 Act grew out of the legal and economic environment of the late nineteenth century, so today the successor Act and the Constitution mould themselves to the economic and social realities of our age. Those in the bully pulpit who think they have the whole truth for all ages need to be put in their place. There is no room in this nation for industrial ayatollahs. Ours is a more temperate and open-minded society, as befits the representative democracy established by the Constitution and the Australian culture of "fair go" which the 1904 Act reflected and to which it made its own contribution.

In his famous *Harvester* judgment⁷⁷, Justice Higgins noted that he had been accorded the responsibility of determining a "fair and

87 at 90 per Barwick CJ, 102 per Mason J. See Kirby and Creighton, above n 72, at 130.

⁷⁵ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116 at [208]-[213].

⁷⁶ Per Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 [28]; cf *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1132 [174].

⁷⁷ *Ex parte H V McKay Ltd* (1907) 2 CAR 1.

reasonable remuneration" for employees in Australia. This required him to conceive of a that which permitted the ordinary Australian to enjoy "a condition of frugal comfort [as estimated by current human standards]"⁷⁸. These were the exact words used by Pope Leo XIII in *Rerum Novarum*.

Even for an Australian of Ulster Protestant lineage, this was an idea that seemed right to Higgins. Its centrality in industrial relations and economic organisation has changed over the century. But the germ of the idea of an essential "safety net" to protect the dignity of every Australian employee - and thereby the dignity of all those who employ them - remains in the ongoing function that Australians expect of their national tribunal for industrial conciliation and arbitration. Over the course of a century, that body "has contributed to the equalisation of costs of labour throughout Australia and hence to the growth of a national economy"⁷⁹. It has reinforced the strong constitutional attention to the creation of a continental common market, nearly a century ahead of that achievement in Europe and North America. It has helped weld Australia together, contributed to the creation of a national economic structure and protected the largely egalitarian society which, until now, has been a special feature of life in Australia. We can change these characteristics as

⁷⁸ (1907) 2 CAR 1 at 218.

⁷⁹ *Attorney-General (Q) v Riordan* (1997) 192 CLR 1 at 41.

we please. However, if we do so, the change will not deny the impact of the Commission and its predecessors upon what it has meant to be an Australian over the past hundred years⁸⁰.

LOOKING FORWARD: ELEMENTS OF CHANGE AND CONTINUITY

Of abolition and such fantasies: Rude as it may be to mention it at such a time, there are those who see no future whatever in the Australian Industrial Relations Commission. For them, it should be closed down, lock, stock and barrel. Or, if retained, converted into a mediatory body "with no legal powers of arbitration or intervention"⁸¹. For those of this opinion, a wholesale revision of the legislation is required; indeed it is urgent.

Persons of such views tend to live in a remote world of fantasy, inflaming themselves by their rhetoric into more and more unreal passions, usually engaging in serious dialogue only with people of like persuasion. For the rest of us, who live in the real world, and know our country and its institutions better, time will not be wasted over such fairy-tales. Australia is not a land of extremes.

⁸⁰ R McCallum, "Collective Labour Law, Citizenship and the Future" (1998) 22 *Melbourne University Law Review* 42 at 58-59.

⁸¹ D Moore, above n 4, 15. See also D Moore, "Better than the Australian Industrial Relations Commission", *Policy* (Summer 1999/2000) 11 at 17.

Irritatingly enough to those of extreme persuasions, Australia's basic institutions and laws tend to adapt very slowly and over time: adjusting to changing economic and social forces only as such adjustment is truly needed. So it has been with the national conciliation and arbitration tribunal. So it will be in the future. Those who want more dramatic change, as distinct from constant adjustment, need to look for another country.

It would be a presumption for me to attempt a sketch of the shape of things to come. A few ideas will suffice.

Big and small proposals for change: Informed writers have made many suggestions on initiatives that might be taken to improve the current system. The President of the Commission, Justice Geoffrey Giudice, has advanced many thoughtful proposals. Some of them have been of a limited variety, likely to upset very few⁸². Others are of a more radical character. Amongst these have been proposals to give renewed emphasis to the conciliation role of the Commission⁸³. All of us, including I should think, the High Court,

⁸² G Giudice, "Address to the Industrial Relations Society of the ACT Conference", 31 March 2004, 3; eg differentiated entitlements to redundancy benefits in employment involving fewer than 15 employees; cf M Pittard, "Australian Industrial Relations Commission and the Current Industrial Relations Environment" (2000) 6 *Employment Law Bulletin* 38.

⁸³ G Giudice, address to Industrial Relations Society of Australia National Convention, noted CCH *Australian Industrial Law*, September 2001, Newsletter 9/2001, 1 at 2.

need to look more closely at that word "conciliation". It has been in the Constitution, and the Act, from the start. But its full potential has never been realised.

Justice Paul Munro, whose recent retirement from the Commission ended a remarkable service to industrial relations and the nation⁸⁴, presented a long list of possible changes in a typically thoughtful paper given in 2002⁸⁵. Amongst his ideas was an endorsement of Justice Giudice's suggestion that the recommendation, made nearly twenty years ago by the Hancock Committee, should be rekindled for a national summit conference on the harmonisation or integration of separate State and federal regulatory regimes⁸⁶. He also called attention to the need for fresh thinking about new forms of employment, such as joint employment⁸⁷; about the scope of private arbitration to supplement the Commission's work under the Act⁸⁸; and the extension of the

⁸⁴ Justice P R Munro retired as a Deputy President of the Commission on 12 July 2004.

⁸⁵ P R Munro, "Industrial Tribunals: Challenges and Opportunities", paper for Australian Industry Group National PIR Group Conference, 6 May 2002.

⁸⁶ *Ibid*, 2. See also G Giudice, "The Industrial Relations Society of Victoria: A Unitary IR System?", paper 18 October 2002 [17].

⁸⁷ Munro, above n 85, 3.

⁸⁸ *Ibid*, 4.

unfair contracts model, administered in some State industrial tribunals, for a wider range of like disputation⁸⁹.

Other writers, such as Professor McCallum have proposed expansion of the Commission's functions in the reinstatement of unfairly dismissed workers⁹⁰. The High Court gets a caning from Professor McCallum for decisions that have led to the present rather cumbersome approach⁹¹. I would not look for a change in that direction in the short run.

Certainly, the expanded interpretation of the external affairs power in the Constitution, read in conjunction with ILO conventions to which Australia is a party, and the enlarged understanding of the corporations power under the Constitution have substantially removed, by the end of the first century, many of the obstacles to the creation of a coherent federal labour relations law such as troubled successive governments during the first century, struggling with the words of par (xxxv). Yet as Professor McCallum notes, the changing economic scene, and the altered character of employment

⁸⁹ *Ibid*, 12.

⁹⁰ McCallum, above n 80, 47: following the *Ranger Uranium Case* (1987) 163 CLR 656. But see *Victoria v The Commonwealth* (1996) 187 CLR 416.

⁹¹ See McCallum, above n 80, 52; cf A Chapman "Termination of Employment Under the *Workplace Relations Act 1996*" (1997) 10 *Australian Journal of Labour Law* 89.

today, mean that many of the old assumptions have to be rethought⁹². One of these, highly practical in nature, is drawn to notice by Justice Giudice.

The Commission, like every court and tribunal in Australia, must now struggle with increasing numbers of litigants who are unrepresented by unions or lawyers⁹³. Whatever may have been the weaknesses of union representation of workers as a group, it was at least an efficient way of aggregating distilled issues, ripe for decision. Struggling with self-represented litigants is never easy for a decision-maker. Least of all is it so in the often fraught circumstances of disputes over employment conditions and termination. The problem of ensuring access to justice is one common to institutions throughout Australia. Industrial tribunals are not exempt.

Markers: global economy and human rights: The fundamental markers for the future of the Commission can be found in the two forces that are at work in the economy and world of today. One is the force of global and regional economies and of the creation of the

⁹² McCallum, above n 80, 61; cf R McCallum, "Too Much Law and Too Little Reform: Industrial Law Regulation in Australia", paper for 42nd Annual Conference Industrial Relations Society of New South Wales, 18 May 2001, 5.

⁹³ One problem that can arise is the overlap of federal and State jurisdictions. See G Giudice, 18 October 2002, 3.

institutions of good governance to facilitate the efficient flows of capital and finance that drive the modern economy. The other is the force of global human rights⁹⁴.

If we look closely at these two forces, they represent an extension of the same elements which, in 1904, were mixed in the special alchemy of the Act of that year. At that time, they were seen, largely if not entirely, in a national and imperial setting. Today, they must be seen in a global and regional context. Then, they were talked of in terms of "management prerogatives" and "industrial equity". Today, the labels and the focus have changed. But the need for a harmonious mix is just as true. Today, as then, we seek the "best possible outcomes to the struggle between economic profit and industrial justice: two wild horses locked together in a harness that commits them to eventual harmony and a common direction"⁹⁵. In this respect, at least, little that is fundamental has changed.

With the dynamic of the global economy and the pressure today for good governance, some of the rigidity of our past national solutions to industrial justice have to give way to the more bracing world of international economic competitiveness, changing

⁹⁴ M D Kirby, "Human Rights and Industrial Relations" (2002) 44 *Journal of Industrial Relations* 562.

⁹⁵ Kirby, *ibid*, 578.

demography and shifting market forces. Yet within Australia, we will continue to maintain protection for the most vulnerable in society. We will do so by our institutions searching in an Australian path towards a fair go all round. Yet it would be astonishing if our institutions were cut off from the global thinking that is reflected in the ILO conventions and that draws lessons from such *stimuli* as the Directives of the European Union on labour standards, technological redundancy and other like contemporary questions⁹⁶. The future is also another country. I am not worried about it in this connection because I am sure that it will continue to be very familiar to those of us who have known the past⁹⁷.

LOOKING AROUND: A PERSONAL REFLECTION

Back to industrial origins: I finish with two personal reflections. I am glad that part of my career in the law took me into the industrial tribunals of this nation, federal and State. I am proud that I served for a time as a member of the Australian Conciliation and Arbitration Commission. As Mary Gaudron has remarked,

⁹⁶ See Fenwick, "International Law and the right to shrike" (2004) 17 *Australian Journal of Labour Law* 125 at 135.

⁹⁷ The Australia-United States Free Trade Agreement includes provisions intended to secure compliance of both parties with international law on freedom of association, including the right to strike. See G Griffin, C Nyland and A O'Rourke, "Trade Promotion Authority and Core Labour Standards: Implications for Australia" (2004) 17 *Australian Journal of Labour Law* 35.

speaking for us both, comparing our lives on the Commission and on the High Court, "we would ... have no hesitation in saying that our time on the Commission was infinitely more fun"⁹⁸. As an advocate and as a judge, I knew the importance of the issues for thousands of people; the economic realism that is required; and the tricky legal minefield that has to be traversed every day. That is why I have returned to my sources in offering this centenary reflection.

A young woman's tale: More recently, I had an insight into the worth of industrial relations law and institutions that few judges have enjoyed. Sometimes it is a good thing to see the law in operation from a different perspective - from the perspective of a consumer.

My niece, Julie, finished school a decade ago. She did not at once pursue tertiary studies. She drifted between jobs in search of something special that would catch her fancy. Like many of today's youth, she was employed from time to time at casual rates. A pretty and intelligent girl, she hoped for a career in television. But she found, as many before and since have done, that such jobs are hard to come by.

⁹⁸ Quoted in Isaac and Macintyre, above n 5, 100.

For two years Julie worked in an enterprise in the entertainment industry (I describe it broadly to avoid identifiers). She worked long hours and with people who were not always pleasant. She never joined a union. People of her age and work often fail to do so. To them, unions sometimes seem very old-fashioned. Julie faced recurring demands to work overtime to please the clients, to get them to sign more contracts. She was constantly underpaid. The promise of regular increments in the salary that she was given on recruitment never eventuated. After two years of this work she resigned. But she was annoyed at the injustice to herself and her work colleagues over the broken promises and underpayments.

Julie is stubborn. It may even be a family characteristic. She went to unions for help but, as she had not been a member, she could spark no interest. Her co-workers, vulnerable and cautious, were frightened, at her urging, to take the matter further. Eventually, a union official was found who told her that what had happened to her was wrong and that the union would take up her cause if she joined up. She did.

Julie's case was taken to an industrial tribunal. It was bitterly fought. Liability was absolutely denied. However, eventually, the Commissioner pointed to the objective evidence of repeated underpayments and the lack of increments. Julie's pay was only fractionally above social security payments. For many young people

in casual work and at the lower end of the spectrum of employment in Australia, there is still vulnerability. If we are committed as a nation to the protection of human dignity in conditions of work and "reasonable and frugal comfort", we still need those who help the vulnerable. We need those who will assert their rights. But we also need those who will defend and uphold basic rights. The market works miracles, as we all know. But at the edges there are those who lose out in the market. To pretend that everyone has equal power in the market is to indulge in serious self-deception.

I watched this case from afar. Julie lives now with my father. I heard about it every week over the sausages. Of course, I took no part. I just listened to the story and tried to understand it from the viewpoint of a young woman of 25. I made due allowance for the fact that I heard only one side. But it seemed a case of arguable wrongs. As described, Julie's union representative spared no effort on her behalf. The tribunal member was wise, perceptive and just. A good outcome was ultimately reached. A payment, important in real and symbolic terms, was made. The employer was duly warned. The other employees were indirectly protected. The Australian system of industrial justice worked in Julie's case.

Julie is now a late entry undergraduate at Sydney University. Occasionally she talks about her case. When she does, I get an insight into the way the Australian system of the industrial fair-go is meant to operate. If it had been left to market forces alone Julie's

complaint would have been unrepaired. Advisory services would, I am afraid, have got absolutely nowhere.

Of course some do not care about the sense of injustice to little individuals like Julie. The breaches of agreements to the young, the powerless and the vulnerable do not matter to them one jot. But a society that allows such injustices to cumulate eventually loses the trust of its citizens. A society that responds to, and repairs, injustice is one that earns and deserves the loyalty of its people. If we look at the reason for the general success of governance in Australia, it is, I believe, because we have offered the means to respond to injustices. Many of us think that we should continue to do so.

In a land committed to equality and justice for all, the door of fairness is not shut at the employment gate. Every now and again, it is good for people like me to come down to earth and hear what it is really like for the disadvantaged and powerless. As Chief Justice Latham said in the High Court long ago, it is easy in our society to protect the entitlements of the strong and the powerful. There, the market does a great job and so generally do politics and the courts. The strong do not even usually need the law for that purpose⁹⁹. The test of a just legal system, and good governance and of our defence

⁹⁹ *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124.

of human dignity and human rights, comes when we are asked to uphold the entitlements of the weak and the vulnerable¹⁰⁰.

As a Justice of the High Court of Australia and as a citizen, I express thanks to those who have served in and with the Australian national tribunal for industrial conciliation and arbitration. Indeed to all such bodies throughout the nation. From the start, they have upheld the twin charter expressed in the Constitution and reflected in the 1904 Act: a recognition of economic realities and a moderation of them, sometimes, in proper cases, where justice and equity so require. I do not doubt that in the coming century the alchemy will continue to be needed and to be delivered. Australia is that kind of country. Economic power, like all forms of power, is ultimately subject to the law. Our sense of justice is insistent. When it is offended, the Australian people demand, and usually receive, "a fair go all round"¹⁰¹. For its contribution to attaining that

¹⁰⁰ cf C Fenwick, (2004) 17 *Australian Journal of Labour Law* 125; R McCallum, "The Internationalisation of Australian Industrial Law: The *International Relations Reform Act* 1993" (1994) 15 *Sydney Law Review* 122; M Pittard, "International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment" (1994) 7 *Australian Journal of Labour Law* 170; and B Creighton, "The ILO and the Internationalisation of Australian Labour Law" (1995) 11 *ICJLLIR* 199.

¹⁰¹ This expression is often traced to the reasons of Sheldon J in the New South Wales Industrial Commission in *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95. It is so used in s 170CA(2) of the *Workplace Relations Act* 1996 (Cth) and the source is noted there.

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objective, I offer honour and praise to the Australian Industrial Relations Commission and its predecessors at this centenary time.



Address

Industrial Conciliation and Arbitration in Australia — A Centenary Reflection

*The Hon Justice Michael Kirby AC CMG**

Another Notable Centenary

From the High Court of Australia, the other independent national decision-maker expressly envisaged by the Constitution,¹ I offer words of respect and praise on the centenary of industrial conciliation and arbitration in Australia.

Let there be no doubt that the national conciliation and arbitration tribunal was expressed in our Constitution. In the words of Justice Isaacs, one of the founders of the Commonwealth, it was 'conspicuously on the face of the Constitution, the third party to every significant industrial dispute'.²

Each of the constitutional bodies, the High Court and now the Australian Industrial Relations Commission, required legislation to set them up so as to perform the functions envisaged at the creation. Each of the bodies has celebrated, within a year of the other, their centenary which accompanied, in turn, the centenary of the Commonwealth. Each of the national bodies has played an influential, even pivotal, role in the history and culture of this continental country. Each has been an exemplar of good governance and the rule of law. Each has been an instrument for the defence of fundamental human rights and dignity. The overlap of personnel between the two bodies has existed over much of the century. Nine of the forty-three Justices of the High Court of Australia, including me, served as presidential members of the conciliation and arbitration tribunal. Our two institutions are therefore locked together in a yoke devised by the Constitution. Sometimes the burden has been easy; but not infrequently (as the recent decision in the *Electrolux* case shows),³ it is heavier and, from time to time, dictates a change of course.

These remarks, which honour the Australian Industrial Relations Commission and its predecessors, their members, other personnel and their achievements, are divided, like Caesar's Gaul, into three parts.

The first, as befits the moment, will remember the history of the creation of the tribunal a hundred years ago. As I shall demonstrate, many of the issues

* High Court of Australia. This text originated as an address to the conference of the Australian Industrial Relations Commission and the Industrial Relations Society of Australia, marking the centenary of industrial conciliation and arbitration in Australia on Friday, 22 October 2004. The author acknowledges the assistance of Mr Alex de Costa, Legal Research Officer to the High Court of Australia, in the preparation of this paper.

1 Australian Constitution s 71; cf, s 51(xxxv).

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

3 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116.

that were debated at that time remain important today. It is as if the process of creation and renewal has, like a human life, been one of constant rediscovery of things that are fundamental.

Then, I will say something of the future; but I can be briefer about that, for reflection on the centenary of conciliation and arbitration ensures that many whose knowledge, opportunity to influence events and freedom to speak their minds is greater than my own, will predict the future with better chances of accuracy than I can muster.

Finally, I will venture a few personal remarks. Many who took part in the history feel a close personal involvement in the story of conciliation and arbitration in Australia — and in its social justification. Critics have more than enough bully pulpits to express their views. At a time of centenary, it is proper to rekindle the essential moral foundation of the idea behind the inclusion of the provision for conciliation and arbitration in the Constitution. It is an idea that I believe is still in tune with Australia's notions of good governance and human rights. These are the notions that, with global economics, represent the most powerful engines for progress in the world. By our Constitution, and by our efforts, Australians got there earlier than the people of most other countries.

Looking Back: Establishment of the New Province

The adoption of s 51(xxxv)

In a recent talk, claiming that a hundred years of conciliation and arbitration was 'more than enough'⁴ (and in curiously excited language) a critic linked me and my 'present-day absurd perspectives' with Justice Henry Bournes Higgins. Little did he know that I could not have been more flattered.

In fact Higgins, like myself, traced his origins to Protestant Ireland. He was brought up in the Church of Ireland and educated by the Wesleyans. But he was greatly influenced (doubtless through his religious upbringing) by notions that we would now describe as founded in fundamental human rights. In the 1890s Higgins embraced ideas that had been propounded in 1891 by Pope Leo XIII in his encyclical *Rerum Novarum*.⁵ As you will understand, it is no small thing for a person with such an Ulster background to adopt papal ideas.

Throughout his life, Higgins was a true liberal. Thus, he supported home rule for Ireland. He would not have disclaimed the reputation, at the constitutional conventions of the 1890s, as a 'radical' and an idealist.⁶ As a Justice of the High Court of Australia, he lived long enough to see many of his constitutional and other notions (frequently first stated in dissent) vindicated:

4 D Moore, 'Overmighty Judges: 100 Years of Holy Grail is Enough', paper presented at the XXVth H R Nicholls Society Conference, Melbourne, 6–8 August 2004, p 16.

5 Pope Leo XIII, *Rerum Novarum*, *Encyclical Letter of The Holy Father, By Providence Pope Leo XIII on Capital and Labor*, Official Translation. Full text available at <<http://www.papalencyclicals.net/Leo13/113rerum.htm>>; cf K Hancock and S Richardson, 'Economic and Social Effects' in J Isaac and S Macintyre (Eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004, p 145.

6 J Rickard, entry on Henry Bournes Higgins, in B Narin and G Serle (Eds), *Australian Dictionary of Biography*, Vol 9, Melbourne University Press, Melbourne, 1983, p 285.

a pleasure that sadly will not be given to me in the time that is left. Higgins saw conciliation and arbitration of industrial disputes as an idea inextricably linked to concepts of civil rights and basic human dignity. Civil rights was the language of the English common law. Basic human dignity was the language of *Rerum Novarum*.⁷

Higgins' considerable intellect and sense of history⁸ helped him and his supporters to brew what was described as '... an antipodean amalgam of Catholic social thought, the ideas of the Fabians, Sidney and Beatrice Webb and North American progressivism'.⁹ It was this potent mixture that was to provide the intellectual under-pinning of the movement towards federal conciliation and arbitration in Australia.¹⁰ We forget our roots when we pretend that the national arbitral tribunal of this country was a mere agency of economics. From conception down to the present, it has been an agency of something more important — industrial equity, a 'fair go all round' or, as we would now usually describe it, human rights.

The past is another country. It is a place safer for people like me to dwell than in the industrial present or the future. Judges live with the past, surrounded by its stories in their books, from which they seek to derive logical analogies and the great streams of principle that will promote consistency and predicability in decision-making. So let me take you back to the highly chancy circumstances by which para (xxxv) of s 51 of the Constitution came to be adopted. Let me remind you of the Act that gave that paragraph life and how it came to be accepted by the Federal Parliament. It is an interesting tale. Like Wellington's description of the outcome of the Battle of Waterloo, each legal accomplishment, so pregnant with consequences for Australia, was to prove a 'close run thing'.

All events have multiple causes. It is an over-simplification to suggest that s 51(xxxv) came about simply as a 'reaction to the nation-wide strikes in the maritime and pastoral industries of the early 1890s'.¹¹ Yet those disruptions to the societies of the fledgling colonies undoubtedly contributed to the sense that something should be done in the new Commonwealth to prevent a recurrence.¹² They demonstrated that a national approach to inter-jurisdictional industrial conflict was sometimes necessary. That idea was never to be lost.

Other legal developments presented precedents that could be adapted to systems of industrial arbitration. In the latter half of the nineteenth century, legislation gained favour in the British Parliament permitting judges, in some circumstances, to determine the reasonableness of railway and canal rates.

7 H B Higgins, 'Another Isthmus in History', Lecture delivered before the University Historical Society, Melbourne, 13 July 1896; cf J Rickard, *H B Higgins: The Rebel as Judge*, Allen & Unwin, Sydney, 1984, pp 79, 173.

8 Rickard, *ibid*, p 80.

9 B Dabscheck, *The Struggle for Australian Industrial Relations*, Oxford University Press, Melbourne, 1995, p xi.

10 See B Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24 *MULR* 839 at 843–7.

11 D Solomon, *The Political High Court: How the High Court Shapes Politics*, Allen & Unwin, Sydney, 1999, p 131.

12 See, eg, *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 3 April 1891, p 688 (C Kingston).

Experienced judges might protest their unsuitability for that task.¹³ But the precedent spread. It caught hold in New Zealand and then Australia, as a means of settling colonial industrial disputes in a way that seemed rational to the highly unionised workforce in the new lands. Judges, after all, have a lot of experience in saying 'what is just and what is unjust and what is fair and what is unfair, because this is their daily task'.¹⁴ But how should such ideas be embraced by the new Australian Commonwealth? That was the challenge for Henry Higgins from Victoria and his co-enthusiast, Charles Kingston, colonial premier of South Australia.

It was Kingston who took to the floor of the first Australasian Federal Convention in April 1891 and spoke of the introduction of industrial relations tribunals in a number of the colonies. For Kingston, it was necessary to recognise that 'it is impossible of any one colony to legislate for the creation of a tribunal which can deal satisfactorily with [interstate disputes]'.¹⁵ Samuel Griffith, later to be Chief Justice of the High Court of Australia, immediately voiced his resistance to the idea. His objection was grounded in his notion of the reserve powers of the States — a doctrine that was to mark the early decades of the constitutional jurisprudence of the High Court. According to Griffith, 'property and civil rights are left to the States'.¹⁶ The danger of Kingston's proposal, as Griffith saw it, was that a national arbitral tribunal could cut across such rights. Because of Griffith's influence in the Convention, Kingston's proposal was stillborn; it was defeated by a majority of 13 votes.¹⁷ The battle over this issue at the 1891 Convention had lasted three months.¹⁸ Yet if Griffith had hoped to administer the *quietus*, he did not count on the determination and moral impetus of Higgins, to whom the baton passed.

The 1897 Convention in Adelaide was full of optimism because the delegates had been popularly elected in 'a deliberate attempt to engage the people of the colonies in the federal movement'.¹⁹ Higgins, a delegate, set about reincarnating Kingston's conciliation and arbitration proposal. At first, he could obtain only occasional interest amongst the Adelaide delegates. On 17 April 1897 he moved that the Federal Parliament be empowered to make laws with respect to interstate industrial disputes.²⁰ Alfred Deakin, who had supported Kingston's proposal of 1891 and was prepared to vote for Higgins' amendment, nevertheless outlined the practical difficulties of defining the 'moment of overflow' from an intrastate to an interstate dispute.²¹ Higgins conceded this difficulty but urged that it be left to the Federal Parliament to provide for its solution. One amendment that Higgins accepted introduced the

13 *Manchester, Sheffield and Lincolnshire Railway Co v Brown* (1883) LR 8 AC 703 at 716 noted by H Wootten, 'Foreword' in G D Woods and P L Stein, *Harsh and Unconscionable Contracts of Work in New South Wales*, Law Book Co, Sydney, 1972.

14 Wootten, *ibid*, p vii.

15 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 April 1891, p 780 (C Kingston).

16 *Ibid*, p 782 (S Griffith).

17 *Ibid*.

18 *Ibid*, p 781 (S Griffith).

19 N Palmer, *Henry Bournes Higgins: A Memoir*, Harrap, London, 1931, pp 142-3.

20 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, p 782 (H Higgins).

21 *Ibid*, pp 784-5 (A Deakin).

mechanism of conciliation and arbitration as the obligatory means for settling such industrial disputes.²² This notwithstanding, the amendment went down by a majority of 10.

Higgins was never a quitter. When the Convention moved to Melbourne in 1898, he again proposed the insertion of a more confined clause in the language now familiar in para (xxxv) of s 51.²³ Mr Josiah Symon attacked the proposal as an attempt to legislate for sentiments of 'kindliness and good-will'.²⁴ Edmund Barton was not put off by this thought but by his belief that 'questions of industrialism' were best handled by 'local authorities'.²⁵

It was at this point that the Red Sea of the Convention parted. Sir Joseph Abbott from New South Wales, who had opposed the Higgins proposal in Adelaide, changed his mind.²⁶ He concluded that there was 'no harm' done by giving power to deal with the question.²⁷ Mr George Reid made the prophetic observation that the proposed clause could enlarge the area of an industrial dispute because employees and employers alike might wish to have it determined by a federal tribunal.²⁸ At this stage, Higgins stood back and left it to Kingston to remind the delegates of the lockouts and strikes of the early 1890s.²⁹

No one knew how the Western Australian delegates would react to the proposal. They had returned home from the Adelaide Convention before the critical vote had been taken. It was therefore a 'dramatic moment'³⁰ when Sir John Forrest rose in Melbourne on 27 January 1898 to announce that, while he was 'not generally in sympathy with the proposals' that Higgins had advanced throughout the Convention, he would nevertheless vote for this measure. For Forrest, the clincher was that the Federal Parliament would be more likely to deal with such issues moderately than local parliaments might do.³¹ The 1890 maritime strike had severely affected isolated Western Australia. No doubt this was in Forrest's mind when leading most of his contingent to support Higgins' proposal.

Notwithstanding that support, para (xxxv) of the proposed s 51 of the Constitution passed into the document only by the slender margin of 22 votes to 19.³² There is comparatively little recognition in the debates of the importance for federal Australia of the step that was thus taken.³³ Most of the delegates seemed to think that the power, thereby adopted, was unlikely to be

22 Ibid, p 793.

23 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, p 182 (H Higgins).

24 Ibid, p 189 (J Symon).

25 Ibid, pp 190-1 (E Barton).

26 He had apparently changed his mind based upon his personal observations of conciliation courts operating in New Zealand: Rickard, above n 7, p 97.

27 *Official Record of the Debates of the Australasian Federal Convention*, above n 23, p 197 (J Abbott).

28 Ibid, pp 208-9 (G Reid).

29 Ibid, p 186 (C Kingston).

30 J J Macken, *Australian Industrial Laws: the Constitutional Basis*, 2nd ed, Law Book Co, Sydney, 1980, p 13.

31 *Official Record of the Debates of the Australasian Federal Convention*, above n 23, p 210 (J Forrest).

32 Ibid, p 215.

33 Macken, above n 30, p 13; Rickard, above n 7, p 98; Palmer, above n 19, p 150.

exercised, as Deakin put it, 'for many years to come'.³⁴ Historians have suggested that many delegates, who ultimately gave way, did so only to placate Higgins,³⁵ the liberal who, on most matters in the Convention, had been relegated to the margins of debate.³⁶ In matters of constitutional design and interpretation, the biggest influence over the long haul in law and institutions belongs to the intrepid and the determined who are not put off by momentary reversals but keep their eyes fixed firmly on the prize of intellectual acceptance.³⁷ Following lunch on 27 January 1898, the founders of the Australian Commonwealth gave the Parliament a power which, with the passage of time, was to 'grow until it covered the industrial sky'.³⁸

The passage of the 1904 Act

The empowerment of the Parliament was one thing. The passage of the Act to breathe life into that power proved quite another. The enactment of the Conciliation and Arbitration Act 1904 (Cth), whose centenary we celebrate, occasioned the fall of three federal governments in the first four years of federation. The Bill which was to become 'a wrecker of governments'³⁹ began its passage in the first Federal Parliament which met in Melbourne in May 1901.

Higgins had been elected to the new Parliament for the seat of North Melbourne. A sometimes difficult individualist, he set out in Parliament to win back ground he had conceded in the Convention debates. He tabled a Private Members' Bill designed to permit the States to refer their industrial relations powers to the Federal Parliament.⁴⁰ The Bill passed the House of Representatives but was ignored in the Senate. The first version of the Bill that became the 1904 Act was presented to the House of Representatives, suitably enough, by Kingston who had been appointed the first Minister of Trade and Customs. It was introduced on 5 June 1901.⁴¹ However, it lapsed at the end of the Parliament's first session.⁴²

Nevertheless, the Bill was revived by Attorney-General Deakin in July 1903.⁴³ A point of controversy was the provision in cl 3 stipulating that the Bill would not apply to disputes involving employees of the public service, federal or State, or of any public authority constituted by them. The nascent Australian Labor Party wished to ensure the opportunity of covering railway

34 *Official Record of the Debates of the Australasian Federal Convention*, above n 23, p 203 (A Deakin).

35 Rickard, above n 7, p 98.

36 Palmer wrote that 'Higgins was usually among a hopeless minority in the Convention sessions': Palmer, above n 19, p 149.

37 M D Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *MULR* 1.

38 J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972, p 285.

39 G Sawyer, *Australian Federal Politics and Law, 1901-1929*, Melbourne University Press, Melbourne, 1956, p 20.

40 *Commonwealth Parliamentary Debates*, vol 1, 14 June 1901, p 1191 (H Higgins).

41 *Commonwealth Parliamentary Debates*, vol 1, 5 June 1901, p 745 (C Kingston).

42 *Commonwealth Parliamentary Debates*, vol 9, 26 March 1902, p 1123 (E Barton).

43 *Commonwealth Parliamentary Debates*, vol 15, 30 July 1903 p 2858 (A Deakin).

workers in federal awards. Its members opposed this exception.⁴⁴ There followed acrimonious debates in which Deakin warned against the risks of destroying 'the self-governing powers of the States by depriving their legislatures and executives of the control of their own servants'.⁴⁵ This issue was to occasion a recurring debate. It has had contemporary resonances.⁴⁶

The Bill secured a Second Reading. In September 1903 the Labor Party successfully sought an amendment to extend the Bill to allow coverage of State railway employees.⁴⁷ Prime Minister Barton immediately announced that the government would not proceed with the Bill as so amended.⁴⁸ Kingston then resigned from the Cabinet when it refused to accommodate his demand that the federal tribunal have power over the shipping industries engaged in the Australian coastal trade.⁴⁹ This is another issue with distinctly contemporary resonances.⁵⁰

Following the second general election in December 1903, Barton had departed the Parliament to become one of the original Justices of the High Court. Deakin formed the first of his three administrations. It was Deakin himself, as Prime Minister, who reintroduced the Bill, designed to fulfil the promise of s 51(xxxv) of the Constitution. He did so in the House of Representatives on 22 March 1904.⁵¹ Deakin refused to accede to the Labor Party's proposal to expand coverage to State public servants. He relied on a constitutional argument that such regulation belonged to the States and that there was 'no word in our Constitution which implies that the States parted with their power' in this respect.⁵² Deakin also embraced the implied immunities doctrine and his opinion in this respect was shortly to appear vindicated by one of the earliest decisions of the High Court.⁵³ As we now know, two unsuccessful constitutional referenda were conducted in 1913 and in 1919⁵⁴ to permit State railway employees to be brought within the ambit of the federal arbitral power. This was one of those issues that strongly motivated the politicians in the early years of federation.

By March, 1904, it was Andrew Fisher who introduced into the Parliament the Labor Party's amendment to permit coverage of State public servants.⁵⁵ He urged that the law-makers deal with the question as a matter of principle and leave possible invalidation to its fate in future litigation in the High Court.⁵⁶

44 Macken, above n 30, p 83.

45 *Commonwealth Parliamentary Debates*, vol 16, 9 September 1903, p 4785 (A Deakin).

46 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; cf *State of Victoria v Commonwealth of Australia (Industrial Relations Act Case)* (1996) 187 CLR 416; 138 ALR 129.

47 *Commonwealth Parliamentary Debates*, above n 45, p 4788.

48 *Ibid*, p 4788 (E Barton).

49 Solomon, above n 11, p 135.

50 *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397; 200 ALR 39.

51 *Commonwealth Parliamentary Debates*, vol 18, 22 March 1904, p 762 (A Deakin).

52 *Ibid*, p 781 (A Deakin).

53 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association (Railway Servants Case)* (1906) 4 CLR 488.

54 See Macken, above n 30, p 85.

55 *Commonwealth Parliamentary Debates*, vol 18, 22 March 1904, p 1043 (A Fisher).

56 *Ibid*.

Higgins supported the Bill and the Labor amendments. He urged that it be passed and he expressed his support in terms that we would now regard as couched in human rights language. It was, he said, 'part of a system of legislation based upon the feeling that if human life is to be used for the purpose of profit it must not be used to its degradation' but to ensure that 'the health and vitality of the community are not lowered'.⁵⁷ Deakin pinned the fate of his government on the passage of the Bill in the form he favoured. When, in April 1904, the Labor amendment was carried by a majority of nine,⁵⁸ Deakin resigned office as Prime Minister. It was in these circumstances, on 27 April 1904, that John Watson formed the first Federal Government led by the Australian Labor Party. Higgins, who was never a member of that Party, consented to be Attorney-General; but only once Kingston's ill-health had ruled him out.⁵⁹

Meantime, the High Court's decision in *D'Emden v Pedder*,⁶⁰ later in 1904, presented a new obstacle to the validity of the amended Bill. That case represented the high water mark of the implied immunities doctrine in the High Court. Higgins would not be deterred. Indeed, he turned the decision against the opponents and waverers. He said that they could vote for the Bill and safely leave it to the High Court to uphold their view of its constitutionality.⁶¹ The debate was a long and bitter one. There was a great deal of resentment at the sight of the *parvenu* Labor Party on the Treasury benches. The central point of contention was the complaint of political opponents that trade unions, because of their donations to the Labor Party, were 'political'. That association led to bitter opposition over the provision of preference to union members in federal awards. The politicians of conservative leanings wanted to do nothing to strengthen the unions who were friends and supporters of their political opponents. Another contemporary theme can be seen.

Uncharacteristically, Higgins left it to the young William Morris Hughes of the Labor Party to defend the preference facility in the Bill.⁶² Hughes urged that such preference was the *quid pro quo* for taking away the unions' right to strike.⁶³ George Reid attacked the Bill, expressing his 'intense repugnance . . . to proposals for compulsory arbitration'.⁶⁴ Despite Hughes' best efforts, in June 1904, the provision permitting the tribunal to protect union membership of Australian workers was amended. After fierce contest and further attempts to provide privileges for unions as the inducement for their participation in the new national system, Watson in August 1904 resigned.⁶⁵ George Reid became Prime Minister. For a time it looked as if the Bill was dead.

Not so. Attorney-General Josiah Symon reintroduced the Bill into the Parliament in September 1904. After a few skirmishes in the Senate, it was

57 *Commonwealth Parliamentary Debates*, vol 18, 14 April 1904, p 1027 (H Higgins).

58 *Commonwealth Parliamentary Debates*, vol 19, 27 April 1904, pp 1243-4.

59 Palmer, above n 19, p 173.

60 (1904) 1 CLR 91.

61 *Commonwealth Parliamentary Debates*, vol 19, 31 May 1904, pp 1699, 1703 (H Higgins).

62 *Commonwealth Parliamentary Debates*, vol 20, 21 June 1904, pp 2501-4 (W Hughes).

63 *Ibid*, p 2505 (W Hughes).

64 *Commonwealth Parliamentary Debates*, vol 20, 24 June 1904, p 2685 (G Reid).

65 *Commonwealth Parliamentary Debates*, vol 21, 17 August 1904, p 4265 (J Watson).

passed on 9 December 1904.⁶⁶ In this way, after three years of debate, much of it over issues that we can recognise in contemporary Australia, the Conciliation and Arbitration Act was enacted and received the Royal Assent on 15 December 1904.

The contents of the 1904 Act

The aims of the 1904 Act were those stated by Deakin: to prevent lockouts and strikes; to constitute a court of conciliation and arbitration; to promote amicable agreement between parties; to enable reference of State powers to the federal body; to facilitate and encourage the organisation of representative bodies of employers and employees; and to provide for the making and enforcement of industrial agreements.⁶⁷ Although the emphasis and mixture of these functions has changed over a century and new and different responsibilities have been added, the basic design of Australia's national labour law was put in place. In effect, it was a design inherent in the words of para (xxxv) of s 51 of the Constitution. The inspiration of Kingston and the single-minded determination of Higgins procured the new province of law and order for the infant Commonwealth's industrial relations.

Consistently with provisions that remain in force to this day,⁶⁸ the new tribunal was not to be bound by legal forms of the rules of evidence. It was required to act in accordance with equity, good conscience and the substantial merits of the case. Procedures for registration of representative organisations, still substantially in force, can be traced directly to the 1904 Act.⁶⁹ Although for a time such organisations were treated as mere agents of their members,⁷⁰ subsequent decisions of the High Court made clear the fully representative role of such organisations in the working of the federal conciliation and arbitration system.⁷¹ Over the ensuing century, every word in para (xxxv) of s 51 of the Constitution has been examined and re-examined by the High Court.⁷² The theories of interpretation of the constitutional power have waxed and waned. Expansive and narrow interpretations have been adopted, depending, in part, upon the composition of the High Court and the views of its members. This is an inescapable feature of any federal supreme court as, indeed, of any decision-making body acting after the independent judicial model.

In the matter of constitutional elaboration, nothing can ever be taken as finally written. Even the decision with the most dramatic impact on the arbitral tribunal itself, the *Boilermakers' Case* of 1956,⁷³ can scarcely be called the last word on the separation of powers required by the Australian Constitution.

66 *Commonwealth Parliamentary Debates*, vol 24, 9 December 1904, p 8200.

67 Conciliation and Arbitration Act 1904 (Cth) s 2.

68 Workplace Relations Act 1996 (Cth) s 110(2).

69 Conciliation and Arbitration Act 1904 Pt V and Workplace Relations Act 1996 Sch 1B.

70 *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees Association* (1925) 35 CLR 528; *Federated Ironworkers Association of Australia v Commonwealth* (1951) 84 CLR 265.

71 R J Buchanan and I M Neil, 'Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power' (2001) 20 *Aust Bar Rev* 256 at 259.

72 Cf M D Kirby and B Creighton, 'The Law of Conciliation and Arbitration' in Isaac and Macintyre, above n 5, p 98.

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

One day, when the time is ripe, that ruling, with its highly inconvenient practical consequences, may be reopened.⁷⁴ Views that are taken in one decade about the ambit of 'industrial disputes' under the statute and the Constitution are narrowed or broadened a decade later with the flux of judicial opinions.⁷⁵ Doubtless, these opinions are, in turn, influenced by national and international realities. In law, context is always critical.⁷⁶

Just as the 1904 Act grew out of the legal and economic environment of the late nineteenth century, so today the successor Act and the Constitution mould themselves to the economic and social realities of our age. Those in the bully pulpit who think they have the whole truth for all ages need to be put in their place. There is no room in this nation for industrial ayatollahs. Ours is a more temperate and open-minded society, as befits the representative democracy established by the Constitution and the Australian culture of 'fair go' which the 1904 Act reflected and to which it made its own contribution.

In his famous *Harvester* judgment,⁷⁷ Justice Higgins noted that he had been accorded the responsibility of determining a 'fair and reasonable remuneration' for employees in Australia. This required him to conceive of a wage that permitted the ordinary Australian to enjoy 'a condition of frugal comfort [as estimated by current human standards]'.⁷⁸ These were the exact words used by Pope Leo XIII in *Rerum Novarum*.

Even for an Australian of Ulster Protestant lineage, this was an idea that seemed right to Higgins. Its centrality in industrial relations and economic organisation has changed over the century. But the germ of the idea of an essential 'safety net' to protect the dignity of every Australian employee — and thereby the dignity of all those who employ them — remains in the ongoing function that Australians expect of their national tribunal for industrial conciliation and arbitration. Over the course of a century, that body 'has contributed to the equalisation of costs of labour throughout Australia and hence to the growth of a national economy'.⁷⁹ It has reinforced the strong constitutional attention to the creation of a continental common market, nearly a century ahead of that achievement in Europe and North America. It has helped weld Australia together, contributed to the creation of a national economic structure and protected the largely egalitarian society which, until now, has been a special feature of life in Australia. We can change these characteristics as we please. However, if we do so, the change will not deny the impact of the Commission and its predecessors upon what it has meant to be an Australian over the past hundred years.⁸⁰

74 *R v Joske; Ex parte Australian Building Contractors Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90 per Barwick CJ, 102 per Mason J; 2 ALR 447. See Kirby and Creighton, above n 72, p 130.

75 *Electrolux*, above n 3, at [208]–[213].

76 *R v Secretary of State for the Home Department; Ex parte Daly* [2001] 2 AC 532; [2001] 3 All ER 433 at [28] (Lord Steyn); cf *Al-Kateb v Godwin* (2004) 208 ALR 124 at [174].

77 *Ex parte H V McKay Ltd* (1907) 2 CAR 1.

78 *Ibid*, at 218.

79 *Attorney-General for the State of Queensland v Riordan* (1997) 192 CLR 1 at 41; 146 ALR 445.

80 R McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22 *MULR* 42 at 58–9.

Looking Forward: Elements of Change and Continuity

Of abolition and such fantasies

Rude as it may be to mention it at such a time, there are those who see no future whatever in the Australian Industrial Relations Commission. For them, it should be closed down, lock, stock and barrel. Or, if retained, converted into a mediatory body 'with no legal powers of arbitration or intervention'.⁸¹ For those of this opinion, a wholesale revision of the legislation is required; indeed it is urgent.

Persons of such views tend to live in a remote world of fantasy, inflaming themselves by their rhetoric into more and more unreal passions, usually engaging in serious dialogue only with people of like persuasion. For the rest of us, who live in the real world, and know our country and its institutions better, time will not be wasted over such fairy-tales. Australia is not a land of extremes. Irritatingly enough to those of extreme persuasions, Australia's basic institutions and laws tend to adapt very slowly and over time: adjusting to changing economic and social forces only as such adjustment is truly needed. So it has been with the national conciliation and arbitration tribunal. So it will be in the future. Those who want more dramatic change, as distinct from constant adjustment, need to look for another country.

It would be a presumption for me to attempt a sketch of the shape of things to come. A few ideas will suffice.

Big and small proposals for change

Informed writers have made many suggestions on initiatives that might be taken to improve the current system. The President of the Commission, Justice Geoffrey Giudice, has advanced many thoughtful proposals. Some of them have been of a limited variety, likely to upset very few.⁸² Others are of a more radical character. Amongst these have been proposals to give renewed emphasis to the conciliation role of the Commission.⁸³ All of us, including I should think, the High Court, need to look more closely at that word 'conciliation'. It has been in the Constitution, and the Act, from the start. But its full potential has never been realised.

Justice Paul Munro, whose recent retirement from the Commission ended a remarkable service to industrial relations and the nation,⁸⁴ presented a long list of possible changes in a typically thoughtful paper given in 2002.⁸⁵ Amongst his ideas was an endorsement of Justice Giudice's suggestion that

81 Moore, above n 4, p 15. See also D Moore, 'Better than the Australian Industrial Relations Commission' (Summer 1999/2000) *Policy* 11 at 17.

82 G Giudice, 'Industrial Relations Society of the ACT Inc Conference', Speech delivered at the ACT Industrial Relations Society Conference, Canberra, 31 March 2004, p 3; eg, differentiated entitlements to redundancy benefits in employment involving fewer than 15 employees; cf M Pittard, 'Australian Industrial Relations Commission and the Current Industrial Relations Environment' (2000) 6 *Employment Law Bulletin* 37.

83 G Giudice, address to Industrial Relations Society of Australia National Convention, noted in CCH, *Australian Industrial Law Newsletter*, September 9/2001, 1 at 2.

84 Justice P R Munro retired as a Deputy President of the Commission on 12 July 2004.

85 P R Munro, 'Industrial Tribunals: Challenges and Opportunities', Paper presented at the Australian Industry Group National PIR Group Conference, 6 May 2002.

the recommendation, made nearly 20 years ago by the Hancock Committee, should be rekindled for a national summit conference on the harmonisation or integration of separate State and federal regulatory regimes.⁸⁶ He also called attention to the need for fresh thinking about new forms of employment, such as joint employment;⁸⁷ about the scope of private arbitration to supplement the Commission's work under the Act;⁸⁸ and the extension of the unfair contracts model, administered in some State industrial tribunals, for a wider range of like dispute.⁸⁹

Other writers, such as Professor McCallum have proposed expansion of the Commission's functions in the reinstatement of unfairly dismissed workers.⁹⁰ The High Court gets a caning from Professor McCallum for decisions that have led to the present rather cumbersome approach.⁹¹ I would not look for a change in that direction in the short run.

Certainly, the expanded interpretation of the external affairs power in the Constitution, read in conjunction with ILO conventions to which Australia is a party, and the enlarged understanding of the corporations power under the Constitution have substantially removed, by the end of the first century, many of the obstacles to the creation of a coherent federal labour relations law such as troubled successive governments during the first century, struggling with the words of para (xxxv). Yet as Professor McCallum notes, the changing economic scene, and the altered character of employment today, mean that many of the old assumptions have to be rethought.⁹² One of these, highly practical in nature, is drawn to notice by Justice Giudice.

The Commission, like every court and tribunal in Australia, must now struggle with increasing numbers of litigants who are unrepresented by unions or lawyers.⁹³ Whatever may have been the weaknesses of union representation of workers as a group, it was at least an efficient way of aggregating distilled issues, ripe for decision. Struggling with self-represented litigants is never easy for a decision-maker. Least of all is it so in the often fraught circumstances of disputes over employment conditions and termination. The problem of ensuring access to justice is one common to institutions throughout Australia. Industrial tribunals are not exempt.

86 Ibid, p 2. See also G Giudice, 'The Industrial Relations Society of Victoria: A Unitary IR System?', Paper presented at the Industrial Relations Society of Victoria, 18 October 2002, at [17].

87 Munro, above n 85, p 3.

88 Ibid, p 4.

89 Ibid, p 12.

90 McCallum, above n 80, at 47: following the *Re Ranger Uranium Mines Pty Ltd; Ex parte FMWUA (Ranger Uranium Case)* (1987) 163 CLR 656; 76 ALR 36. But see *State of Victoria v Commonwealth of Australia (Industrial Relations Act Case)* (1996) 187 CLR 416; 138 ALR 129.

91 See McCallum, above n 80, at 52; cf A Chapman 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 AJLL 89.

92 McCallum, above n 80, at 61; cf R McCallum, 'Too Much Law and Too Little Reform: Industrial Law Regulation in Australia', Paper presented at the 42nd Annual Conference of the Industrial Relations Society of New South Wales, Bowral, 18 May 2001, p 5.

93 One problem that can arise is the overlap of federal and State jurisdictions. See Giudice, above n 86, at [3].

Markers: global economy and human rights

The fundamental markers for the future of the Commission can be found in the two forces that are at work in the economy and world of today. One is the force of global and regional economies and of the creation of the institutions of good governance to facilitate the efficient flows of capital and finance that drive the modern economy. The other is the force of global human rights.⁹⁴

If we look closely at these two forces, they represent an extension of the same elements which, in 1904, were mixed in the special alchemy of the Act of that year. At that time, they were seen, largely if not entirely, in a national and imperial setting. Today, they must be seen in a global and regional context. Then, they were talked of in terms of 'management prerogatives' and 'industrial equity'. Today, the labels and the focus have changed. But the need for a harmonious mix is just as true. Today, as then, we seek the 'best possible outcomes to the struggle between economic profit and industrial justice: two wild horses locked together in a harness that commits them to eventual harmony and a common direction'.⁹⁵ In this respect, at least, little that is fundamental has changed.

With the dynamic of the global economy and the pressure today for good governance, some of the rigidity of our past national solutions to industrial justice has to give way to the more bracing world of international economic competitiveness, changing demography and shifting market forces. Yet within Australia, we will continue to maintain protection for the most vulnerable in society. We will do so by our institutions searching in an Australian path towards a fair go all round. Yet it would be astonishing if our institutions were cut off from the global thinking that is reflected in the ILO conventions and that draws lessons from such *stimuli* as the Directives of the European Union on labour standards, technological redundancy and other like contemporary questions.⁹⁶ The future is also another country. I am not worried about it in this connection because I am sure that it will continue to be very familiar to those of us who have known the past.⁹⁷

Looking Around: A Personal Reflection

Back to industrial origins

I finish with two personal reflections. I am glad that part of my career in the law took me into the industrial tribunals of this nation, federal and State. I am proud that I served for a time as a member of the Australian Conciliation and Arbitration Commission. As Mary Gaudron has remarked, speaking for us both, comparing our lives on the Commission and on the High Court, 'we would . . . have no hesitation in saying that our time on the Commission was

94 M D Kirby, 'Human Rights and Industrial Relations' (2002) 44 *Jnl of Industrial Relations* 562.

95 *Ibid.*, at 578.

96 See C Fenwick, 'International Law on the Right to Strike' (2004) 17 *AJLL* 125 at 135.

97 The Australia-United States Free Trade Agreement includes provisions intended to secure compliance of both parties with international law on freedom of association, including the right to strike. See G Griffin, C Nyland and A O'Rourke, 'Trade Promotion Authority and Core Labour Standards: Implications for Australia' (2004) 17 *AJLL* 35.

infinitely more fun'.⁹⁸ As an advocate and as a judge, I knew the importance of the issues for thousands of people; the economic realism that is required; and the tricky legal minefield that has to be traversed every day. That is why I have returned to my sources in offering this centenary reflection.

A young woman's tale

More recently, I had an insight into the worth of labour law and institutions that few judges have enjoyed. Sometimes it is a good thing to see the law in operation from a different perspective — from the perspective of a consumer.

My niece, Julie, finished school a decade ago. She did not at once pursue tertiary studies. She drifted between jobs in search of something special that would catch her fancy. Like many of today's youth, she was employed from time to time at casual rates. A pretty and intelligent girl, she hoped for a career in television. But she found, as many before and since have done, that such jobs are hard to come by.

For two years Julie worked in an enterprise in the entertainment industry (I describe it broadly to avoid identifiers). She worked long hours and with people who were not always pleasant. She never joined a union. People of her age and work often fail to do so. To them, unions sometimes seem very old-fashioned. Julie faced recurring demands to work overtime to please the clients, to get them to sign more contracts. She was constantly underpaid. The promise of regular increments in the salary that she was given on recruitment never eventuated. After two years of this work she resigned. But she was annoyed at the injustice to herself and her work colleagues over the broken promises and underpayments.

Julie is stubborn. It may even be a family characteristic. She went to unions for help but, as she had not been a member, she could spark no interest. Her co-workers, vulnerable and cautious, were frightened, at her urging, to take the matter further. Eventually, a union official was found who told her that what had happened to her was wrong and that the union would take up her cause if she joined up. She did.

Julie's case was taken to an industrial tribunal. It was bitterly fought. Liability was absolutely denied. However, eventually, the Commissioner pointed to the objective evidence of repeated under-payments and the lack of increments. Julie's pay was only fractionally above social security payments. For many young people in casual work and at the lower end of the spectrum of employment in Australia, there is still vulnerability. If we are committed as a nation to the protection of human dignity in conditions of work and 'reasonable and frugal comfort', we still need those who will help the vulnerable. We need those who will assert their rights. But we also need those who will defend and uphold basic rights. The market works miracles, as we all know. But at the edges there are those who lose out in the market. To pretend that everyone has equal power in the market is to indulge in a miraculous self-deception.

I watched this case from afar. Julie lives now with my father. I heard about it every week over the sausages. Of course, I took no part. I just listened to the story and tried to understand it from the viewpoint of a young woman of 25.

⁹⁸ Quoted in Isaac and Macintyre, above n 5, p 100.

I made due allowance for the fact that I heard only one side. But it seemed a case of arguable wrongs. As described, Julie's union representative spared no effort on her behalf. The tribunal member was wise, perceptive and just. A good outcome was ultimately reached. A payment, important in real and symbolic terms, was made. The employer was duly warned. The other employees were indirectly protected. The Australian system of industrial justice worked in Julie's case.

Julie is now a late entry undergraduate at Sydney University. Occasionally she talks about her case. When she does, I get an insight into the way the Australian system of the industrial fair-go is meant to operate. If it had been left to market forces alone Julie's complaint would have been unrepaired. Advisory services would, I am afraid, have got absolutely nowhere.

Of course some do not care about the sense of injustice to little individuals like Julie. The breaches of agreements to the young, the powerless and the vulnerable do not matter to them one jot. But a society that allows such injustices to cumulate eventually loses the trust of its citizens. A society that responds to, and repairs, injustice is one that earns and deserves the loyalty of its people. If we look at the reason for the general success of governance in Australia, it is, I believe, because we have offered the means to respond to injustices. Many of us think that we should continue to do so.

In a land committed to equality and justice for all, the door of fairness is not shut at the employment gate. Every now and again, it is good for people like me to come down to earth and hear what it is really like for the disadvantaged and powerless. As Chief Justice Latham said in the High Court long ago, it is easy in our society to protect the entitlements of the strong and the powerful. There, the market does a great job and so generally do politics and the courts. The strong do not even usually need the law for that purpose.⁹⁹ The test of a just legal system, and good governance and of our defence of human dignity and human rights, comes when we are asked to uphold the entitlements of the weak and the vulnerable.¹⁰⁰

As a Justice of the High Court of Australia and as a citizen, I express thanks to those who have served in and with the Australian national tribunal for industrial conciliation and arbitration. Indeed to all such bodies throughout the nation. From the start, they have upheld the twin charter expressed in the Constitution and reflected in the 1904 Act: a recognition of economic realities and a moderation of them, sometimes, in proper cases, where justice and equity so require. I do not doubt that in the coming century the alchemy will continue to be needed and to be delivered. Australia is that kind of country. Economic power, like all forms of power, is ultimately subject to the law. Our sense of justice is insistent. When it is offended, the Australian people demand, and usually receive, 'a fair go all round'.¹⁰¹ For its contribution to

99 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124.

100 Cf Fenwick, above n 96; R McCallum, 'The Internationalisation of Australian Industrial Law: The International Relations Reform Act 1993' (1994) 16 *Sydney L Rev* 122; M Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *AJLL* 170; and B Creighton, 'The ILO and the Internationalisation of Australian Labour Law' (1995) 11 *IJCLIR* 199.

101 This expression is often traced to the reasons of Sheldon J in the New South Wales Industrial

attaining that objective, I offer honour and praise to the Australian Industrial Relations Commission and its predecessors at this centenary time.

Commission in *Re Loty & Holloway v Australian Workers' Union* [1971] AR (NSW) 95. It is so used in s 170CA(2) of the Workplace Relations Act 1996 and the source is noted there.