SPECIAL ADDRESS

THE STRANGE DEMISE OF THE CONCILIATION AND ARBITRATION POWER

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In the Constitutional Convention debates of the 1890s, the point of what was to become section 51(xxxv) of the *Constitution* was self-evident: there was a need to provide a means for the settlement of industrial disputes which were beyond the competence of any one state to deal with effectively.[1] Even then, however, George Reid observed presciently that:

> the proposed sub-clause would tend to enlarge the area of trade disputes, for the very reason that the employers or the men might be disposed to extend the area of a dispute, in order to get the advantage of having it settled by the federal tribunal.[2]

Enlarging the dispute might be one thing: creating a dispute where otherwise there would not have been one was to be another matter altogether. It was a stratagem of the latter kind that came to be one of the two defining characteristics of the Australian system of federal industrial regulation in the three generations that followed the passage into law of the *Conciliation and Arbitration Act 1904* (Cth) ('*1904 Act*').

The other defining characteristic, of course, was the judicial procedural setting in which wages and conditions of employment were, from the outset, established. This was the natural, if not the inevitable, consequence of the constitutional and statutory requirement that it be by a process of arbitration that unsettled industrial disputes be resolved.

Unsurprisingly, the principled resolution of disputes by judges[3] provided ample scope for the emergence of something like a system of precedent and led to the application of high-level outcomes across broad sectors of the economy. Of itself, such a system was ill-adapted to deal with industrial disputes, which in point of reality did not extend beyond the limits of any one state, much less to address the low-level needs of particular enterprises and those who worked in them.

Over the years, various means were deployed to make the nationally-based award system responsive to the needs of particular industries, occupations and enterprises. Inter-occupational discriminations were the concern of the so-called 'margins for skill', which were originally paid in addition to the basic wage. A third tier of remuneration, as it came to be called, were the over-award payments. In due course, the two award-based tiers were collapsed into a 'total wage', and such discriminations as were inevitably called for as between occupations, industries and enterprises were addressed by making awards of limited coverage. That is to say, the dispute had to extend beyond a single state, but the architecture of any settlement might, and usually did, have a very different appearance. And of course, over-award payments, of their nature an enterprise-based solution, continued to be a feature of the system.

In the result, by the 1980s Australians had become accustomed to a system characterised by a combination of public adjudication and clubby settlements which satisfied neither the macro nor the micro needs of a growing labour market. At the same time, even those who enthused over the concept of compulsory conciliation and arbitration had to acknowledge that a legislative model which required for its efficacy the existence or imminence of an interstate industrial dispute tended to throw

up a never-ending cascade of technical and arcane distinctions, such as the propositions which had it that a dispute over whether a government bus should be crewed by one man or two was not an industrial one, while a dispute over whether a driver should be required to operate his bus without the assistance of a conductor was an industrial one.[4]

One is minded of what had been said 30 years, and a world war before these one-man bus cases, by Anstey Wynes:

> [The meaning of s 51(xxxv)] has been subjected to the most remarkable variations and we venture to suggest that a versatility has been displayed in legal argument paralleled in British constitutional history only by the ingenuity of those who took part in the great struggle between King and Parliament during the Stuart period. From an apparently simple concept couched in layman's language, the subject matter of the 'industrial power' has not merely become technical in the most technical sense, but has attracted to itself conceptions bordering on the metaphysical.[5]

It might be wondered whether the conciliation and arbitration power had any defenders. However, probably because it provided a system of centralised wage fixation which was beneficial to employees, and which could be tolerated by employers in an era of protection, it endured and became, in effect, a rusted-on attribute of the national psyche. Yet the power is now all but a dead letter. How did that come about?

Notwithstanding various ructions over the years, such as the institutional adjustments made necessary by the *Boilermakers* case,[6] it was business as usual for the compulsory arbitration system until, and including, the response required to the inflationary pressures generated by the so-called 'Cameron Experiment'[7] of 1974. That response involved, rather ironically

it might be thought, the introduction of a system of semi-automatic wage adjustments based on quarterly movements in the consumer price index.[8] That system laboured on for about six years, after which it was abandoned.[9] The next system of centralised wage fixation went through a series of iterations over the period 1983 to 1993, each of which was responsive, more or less, to an 'accord' between the Commonwealth and the Australian Council of Trade Unions and involved some kind of trade-off for what was typically another layer of remuneration adjustment. These trade-offs, it may be noted, tended to focus on the removal or mitigation of some of the more cumbersome award provisions and related practices, rather than on industrial productivity. At the same time, there came to be heard, off-stage as it were, increasingly strident voices calling for a move towards more enterprise-oriented arrangements for the setting of wages and other conditions of employment. Eventually, the 'main players', as we may describe the organised employers and employees of the era, saw the sense in these calls, and moved to reset their institutional arrangements accordingly.

Before getting to that development, however, we should note what was happening on the legislative front over this period. Recourse to heads of constitutional power other than the conciliation and arbitration power for the purpose of regulating industrial relations had become a familiar sidebar to the legislation by the late 1970s. With respect to seamen, for instance, the Conciliation and Arbitration Commission had the power to settle by conciliation, and to hear and determine, industrial matters in so far as they related to trade and commerce with other countries or among the states, whether or not an industrial dispute existed in relation to those matters.[10] The trade and commerce power was availed of also in the regulation of industrial relations in the stevedoring industry[11] and, to an

extent, the airline industry.[12] Although, constitutionally, there was no need for the mechanisms of conciliation and arbitration to have been deployed in these areas of regulation, it was institutionally both convenient and uncontroversial for the Commonwealth to have proceeded in this way.

But, until the events about to be related, recourse had never been had to the corporations power for the purpose of regulating industrial relations. Then a beachhead, of sorts, was established by the enactment of section 45D of the *Trade Practices Act 1974* (Cth) ('*TP Act*') in 1977 and its successful defence against a constitutional challenge in the *Fontana Films* case in 1982.[13] That section – at least for presently material purposes – relied on the corporations power. In *Fontana Films*, the Court rejected the argument advanced by Michael McHugh QC that '[s]ection 45D is not a law with respect to … trading corporations … It is a law regulating the conduct of persons imposing secondary boycotts'.[14]

Seven months after the judgment in *Fontana Films*, Dr Bob Brown and his supporters commenced their blockade of the works for the construction of what was to have been the Gordon below Franklin Dam, thereby putting in train a series of events that would lead to the establishment of Commonwealth legislative protection for large areas of the Tasmanian wilderness. Little did they realise that they were sharpening the axe that would eventually bring down the conciliation and arbitration power. But so it was: in July 1983, the High Court upheld the validity of laws and regulations that enabled the Commonwealth to prevent the construction of the dam.[15] One of the grounds upon which the majority did so was that these laws and regulations, at least to the extent necessary for the Commonwealth's then purposes, came within section 51(xx), that is, they were laws with respect to trading corporations, the

corporation in question being, of course, the Hydro-Electric Commission of Tasmania. Mason,[16] Murphy[17] and Deane JJ [18] regarded this head of power as extending to any law on the subject of a trading corporation, whether or not touching the trading activities of it, and the fourth member of the majority, Brennan J, decided the point – on what was then the more conventional basis – because the legislation under challenge was, in one of its alternative formulations, confined to conduct by a body corporate 'for the purposes of its trading activities'.[19]

Returning from the pristine forests of Tasmania to the much more prosaic environment of the industrial workplace, a fortnight after the judgment in the *Dams* case, the Minister for Employment and Industrial Relations constituted a tripartite 'Committee of Review into Australian Industrial Relations Law and Systems', the terms of reference for which, though broad, provided no encouragement for a recommendation that might favour recourse to a head of power for the regulation of industrial relations other than para (xxxv) of section 51. Likewise, when the committee itself reported on 30 April 1985, it dismissively referred to other heads of power as 'exotic', the use of which would involve 'a serious risk of antagonising the states and significant sections of the industrial relations community and might be counter-productive'.[20] With respect to section 45D of the *TP Act*, there were two 'conflicting views' on the Committee. One saw the section as concerned with the regulation of what were 'essentially industrial' activities, while the other saw it as the means by which third parties could secure 'legal redress' for loss and damage inflicted on them by participants in a dispute in which they were not directly involved.[21] It was the former view which, it seems, informed the decision to include div 7 of pt VI in the *Industrial Relations Act 1988* (Cth) ('*IR Act*'), which replaced the *1904 Act* and which

was, ostensibly at least, the Government's response to the committee's report. The provisions of div 7, which provided a mechanism to involve the Commission in conciliation for the settlement of so-called boycott disputes, relied on the corporations power.

Then, in 1992, sections 127A–127C were introduced into the *IR Act*.[22] They invested the Industrial Relations Commission with the power to set aside or to vary a contract to which a 'constitutional corporation' was a party on the ground that it was unfair, harsh or against the public interest. To the extent that the new provisions went further and empowered the Commission to deal with a contract which was linked to a non-party constitutional corporation only because it related to the business thereof, those provisions were held to be invalid in 1995,[23] but that limited qualification on what was starting to look like a trend towards the wider use of the corporations power is tangential to the present discussion.

This brings me to the point which I had earlier reached in my summary of the history of wage fixation at the federal level since about the mid-1970s. By the end of the 80s there was an increasing push to move these processes out of the halls of the Commission and into the conference rooms of the nation's many enterprises. This culminated in the making of a submission, with strong support from both sides of the industrial divide, in the proceedings leading to the national wage decision of April 1991[24] to the effect that the Commission's principles should permit, even promote, enterprise bargaining, and to the now famous retort from the Commission that 'the parties to industrial relations have still to develop the maturity necessary for the further shift of emphasis now proposed'.[25]

It was only another six months before the Commission relented, and introduced into its principles a clause which provided for the making of consent awards, and the certification of agreements, by way of formalising the outcomes of enterprise bargaining.[26] The collective bargaining genie, while not yet out of the bottle, had removed the lid and was looking around. The landscape which he hoped to occupy was formalised by legislative change in 1992[27] and, *mirabile dictu*, it was a requirement, in all but clearly limited exceptional cases, that an agreement could not be certified by the Commission unless the parties included a nationally-registered trade union.[28] And no one ought to have been surprised by that. The system then introduced was characterised by a singular grounding circumstance: the consent awards being made, and the agreements being certified, had to be founded on interstate industrial disputes which satisfied the description in section 51(xxxv) of the *Constitution*. In the nature of things, the party to a dispute of that kind, on the employee side, would almost always be such a union.

Only the following year, 1993, the legislature made further changes, this time harnessing certified agreements to awards, that is to say, to instruments made by the Commission in the prevention or settlement of industrial disputes. The Commission was not empowered to certify an agreement unless the wages and conditions of employment of those covered by the agreement were regulated by an award.[29] The position thereby established was not only one which made the certification of agreements an exercise of the power referred to in section 51(xxxv): it was one in which an agreement could not be certified unless it shared the same bed as an award made in prevention or settlement of an interstate industrial dispute.

Those responsible for this hybrid system of regulation cannot have been aware of what Sir John Moore, then President of the Conciliation and Arbitration Commission, had said in 1973:

> Now, if one wants collective bargaining in its full and complete sense one would have to abolish all the arbitration systems. Collective bargaining presupposes that the bargainers will continue bargaining until they ultimately agree and if they have difficulty in agreeing they will not be able to go to anybody or institution which could ultimately decide between them as arbitrators can in this country. They may accept a mediator to assist them in reaching their collective bargain, so one might assume some form of mediation service in this country were collective bargaining to be accepted as the norm. But arbitration and collective bargaining in its full sense are incompatible.[30]

Of more present interest apropos the 1993 amendments is the circumstance that, for the first time, the corporations power was used to justify legislation which provided for the making of 'agreements' – the so-called 'enterprise flexibility agreements'[31] – otherwise than in prevention or settlement of disputes to which trade unions would most likely be parties, and where the participation of trade unions in the bargaining process was not required.[32] Albeit that such an agreement could be approved by the Commission only if the wages and conditions of the employees concerned were regulated by an award made under traditional section 51(xxxv) powers[33] – thereby laying the oil of a collective agreement made under the corporations power over the water of an award made under the conciliation and arbitration power – this legislation amounted to a significant development in that it provided a conspicuous demonstration of

how the corporations power might be utilised in the regulation of mainstream wages and conditions of employment.

If you are, by now, tiring of metaphors, let me try your patience once more, although I assure that this is, and was, not one of my own. The 1993 amendments were also the occasion for the legislative appearance of the notion that awards should act as a 'safety net of minimum wages and conditions of employment underpinning direct bargaining'.[34] Reading this I realised for the first time just how toxic a mixed metaphor could be. Were awards to be, like a safety net under the high wire, something which you never used unless visited by disaster, or were they to be, like the underpinning structures of a building, something which provided working support on an ongoing basis?

Either way, it was, perhaps, a mark of the cynicism which characterised the whole business of industrial relations legislation in the early 1990s that (almost) no one noticed – or if they did they did not care to draw attention to – what had become a clear separation between the stated statutory purpose of awards and the historical, and still textual, constitutional purpose which was supposed to sustain the whole complex system. The idea that employees and employers could be in dispute, across state borders, about the positioning of the safety net – an artefact which was not intended to correspond with the wages and conditions of employment actually being enjoyed by any individual – can only be described as weird. A concept which is treated, by its own legislation, with such cynicism is a concept which does not have long to live. And so it was with the conciliation and arbitration power.

But that power might yet have survived had it not been accepted by the High Court – effectively a matter of concession by the major parties concerned – 'that the Parliament [had] power to legislate as to the industrial rights and obligations of constitutional corporations'.[35] This was in 1996, in which year the legislation was again amended to provide for the making of conventional collective agreements under statutory provisions which relied on the corporations power.[36] There was thus ushered in, a period during which the conciliation and arbitration power continued to be used to sustain so much of the legislation as related to the prevention and settlement of industrial disputes, including those provisions under which awards were made and agreements which tended to settle such disputes were negotiated, while the corporations power sustained so much of the legislation as related to agreements made between constitutional corporations and their employees, or the relevant trade unions.

The Work Choices amendments of 2005 have gone down in history as the good idea that destroyed a government. More of that presently. But it was the legislative regime introduced in 1996 which truly involved choices. The parties to a successfully negotiated collective agreement could choose whether to formalise things under provisions which depended on the corporations power or to do so under provisions which depended on the conciliation and arbitration power. In the latter case, of course, they would need to have the existence of an industrial dispute recorded, but parties had, by the 1990s, come to regard that as the merest of formalities.

What was the experience of the system under this 'choices' regime? Of the total number of agreements lodged for certification in the first full year of the operation of this system (1996-97), 67.7 per cent utilised the stream that relied on the

corporations power.[37] In the following year, this figure had risen to 83.2 per cent, and it never again fell below that. By the final full year before the Work Choices amendments commenced (2004-05), the figure had risen to 93.5 per cent.[38] It is clear that, when faced with a choice between utilising provisions sourced in the corporations power and utilising provisions sourced in the conciliation and arbitration power, the parties actually working in the collective bargaining system voted with their feet in favour of the former.

In the absence of any High Court challenge to the 1996 amendments, and in the light of the experience of those amendments just referred to, the way was open for the legislature to phase out reliance on the conciliation and arbitration power, which it did in the Work Choices amendments themselves.[39] If there was one thing that the legislation did not do thereafter in relation to the formalisation of the outcomes of collective bargaining, it was to provide a choice as between a stream which relied on the conciliation and arbitration power and a stream which relied on the corporations power, as had hitherto been the case. Neither did the legislation any longer empower the Commission to settle industrial disputes by the making of awards. Existing awards, which were implicitly treated as a kind of anachronism from a previous era, could be varied only in very limited circumstances, such as by way of 'rationalization' or 'simplification',[40] or under the transitional provisions.[41] Indeed, only in the latter case was there any reference to an 'industrial dispute' in the amended legislation.

It was the abandonment of the conciliation and arbitration power as a constitutional justification for industrial relations legislation, in favour of the corporations power, that formed the basis of a High Court challenge to the Work Choices amendments. That challenge was unsuccessful,[42] but it was the

words of Justice Kirby in dissent which, albeit deprecatingly, captured the mood of the age:

> The precise constitutional issue now presented has not previously been decided by this Court because, for most of the past century, its resolution was regarded as axiomatic. It was self-evident that the corporations power did not extend so far as the majority now holds it to do. It was for this reason that, through referendums, successive governments sought – without success – popular approval for the enlargement of federal power with respect to industrial disputes. The repeated negative voice of the Australian people, as electors, in votes on these referendums, is now effectively ignored or treated as irrelevant by the majority. I accept that the corporations power in the Constitution, when viewed as a functional document, expands and enlarges so as to permit federal laws on a wide range of activities of trading and financial corporations in keeping with their expanding role in the nation's affairs and economic life. But there are limits. Those limits are found in the express provisions and structure of the Constitution and in its implications. This Court's duty is to uphold the limits. Once a Constitutional Rubicon such as this is crossed, there is rarely a going back.[43]

While I acknowledge the appropriateness of his Honour's classical allusion,[44] I am disposed to think that his timing was out by about 12 years. It was at the time of the 1993 amendments, where the corporations power was utilised in the context of non-union enterprise flexibility agreements, that the Rubicon was truly crossed. As Justice Kirby noted, in such circumstances 'there is rarely a going back', and it was only

onwards and upwards that the corporations power thereafter marched.

Conventional wisdom has it that it was the demonisation of the post-Work Choices legislation which secured for Labor its comprehensive victory in the 2007 federal election. The new administration's response to the despised legislation was not, however, merely to reverse the amendments which had been made in 2005. Instead, what was, ostensibly at least, an entirely new legislative regime was introduced in the form of the *Fair Work Act 2009* (Cth). And, perhaps surprisingly, the opportunity was not taken to enact provisions based on the conciliation and arbitration power. A safety-net instrument was reintroduced, but, while described as an 'award' – doubtless in symbolic deference to historical usage – this instrument was, and remains, a quasi-legislative one made under the corporations power. The new collective bargaining regime, and the provisions for the approval of enterprise agreements, likewise relied – at least in their application to mainstream private sector activities – wholly on the corporations power.

That then is the story of the demise of the conciliation and arbitration power: Given the love affair, which by international repute, Australians had had with that power and with the practices which it spawned, the story is indeed a strange one. It was written in instalments over a period of about 20 years, with politicians of both major colours having made contributions. Perhaps the strangest aspect of all is that a Labor administration was involved at both ends: when the gates to the citadel were opened by Laurie Brereton in 1993 and when all semblance of resistance was given up by Julia Gillard in 2009.

There is another strange aspect to all of this. As noted at the outset, participants in the Constitutional Conventions of the 1890s were earnest in their concern that interstate disputes might remain unsettled because of the inherent limitations in the legislative competence of any individual state. Was that concern based on a misunderstanding? At the federal level, we no longer have any legislation which provides for the prevention and settlement of interstate industrial disputes by conciliation and arbitration. Are such disputes no longer a feature of our economy? How is it that policymakers today are seemingly so blasé about a subject which troubled their predecessors, about 120 years ago, so greatly?

Those are my take-home questions for today.

Endnotes

1 See Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Butterworths, rev ed, 2015) 769.

2 Ibid 770.

3 Or judge-like arbitrators.

4 See *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443 and *Melbourne and Metropolitan Tramways Board v Horan* (1967) 117 CLR 78.

5 W A Wynes, *Legislative and Executive Powers in Australia* (Law Book Co, 1936) 223. In the corresponding paragraph in the second edition, so much of the first sentence as followed 'variations' was omitted and did not reappear in later editions (2nd ed, 1956) 421.

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

7 P A Riach and G M Richards, 'The Lesson of the Cameron Experiment' (1979) 18 *Australian Economic Papers* 21–35

8 *National Wage Case – April 1975* (1975) 167 CAR 18.

9 *National Wage Case – July 1981* (1981) 260 CAR 4.

10 *Conciliation and Arbitration Act 1904* (Cth) ('*1904 Act*') Pt III Div 2 (for the like provisions which were in force until 1956, see Pt XA of the *Navigation Act 1912* (Cth).

11 *1904 Act* Div 4 of Pt III, and specifically s 82(b). The revision of these provisions in 1977, whereby high-level references to the 'stevedoring industry' were replaced by references to 'waterside workers', is not material to the present discussion.

12 *1904 Act* Pt IIIA, and specifically s 88U(1)(b)(iii).

13 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.

14 Ibid 171.

15 *The Tasmanian Dam Case* (1983) 158 CLR 1.

16 Ibid 148–149.

17 Ibid 179.

18 Ibid 268.

19 Ibid 240–242.

20 Committee of Review into Australian Industrial Relations Law and Systems, *Report* (1985) [7.13].

21 Ibid [10.320].

22 By the *Industrial Relations Legislation Amendment Act 1992* (Cth).

23 *Re Dingjan* (1995) 183 CLR 323.

24 *National Wage Case April 1991* (1991) 36 IR 120.

25 Ibid 156.

26 *National Wage Case October 1991* (1991) 39 IR 127, 129–133.

27 *Industrial Relations Legislation Amendment Act 1992* (Cth) (the same Act as introduced ss 127A–127C, mentioned above).

28 s 134E(1)(e)(i) as introduced in 1992.

29 s 170MC(1)(a) as introduced in 1993.

30 Speech made to the Industrial Relations Society of New South Wales on 8 August 1973, reproduced in J J Macken, *Australian Industrial Laws – The Constitutional Basis* (Law Book Co, 1974) 202–203.

31 They were agreements in name only: if a majority of the relevant employees agreed, an instrument 'prepared' by the employer could be approved by the Commission: s 170NC(1)(i) as introduced in 1993.

32 Pt VIB Div 3, as introduced in 1993.

33 s 170NC(1)(b) as introduced in 1993.

34 s 88A(b) as introduced in 1993. The so-called 'paid rates awards' were excluded from this object of the legislation.

35 *Industrial Relations Act Case* (1996) 187 CLR 416, 539.

36 Pt VIB Div 2, as inserted by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

37 This statistic related to agreements lodged under s 170LJ of the *Workplace Relations Act 1996* (Cth) ('*WR Act*'), which covered not only agreements with constitutional corporations but also agreements with the Commonwealth and its various authorities. The latter category is unlikely to have made a substantial numerical contribution to the statistic.

[38] The statistics in this paragraph are taken from the *Annual Reports of the Industrial Relations Commission*.

[39] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

[40] *WR Act* s 552.

[41] *WR Act* Sched 6.

[42] *Work Choices Case* (2006) 229 CLR 1.

[43] Ibid 245-246 [614].

[44] An allusion, it might be noted in passing, of which his Honour was fond. In *Wilson v Anderson* (2002) 213 CLR 401, 457 [139], he used it to convey what had happened apropos native title in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 206 [113] he used it with reference to the removal of the stifling effect of an inconvenient Privy Council judgment on the development of the Australian law of charities.