CONCILIATION AND ARBITRATION IN AUSTRALIA — WHERE THE EMPHASIS?

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I give personal and not official opinions in this article but as the first, and so far only, President of the Commonwealth Conciliation and Arbitration Commission the conciliation and arbitration I discuss shall be those in the national area.

The Commission's work comes under fire from many directions. Those who see it as a predominantly legal institution are very critical. Curiously enough they divide into two opposing sections, the one pointing to the Commission's failure to adhere strictly to a predictable judicial process and the other condemning it for being too legalistic. On the other hand, there are those who look on the Commission as an economic legislative body and criticise its alleged inability to gauge the impact of its decision making policy on the level of economic activity in Australia. Indeed, all criticisms, if one adopts the exclusively particular view of the Commission which each set of critics has, may have some justification. The truth of the matter, and indeed the answer to each of these and most other critics, is not in attempting to deny the point which they are seeking to advocate but simply to say that the Commission must be looked at from a broader perspective. This broader perspective is to be found in the framework of the industrial relationship in the Australian economy and the role of the Commission in maintaining a viable relationship between employers and employees. The constitutional role of the Commission is the prevention and settlement of interstate industrial disputes which one would expect to be restrictive rather than otherwise. However in the process of preventing and settling these disputes, questions relating to matters of economic policy arise and force the Commission into other spheres. Also the processes of conciliation and arbitration involve, in our system, the need for the use of legal forms and procedures as well as a knowledge of constitutional law. However, our problem is not, as I see it, one of creating a consistent cradle of case-made law or even of lore, nor is it the objective of the Commission, as presently constituted, to pursue and implement specific targets regarding economic policy. It has not the power, nor should it have the ambition to aim at these targets.

On the *stare decisis* question the High Court of Australia, whilst acknowledging the rule, rejects any notion of the immutability of its

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own decisions and I would have thought it pretty obvious that even a vague bow towards uniform decisions would be conceded as impossible by practitioners in the Commission's area. However this may not be the case, as I ascertained in conversation with an eminent member of the legal profession some years ago, when he told me that it was generally thought, by senior counsel in his city, that the Commission's policies should be reformed, so that learned Counsel who did not regularly practice before the Commission should be able, from a quick study of the *Commonwealth Arbitration Reports,* to ascertain and advise with some certainty how a case would "go" at the hearing. I was shocked indeed to find that what I thought was a somewhat gauche joke was meant as a serious criticism. In case, however, observance by the Commission of the doctrine of *stare decisis* is yearned for by the profession or other advocates, I quote from a judgment of half a century ago of Isaacs and Rich JJ. My only comment is that if their words were apt in 1918 how much more so when applied to the world of today.

> Industrial disputes extending beyond the limits of any one State embrace so many possible divergencies, of industry, of conditions, of claims, of surrounding circumstances at home and abroad, and of constant changes, that direct legislation in advance is incapable of being applied to them. No one can foresee for any appreciable period the legislative requirements of industrial peace in any one industry, much less in all industries of the Commonwealth which are common to more than one State. Any attempt at detailed regulation, applicable to all industries even if suitable to-day—practically an impossible hypothesis, would certainly be less suitable a month hence. Nevertheless, it was thought necessary that such disputes should not go uncontrolled but that the control should be exercised only by means of conciliation and arbitration. That is essentially different from the judicial power . . . Both presuppose a dispute, and a hearing or investigation, and a decision.[1]

On the question of economic policy, the then Chief Justice of the High Court, Sir Owen Dixon in 1953 used words of such clarity and wisdom that they would have put the Commission's role beyond question I would have thought. However although all newcomers find them early and quote them often they have not resolved the confusion. I myself quote Sir Owen again in the hope that among readers of this review at any rate the repetition of his wise words will have the effect they deserve. Sir Owen's oft quoted words are:

> While an arbitral tribunal deriving its authority under an exercise of the legislative power given by s. 51 (xxxv) must confine itself

[1] *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434, 462-463.

> to conciliation and arbitration for the settlement of industrial disputes including what is incidental thereto and cannot have in its hands the general control or direction of industrial social or economic policies, it would be absurd to suppose that it was to proceed blindly in its work of industrial arbitration and ignore the industrial social and economic consequences of what it was invited to do or of what, subject to the power of variation, it had actually done.[2]

Apart from what the Chief Justice said in the *Railways'* case, the key to the Commission's role lies in the world in which it operates. This is the complex world of industrial relations. In regulating those relationships within its bailiwick, its prime objective is to ensure that agreement is reached between employers and employees in such a way and of such a kind that there is a minimum disruption to the productive process, to which a combination of the contributions of labour and management give rise. To hope that no disagreement will ever arise between these two parties is, of course, to hope for the millennium. The simple fact is that each of these groups has differing interests. To achieve these interests each has at its disposal a certain amount of economic power. Disputes, of course, will naturally arise where there is a clash of interests and it is here that the power apparatus of each group may come into conflict. In many countries the solution to the dispute which arises is left to be worked out in a test of strength between the two parties.

In Australia, we have chosen to replace this form of settlement with the use of a system whereby each party may bring a dispute to an independent tribunal whose job it is to use the processes of the law to achieve an amicable agreement through conciliation or, ultimately, arbitration. In other words, we have selected a system sometimes described as a system of industrial law and order and it is here that the source of many of the misconceptions regarding the role of the Conciliation and Arbitration Commission with respect to its juridical functions arises.

Misconceptions arise, it appears to me, from an authoritarian view of the concept of industrial law and order. The greatest excesses of this point of view are committed when the Conciliation and Arbitration Act is regarded as some form of criminal code. Whilst acknowledging the existence and need for some sanctions, I do not like a "goodies" and "baddies" approach because to regard, as the mainspring of the system, the attempt to discipline groups of people in whose hands

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[2] *The Queen v. Kelly; Ex parte Australian Railways Union* (1953) 89 C.L.R. 461, 474-475.

resides economic power, especially when they themselves can often see no reason for the discipline, is just not feasible.

On the other hand, to regard the system as one akin to the law of equity is similarly misconceived. The great difference here, of course, is that in our system of equitable law two parties in dispute may bring themselves before a court which makes its decision and then they depart, not necessarily having to come into contact with each other again. The industrial relationship, however, is an ever-continuing one at the lower levels where particular workers and employers disagree and also at higher levels where organization is national. The settlement of one particular dispute does not end their relationship there and then. Not only must they continue to work together to maintain the productive process, but it is inevitable that there will be further disagreements, at any rate about other issues from time to time. Each particular solution may not be the solution sought by both or either of the parties but at least it must, in the ultimate, become acceptable to both. Without this mutual acceptance the economic co-operation which is essential in the production of goods and services for the community will break down. At the national level, the co-operation must exist between organized groups of employers and employees.

My purpose so far has been to suggest that there will be a better understanding of the workings of the Commonwealth conciliation and arbitration system if we look at the Commission as a key-stone of our industrial relations system, rather than as a legal institution or as an economic policy maker. This is not to deny that certain aspects of its work, and very important ones, are legal in nature and process and affect economic policy in their outcome. However, we may put these questions aside for one moment and take a very broad look at the development of the Commission and its processes from the point of view which I have been recommending.

I hope so far to have laid the foundations for a discussion of where lies or should lie the emphasis in the legal and economic areas of national conciliation and arbitration. Discussion of where the emphasis lies or should lie within the institution itself—on judges or commissioners, laymen or economists, full or single benches and so on—should perhaps follow some short recent history and a description of the present Commission.

For the reason that I write for an informed readership which fortunately has ready access to literature other than mine, I shall delve

into history no more than is necessary for my theme and content myself with a very summary description of the set-up of the Commission.

1956 is a convenient starting point from my point of view because the Commission came into being in that year and because the discussions in the Parliament to which I shall refer deal with most relevant aspects of history.

Let us go to the Parliament itself and take a look in retrospect at what was said in that very important focus of our democratic life. Although we have had a Commonwealth Conciliation and Arbitration Act since 1904 and it has been amended on numerous occasions since, the Governments of the day have become quite chary of making substantial changes in the legislation through fear no doubt of the electoral consequences should there be any serious error in understanding the popular will.

A dramatic example of this occurred in 1929 when the Bruce-Page Government, which had a huge majority, attempted to bring down legislation which would have had the effect of returning the whole industrial power, except in relation to maritime matters, to the States. It must be remembered that although this legislation would have meant the end of the *national* system of conciliation and arbitration, it would not have left a vacuum because the States would have had full power to legislate in respect of their particular territories. However, when the legislation was defeated in the Parliament, an election was held and not only was the Government defeated but the Prime Minister himself became the only sitting Prime Minister to lose his seat in an Australian election.

However, to come on to 1956, the Government in that year decided on sweeping changes in the national system which were argued in a very critical House of Representatives. In his Second Reading Speech the then Minister for Labour and National Service, Mr. Harold Holt, later to become Prime Minister, expressed confident hopes for what would flow from the changes. The then Leader of the Opposition, Dr. Evatt, although making some dire complaints about the system itself, attacked the Government's proposals. Interestingly Dr. Evatt, on the attack against the Government in 1956, was in some ways on the defensive. This was because it was he who, in the Chifley administration, had initiated the very substantial changes to the national system in 1947 which created in effect a dichotomy between judges and lay commissioners. In 1956 Mr. Holt was attempting to depart very substantially from the pattern set by Dr. Evatt.

The Minister pointed out that there had been a national system of conciliation and arbitration since 1904 which had had the support of all Governments and of all major political parties. Mr. Holt thus predicated the inevitability of its continuance. He based this partly no doubt on the experience of Mr. Bruce and partly on a number of other factors which he expressly mentioned. One was that Australia was the most highly unionised country in the world with about 60 per cent of its work force trade unionists as against 40 per cent in the U.K., about 27 per cent in the U.S. and about 22 per cent in Canada. (Subsequent changes in these figures are of no significance in my context.) Another was that unions and unionists were organised to a greater extent in Australia than in other countries. Although this organisation would flow in part, of course, from the mere existence of an arbitration system, nevertheless unions were also in Australia highly organised in political activity, as distinct from industrial activity. This created another factor of increased power of the Australian industrial movement in national affairs generally. Also Australian secondary industries, and therefore those engaged in them as employers and employees, had a substantial wall of tariff protection against competing industries in other countries.

Yet another factor was the lack of power in the Commonwealth Parliament to legislate directly on conditions of employment. The federal Parliament is required not only to delegate its power to some other body but also to a body which may act only by conciliation and arbitration and then in respect only of industrial disputes extending beyond one State. Even then the award, the result of the arbitration, binds only the parties to it and may not operate as a common rule for industry generally or in a particular geographical region.[3] Thus we have the various State systems serving the remainder of employers and of the Australian work force not subject to federal awards.

This was the background the Minister gave to explain the existence and growth of the Australian arbitration system. He pointed out that there was an urgent need for a change in one particular respect, which need was caused by a combination of policy reasons and judicial decisions. Since the original Act was passed in 1904, there had been reposed, in the Court of Conciliation and Arbitration, dual powers. One was to settle and prevent disputes by conciliation and arbitration. This is generally referred to as the "arbitration power". The other

[3] This statement does not apply to the Australian Capital Territory and the Northern Territory.

was the power to enforce obedience to the awards of the Court by means amongst other things, of imposing punishment for strikes and lockouts and other acts which might prevent the system from being successful. This latter power was a judicial power and the two powers had been conjointly exercised by the one Court over the whole period of Australia's history from 1904-1956. Then in the *Boilermakers'* case the High Court had held that the two powers could not be conjointly exercised by the one body. This meant that if the judicial powers of enforcement and the like were to be continued, they would of necessity have to be exercised by a judicial body which could not, at the same time, exercise the power of conciliation and arbitration. The Government therefore had decided to create the Conciliation and Arbitration Commission on the one hand and the Industrial Court on the other to take the place of the old Court of Conciliation and Arbitration. The Commission would be confined to conciliation and arbitration and the Court to the strictly judicial powers of enforcement, punishment and interpretation. The Minister was at pains to point out that, although the decisions of the High Court and Privy Council had made this creation and separation inevitable, the Government had come quite independently to the conclusion that it was not desirable to have the one body attempting to conciliate and arbitrate and thereby maintain goodwill in industry and, at the same time, exercise the conflicting powers of punishment.

The Minister also pointed out that since 1947 there had been a dichotomy between the Judges on the one hand and the Conciliation Commissioners on the other hand and that this was a bad thing. The power of the Judges had since 1947 been confined in that except for the stevedoring industry they only sat in full bench and even then, only on cases affecting the basic wage for males and females, long service leave and standard hours of work in industry. The Conciliation Commissioners of whom upwards of sixteen had been appointed in and after 1947, on the other hand, had full power to deal with all other conditions of employment in the various industries which had been divided amongst them. However there had been no system of integration in the decisions of the various Conciliation Commissioners or in the important duties which had fallen separately to the Judges and the Conciliation Commissioners. Worse still, there had been no communion of mind or spirit between the Judges and the Conciliation Commissioners and it was a very difficult thing for a system to work properly without this team-work. He attributed these defects in part to the fact that between 1947 and 1952 there had been no right of appeal from single Conciliation Commissioners and after 1952 only by special leave.

The Minister claimed that there had not been enough emphasis on conciliation; he also alleged an undue legalism and formality in the proceedings of the old Court coupled with a need for streamlining the system which, so far as I can gather, has been talked about since 1904.

The Opposition objected to the continuation of penalties enforceable by process of contempt of court. It claimed that powers of punishment or enforcement in industrial matters if needed at all should be vested in existing State and Commonwealth courts. It opposed the special creation of the Commonwealth Industrial Court. The Opposition also pressed for the vesting in the Commonwealth Parliament of full powers both in relation to industrial matters generally and to just fixation of prices and profits on an Australia-wide basis which it argued were essentially inter-related.

I turn now to discuss briefly these 1956 changes. The most important was the removal of the penal provisions from the arbitrating body and vesting them in the Commonwealth Industrial Court which was a judicial body created by the 1956 Act. Nevertheless the changes made in respect of appeals and references from a single member to a full bench of the Commission itself were also of great importance. One of the problems associated with arbitration is that there is a need for some sort of co-ordination of decisions by single members which might have effects beyond their particular industry. It is apt that full benches should play their part in this. But as I have already inferred it is also most desirable to avoid a sort of worship of past decisions of full benches and an automatic application of them to what, on the surface, may seem to be the same set of facts. I concede general uniformity to be desirable, provided the needs of a particular industry or situation are examined and the use of appeals or references to full benches is prevented from exploitation as a delaying tactic. Between 1947 and 1952 there had been an attempt to eliminate tactical delays by simply not having appeals or references to full benches at all. Nothing had been done in that period so far as legislation was concerned about achievement of co-ordination between single arbitrators. Between 1952 and 1956 it was attempted to deal with the two aspects by providing that there should be appeals but only when the Chief Judge or his delegate gave leave. This provision, however, was found to result in delay; and in 1956 there was an attempt to make some sort of overall uniformity possible but without need for automatic delay. Thus rights of appeal and of reference to full benches were given but in limited circumstances and by informal and simple procedure. Each full bench, constituted to hear an appeal, since 1956, has had to decide whether there is sufficient importance

that, in the public interest, an appeal should lie at all and where possible, this is decided as a preliminary question. Similarly references of matters to a full bench only occur when the President, in a most informal procedure, decides that a full bench should deal with them, rather than a single Commissioner.

I think it can be said that both these procedures have worked reasonably well. They have certainly avoided the old delays. To give some figures in regard to appeals, there have only been attempts to appeal in less than one case in more than 100 decisions given by single members. All appeals have been speedily determined. It may be of interest that of the 177 appeals filed in the Commission's lifetime of 13 years, 105 have been by employers and 72 by employees; 46 have been held not to lie because of lack of importance in the public interest. There have been 272 applications to me as President for reference to full benches, of which I have granted 158 and refused 114. These figures include applications from the Public Service Arbitrator.

As to the alleged defects of undue legalism and formality, I think it would not be immodest to claim that they no longer exist. The old dichotomy which existed between the Judges on the one hand and lay Commissioners on the other hand has happily disappeared. I think this has been to the advantage of both the Judges and the Commissioners and therefore has been of benefit to the system generally. On the personal side I can say that the joint benches which hear appeals and references have resulted in very happy associations between the Judges and the Commissioners and have led to a very valuable exchange of ideas. Speaking for the Judges, they benefit from association with persons well versed in the practical every-day problems of particular industries. The Commissioners on their part make a reciprocal acknowledgement. A less important but significant change has been the virtual discarding of wigs and gowns.

When I became the Commission's first President in 1956 I had to decide as a matter of policy the emphasis I should give to different aspects of my work and those of my fellow members of the Commission. I make no secret of the fact that the principal part of my energies was firstly devoted to the aim of destroying the dichotomy which had previously existed between the Judges on the one hand and the Commissioners on the other. That is putting it in a negative way but I do so deliberately because history and particularly the recent history from 1947 onward had made this separation of Judges and Commissioners in the social sense, the industrial relations sense and in

pretty well every other sense, the most powerful obstacle to sensible co-operative work by those responsible for the prescription of industrial conditions in federal awards.

The destruction of the dichotomy between Judges and Commissioners having been achieved, the way was left for us all to become a team, which I think we have become in a very real sense in spite of occasional set-backs. I would like to add that the very fact that I was the first captain, with the aims mentioned, has meant that I have had the opportunity throughout the Commission's life-time of constant contact with the Commissioners. I have also, in particular, talked often with all of them in the statutory conferences which take place on applications for references to a full bench of the Commission and I know the value of their everyday practical knowledge of the problems of their own industries and formerly of the assessment of marginal additions to the basic wage and now of the total wage itself. These contacts have convinced me of the essential need for a Commissioner to be on any full bench dealing with the practical problems of everyday industry.

The reader may remember that the Government thought in 1956 that there had not been enough accent on conciliation. This led to the creation of the separate office of Conciliator. The figures relating to the work of the three Conciliators may be found in my Annual Reports. As a sample, of 443 disputed matters handled last year by the Conciliators 359 were satisfactorily completed, 23 were still continuing at the end of the year and 61 had not been settled. Single members and even full benches of the Commission still emphasize conciliation in their own procedures.

There was one particular reason for the creation of the separate office of Conciliator. Although often the person who eventually arbitrates may be at the same time a good conciliator and a good arbitrator, there are often occasions when the mere fact that he will eventually arbitrate may make him not the most desirable conciliator. Similarly having unsuccessfully tried to conciliate he may, on occasion by that very fact, have had his value as an arbitrator lessened. In this regard one must bear in mind that the model conciliator may often hear things that the arbitrator should not. Also the parties may not be as free and easy in their discussions and admissions when trying to reach agreement in the presence of a person who may at the drop of a hat, become an arbitrator.

Thus the 1956 legislation not only created the office of Conciliator but it confined the Conciliator to conciliation. He is not allowed

to arbitrate unless all parties request him to do so and may only report to a Commissioner what transpires in the conciliation if all parties agree and also agree on the contents of his report.

The 1956 changes which established the Commission were not only a manifestation of the legal concept of the *Boilermakers'* case but also an attempt to make less judicial and also to streamline the dispute settling apparatus. Perhaps many of the criticisms of the Commission's approach to its work at the present moment, particularly those coming from the legal world, still stem from a conception of the Commission in terms of the old Court. In other words many do not accept that our institution has ceased to be primarily and substantially a Court and they therefore expect it to behave much the same as any other Court in Australia. The point here is simply that, because the old Court did not and could not behave as other than a Court, the legislation provided that, whilst to some extent still a legal tribunal, the Commission, on the other hand, is no longer burdened with the restrictions and trappings of a judicial chamber. Thus the approach of the Commission to its decision making may be flexible and run counter to the doctrine of *stare decisis* which is one of the bases of the British legal system. Mr. Brodney a welcoming speaker at our first presidential session in 1956 hoped that the new Commission would differ from the old Court and move with the freedom of the bus rather than in the predestinate curve of the tram. This was an apt simile. The bus can do many things a tram cannot. It can change its route to get to the same destination in order to avoid traffic blocks. It can pull out and go past other buses which are taking longer than it to reach their destination. It can undertake journeys away altogether from its normal route to meet sudden demands, and occasionally it can be used for ancillary purposes perhaps to a greater extent than the tram. The tram on the other hand has the advantage of a well-known route which the community knows is not subject to sudden change.

At the level of first instance, that is in the work of the Commissioners and Conciliators, the need for flexibility is, of course, patently obvious. The use of rigidly formal procedures and the arrival at standardised decisions at this level would not be conducive to the maintenance of harmonious industrial relationships. The prime object of the Conciliator and the Arbitrator in these disputes is to obtain agreement from the parties on a particular solution of a particular dispute. The imposition of a settlement, to which one or both of the parties is strongly opposed may, in fact, result in a deterioration of the situation. Similarly, if the constant or near-constant impression is given that a

case before the Commission, generally speaking, brings either of the parties to trial, that a party must be rapped over the knuckles for mistaken thinking or even for misbehaviour, the efficiency of the system must inevitably suffer. Again, even though the word "expediency" has or may have certain undesirable undertones, it may well be that in particular situations it is an expedient solution which must be reached. Speed on some occasions may be the essence of the problem and the existence of formalized legal restrictions and regulations may cause undue frustration, the ramifications of which may extend far beyond the immediate situation. Perhaps the case for flexibility in the work of the Commission at this level is readily perceivable and generally accepted. It may not, however, be so readily accepted in cases where wider issues than one dispute in a particular work situation are involved. The nature of the industrial relationship is an extremely complex one. Individual disputes may stem from many different sources. Therefore, to lay down inflexible rules may inhibit or tie down the arbitrators whose most important task is to reach an agreement.

At the national level where questions of determining minimum wage rates and total wage levels, long service leave, female wage rates and standard hours and the like are involved, the same considerations do not apply as obviously. Nevertheless, even here, flexibility may be preferred to uniformity and conformity. I do not want to give the impression that I am arguing for some sort of capricious approach to decision making policy. Whilst it is my contention that the Commission, in exercising its tasks, should not feel itself bound by previous decisions it has made, it should, however, maintain consistency in its approach to decision making procedures and this consistency MUST be based on a willingness to take into account all the important and relevant considerations presented before it and the maintenance of an open mind with regard to the total industrial and economic situation.

This contention of mine is based on two over-riding factors. The solutions of the Commission to problems in the major areas mentioned above are often tantamount to the making of social and economic changes. In the first place, as far as social emphasis is concerned, the work of the Commission must from time to time branch out into new areas. In the fixing of female wage rates, for instance, it is clear that the solution of some of the problems involved must, in the event, result in an alteration of social relationships in the community. To deny equal pay to women, or a movement towards it on the one ground that the female basic wage was fixed at 55 per cent of the male basic wage more than fifty years ago, even though fixed by what was in essence the same institution would, of course, be patently

absurd. This is not to say that there are no valid arguments against the principle but I am merely indicating that the Commission must be prepared to put aside previous decisions. Significant changes in social environment have from time to time occurred since 1904 and must, when recognized, be taken into account.

It may be said that all courts of law should be alive and receptive to a recognition of this need. However, it is generally conceded that, by their nature, courts of law tend to be conservative and to lag behind social changes in the general community. The one notable exception to this statement would be the United States Supreme Court in the past decade, which has in fact become something of a progressive social legislator. These comments are not intended by way of criticism of the role of the courts of law in our community and the question is not one which I claim competence to discuss; but the position of the Arbitration Commission is quite different in that it must decide questions regarding social relationships which affect the industrial environment and here its concern, as a settler of industrial disputes, is the maintenance, not only of a harmonious industrial situation, but of one that is viable. For instance, new techniques involving the automation of information handling processes or the containerization of cargo and the stream-lining of transportation procedures, do bring into the matter new social problems which impinge heavily on specific work allocations and demarcations, and even extend to claims for permanent employment until retirement through old age. These are problems which cannot have been envisaged by previous members of the Court simply because technology at that time was not so advanced. It is unrealistic, therefore, to expect the Commission in its work to be bound by the decisions of former members which may be thought to apply to situations which they could never have hoped to anticipate.

The second factor to which I must come involves the role of the Commission when its decisions result in economic change. The setting of minimum "take home pay" and total award wage rates in particular, and many other aspects of the Commission's work in general, have widespread effects on our nation's economy. This aspect of the Commission's work is, in fact, the centre of a great and continuing controversy, resulting from the contention that the Commission is, in fact, a body whose main task is the consideration, implementation and execution of particular aspects of economic policy. The controversy here centres around the question of whether a legal tribunal has the capacity to carry out this role. It is further intensified by contentions that the Commission does not, in fact, consider the economic impact of its decisions, that it is, to borrow a phrase from the Australian Financial Review of 27 June 1969, an "independent variable". I feel,

perhaps, that the controversy is further intensified in places where the impression exists that the Commission is, in fact, a combination of court and legislator whose job it is to administer this body of law as it sees fit.

This latter impression to my mind would not exist if there was a complete appreciation of the nature of the changes which took place in 1956 and the work of the Commission as I have described it in the preceding paragraphs. The short answer to the controversy regarding the Commission's role as an economic legislator has already been given in the words of Dixon C.J. from the *Railways* case which I have quoted above. The effect of them is that while an arbitral tribunal must confine itself to arbitration and cannot have in its hands the general control or direction of industrial, social or economic policies, it would be absurd to suppose that it was to proceed blindly in its work and ignore the industrial, social and economic consequences.

The problem, of course, is that, concise and explicit as Chief Justice Dixon's statement is, various constructions could be and have been placed upon it. The problem centres around the relative emphasis to be given to each aspect of a particular decision. Should the Commission pay more attention to industrial relationships, to the social consequences of its decisions, or to their effect on the national economy? Clearly, having in mind both the preceding passage of Dixon C.J. and the powers given to the Commonwealth Conciliation and Arbitration Commission in both the Act and Constitution, it is dependent upon the particular environment in which a decision is made as to which of the three factors will be given most emphasis. This environment is constantly changing.

I have outlined previously in a brief manner the changing nature of the industrial and social relationships which affect the Commission's work. It is convenient to point out here, too, that our economy is in a constantly changing situation. The levels of demand and supply for goods and services, and, consequently, the levels of production and employment and the demand for labour are in a permanent state of flux, both in an aggregative sense and with respect to their component parts. Fortunately there is no need for me to enter into the debate regarding the role of the Commission at the present stage. My views are quite well known and have been expressed in several past national wage case judgments. The point I am trying to make here is simply that whatever the relative weights given to the multi-various factors used as a basis for the Commission's decision making activities, it is important that the Commission should be flexible in approach and that

its decisions should not be bound by the legal precedents of previous years but should be framed in the context of their current industrial and economic environment.

I think comments of Higgins made fifty years ago are very appropriate here. The situation, of course, has altered drastically in that, at the time of his writing, the Court, as it was then known, was still feeling its way. It had not yet established a long history which it could use as a precedent. Nevertheless, I feel his ideas have just as much importance at the present moment when the temptation to become the captive of precedents is much greater. "It may fairly be said", he commented, "that the greatest gains which humanity has made for itself have been the result of bold experimentation with correction of mistakes".[4] He then quoted Roger Bacon who said:

> Experiment, experiment; pore not over the teaching of Aristotle to find solutions.[5]

And Higgins himself expressed the same sentiments as I am at the moment, when he wrote:

> In these days the problems of industry must be approached, not through the dicta of the political economists of the nineteenth century, but by thoughtful and well-directed experiment.[6]

The question which becomes inevitable, as a result of all this discussion is why, if the Commonwealth Conciliation and Arbitration Commission is, in fact, exercising quasi-legislative duties, is it allowed to continue in existence as a predominently legal tribunal? Alternatively, is not the Commission intruding on the province of the parliamentary legislature? This, I think, is an important question and it may well be that future generations will, in their new environment, seek to answer it by changing the institutions of their society. However, for us, at the present moment, the answer to the question lies in the political and social framework in which we live. As a first point, the federal Parliament would not have the constitutional power to legislate directly on the sorts of problems with which an arbitral tribunal finds itself confronted.

As a second point, I would rely on the comments from Mr. Justice Isaacs and Mr. Justice Rich already quoted[7] and referring to the fact that industrial disputes "embrace so many possible divergencies, of industry, of conditions, of claims, of surrounding circumstances at home and abroad, and of constant changes, that direct legislation in advance

[4] H. B. Higgins, *A New Province for Law and Order* (1922) 167.
[5] *Ibid.*
[6] *Ibid.*
[7] *Supra* n. 1.

is incapable of being applied to them." As the Judges went on "detailed regulation, applicable to all industries, even if suitable today—practically an impossible hypothesis—would certainly be less suitable a month hence."

On the other hand, whilst a decision of the Commission may have the same impact as direct legislation because it is, during its life, a law of the Commonwealth, decisions generally are less immutable than direct legislation because the parties may and do continually seek changes.

By way of conclusion to this particular discussion, I should point out that the Commission does not regard itself as a social and economic legislator. On the other hand, it recognises that when it makes its decisions, as Sir Owen Dixon has said, it must be aware of the wider consequences. To criticise the Commission for not being aware of the consequences of its decisions is unfounded. The Commission is and is continually being made aware of the economic environment within which it operates and in framing its decisions on industrial matters it seeks to adapt them to the context of this environment. This is an important consideration because the Commission should not attempt to impose an unacceptable solution on the parties involved simply because of its legal position. I again stress that it must seek decisions which will be accepted, even though there may be disagreement with them, as being both appropriate and just in the particular circumstances of each case and to the extent that the acceptability of its decisions is determined by the nature in which they are framed; the Commission must pay heed to the way it solves each problem and presents the solution.

This is a more generalized aspect of the environmental problems I have been discussing. For instance, if the Commission is operating in an environment which believes that the earth is flat, then, although it should not decide that the earth is flat simply because everyone in that environment believes it is, it must, nevertheless, present a particular decision taking into account that this belief exists and is widely held. The decision would not be likely to be different in essence from one made where such beliefs did not exist but nevertheless the approach and the framing of the decision would be different in the former circumstance. The Judges and Commissioners should and do place reliance on the legal obligation to obey their decisions but it should be a reliance also on obedience deriving from a belief in the ethics and the efficacy of the system. The aim should be at a continuing confidence in our ethics by employers and employees from the rank and file up to the leaders of national organizations. Without this there would be no wholehearted acceptance of the Commission's decisions and their impacts,

and the fabric of our system would be destroyed. Harmonious industrial relations and the maintenance of co-operative behaviour between worker and employer depend upon this mutual acceptance. This is not to say that this situation has been reached and I suggest in this regard that the comparison should not be with an ideal state but rather with the functioning of other parts of our society which after all still has its individual and collective patterns of misbehaviour and violence. The daily papers—even the staid and prosaic ones—still give a picture of embezzlements, murders, rapes, company failures and the like in our community, as well as a picture of good citizenship, love, charity and the recognized virtues. Perhaps critics of our industrial relations life will recognize that it is not strange that it too presents a mixed picture.

At the welcome to the new Commission in August 1956 the then Solicitor-General of the Commonwealth described the new body in a manner which might fill in the gaps in what I have been trying to convey. Professor Bailey (as Sir Kenneth Bailey then was) said this in part:

> The establishment of this Commission brings into existence, in the field of conciliation and arbitration marked out for the Commonwealth by the Constitution, an authority of a quite new type. The fact that the names and the faces of the Presidential members—and for that matter of all of its members—are happily familiar should not be allowed to conceal the real changes that have taken place. These changes are all symbolised in the alteration of the title of the Authority from "Court" to "Commission".
>
> With the exception of a brief interregnum just after the first world war, there has never before been a general Commonwealth industrial authority charged with the duty of conciliation and arbitration but not with the duty of enforcing industrial awards or any other part of the industrial law of the Commonwealth. Nor previously, in the history of Commonwealth arbitration, has there been the association, as in this Commission, in a single organisation, of lay Commissioners with Presidential members possessing the qualifications and status of Judges of a superior Court.
>
> Today the Commission in Presidential Session in effect takes over, from what we shall probably become accustomed to calling the "old Court", that is, the Court of Conciliation and Arbitration, the responsibility for determining interstate disputes as to the nation-wide matters of basic wage, standard hours and long-service leave.
>
> The Commission will not of course take over, either in Presidential Session or at all, the judicial powers that Your Honours exercised as Judges of the "old Court". I mean the power to

impose penalties for breaches of awards, to issue injunctions and to punish for contempts. These powers, as your Honours know, go to the new Industrial Court, an entirely separate and strictly judicial body. There is no appeal from the Commission to the Industrial Court or, for that matter, to any other Court. The functions of making arbitral awards and of enforcing industrial law will, to use a metaphor very familiar to the Bar in this city, be as different as half a pound of cheese is from half past four in the afternoon.

It may be that there will never be, except in conference, a sitting of the entire Commission, Presidential Members and lay Commissioners combined. We shall no doubt become accustomed to the several types of Commission sittings prescribed by the Act for different purposes—Presidential Session for the general purposes that I have mentioned; a mixed session with at least two Presidential members, for appeals against awards; and a sitting for references, in which at least one Presidential member participates.

No doubt also there will be different rules as to robes and as to procedure for the different kinds of sittings, as to which you, Mr. President, will in due course give a direction.

The new constitution of the Commission is a challenge to the imagination and resourcefulness of all its members to mould and adapt established, and indeed traditional, procedures so as to meet new needs and new concepts.

The fact that members of the legal profession are to be found in leading positions in industry, in administration and in political life gives strong ground for the belief that in this Commission the challenge will be splendidly met. On the other hand it is significant that Parliament has retained (I might almost say has insisted on retaining), to deal with the great general matters of standard hours and basic wage, men (judges) whose training will have developed in them the traditional legal virtues of impartiality, disinterestedness and the ability, which is much more than the willingness, to hear both sides of a question.[8]

From Sir Kenneth Bailey in 1956 I go to the High Court in 1969. In *Ex parte The Angliss Group*[9] the High Court had before it an application for prohibition which illustrates in the one case the role of the Commission in a modern and changing world, how the fabrics of cases before it as well as industrial and social public problems become interwoven and the legitimacy, even the need, on occasion to warn and speak of the likely pattern of future cases. Future examiners and students of industrial relations history may well bless the felicitous

[8] Transcript of proceedings of 21 August, 1956.
[9] (1969) 43 A.L.J.R. 150.

combination of circumstances, authors and oracles which culminated in this single case. The Angliss group of meat companies sought to prohibit myself and Moore J. from sitting on a full bench to hear an application by the meat union to prescribe equal pay for men and women doing the same work under the federal meat industry award. That application had set out in its support a quotation from the pronouncement made by me as President on 5 June 1967 on behalf of myself and other members of the bench in that year's national wage hearing at which I had presided. My pronouncement read:—

> Although we refer to the total wage, there will for the present be a different total wage for males and females and a number of total wages for many classifications. These result from existing basic wage differentials and from the quite complex history of basic wages particularly those for females, starting many years ago from a concept of differing needs and responsibilities of men and women. Both basic wages have over the years been adjusted in a variety of ways. We are conscious of these apparent anomalies, but consider it is not practicable to attempt to deal with either at this time.
>
> The community is faced with economic industrial and social challenges arising from the history of female wage fixation. Our adoption of the concept of a total wage has allowed us to take an important step forward in regard to female wages. We have on this occasion deliberately awarded the same increase to adult females and adult males. The recent *Clothing Trades* decision affirmed the concept of equal margins for adult males and females doing equal work. The extension of that concept to the total wage would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered. To a lesser extent the same may be said about the abolition of locality differentials. We invite the unions, the employers and the Commonwealth to give careful study to these questions with the knowledge that the Commission is available to assist by conciliation or arbitration in the resolution of the problems.[10]

The grounds in summary form upon which the motion for prohibition was made were:

> That it would be contrary to the principles of natural justice for myself and Moore J. to adjudicate upon the said application; that we were disqualified because there were reasonable grounds for suspecting that we had pre-judged an issue involved; that we

[10] Not yet reported in Commonwealth Arbitration Reports but see Print No. B2200 National Wage Case of 1967; also transcript of proceedings p. 743, 5 June, 1967.

> were disqualified because it might reasonably be thought that the union's application had been made in response to an invitation by us in which we indicated that we would entertain such an application favourably and that justice would not appear to be done if we were members of the Bench.

The Angliss Group in the High Court hearing argued that the passage and the fact that the union had made the application assigning that passage, as a reason for making it, gave rise to a reasonable suspicion that Moore J. and I might have already determined that it was desirable that men and women performing the same kind of work should be paid at the same rate and that this principle of wage fixation should be progressively implemented by the Commission. The group said that these were issues to arise in the hearing of the respondent's application, and propositions which it desired to contest. Accordingly, the group submitted that the common law principles of natural justice required that we should not participate in the hearing.

In slightly abridged form the reasons of the Chief Justice and his six colleagues were to this effect:—

> It is plain that when it is necessary to consider a question of fairness in relation to a tribunal the whole of the circumstances in the field of the inquiry are of importance. The nature of the jurisdiction exercised and the statutory provisions governing its exercise are amongst those circumstances. It is therefore important to bear in mind that the Commission does not sit to enforce existing private rights. Amongst other things, it is its function to develop and apply broad lines of action in matters of public concern resulting in the creation of new rights and in the modification of existing rights. It is not necessarily out of place, and indeed it might be expected that a member of the Commission from time to time in the course of discharging his duties should express more or less tentative views as to the desirability of change in some principle of wage fixation. The very nature of the office of a member of the Commission requires that he should apply his mind constantly to general questions of arbitral policy and consider the lines along which the process of conciliation and arbitration for the prevention and settlement of industrial disputes ought to move. But allowing for considerable scope for the formation and expression of opinion upon such matters of public interest and concern, it should not be forgotten that the confidence with which the Commission and its decisions ought to be regarded and received may be undermined, as much as may confidence in the Courts of Law, by a suspicion of bias reasonably—and not fancifully—entertained by responsible minds . . .
>
> After a paragraph the High Court's reasons went on:—[Those] requirements of natural justice are not infringed by a mere lack of

nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.

The applicant's case for prohibition depends solely upon the passages quoted from the Presidential pronouncement, together with the fact of the respondent's application to vary the Award for the reasons assigned by the respondent. It is important that the background against which the President's words were used should be borne in mind. In the National Wage Case in 1967 the Commission chose to inaugurate a new system of wage fixation. It decided then and for the future to express the appropriate wage for each classification of work within an award as a single money sum rather than as formerly by the prescription of a male and female basic wage to which a particular margin should be added. Desiring, generally upon economic considerations, to increase the total wage in respect of all the classifications of work referred to in the Awards then under consideration, the Commission decided to add an increment for males and females alike. Formerly, when maintaining the basic wage plus margin method of wage fixation the increment for females, due to economic considerations, had more or less generally been expressed as a percentage of the increment awarded to male employees in the same classifications. But freed from that system of wage fixation the Commission felt able to give the same increment to male and female employee alike. However, quite evidently the Commission at that time did not take the view that the time had arrived where it could, or should, award the same total wage to male and female employees in the same classification. The former distinction between the wages awarded to males and to females respectively was still reflected in the total wages now fixed though, of course, the former percentage relationship of the two wages was modified as a consequence of the fact that the same increment in money terms had been awarded to females as well as to males in respect of the same classification of work.

Whether or not the Commission's decision to add the increment alike to male and female employees, without any request so to do or any argument as to whether it should be done, was a deliberate attempt on the part of the Commission to implement pro tanto a policy of equal wages for work of the same classification irrespective of the sex of the employee is a matter about which more than one view may be taken. Logically, the decision to add the

> increment to the total wage of all employees in the one classification did not necessarily involve the pursuit of such a policy. But whatever the right view as to the actual reasons for the Commission's decision, what was said by the President was clearly open to the inference that the minds of the members of the Commission on whose behalf he spoke tended to favour the adoption of the principle of equal pay so soon as the economic and industrial situation of the community would permit: and to the further inference that the decision in the National Wage Case was an expression of that tendency of mind. But, in our opinion, the existence of such a general tendency of mind would not disqualify a member or members of the Commission from sitting in a matter in which a decision as to the awarding of equal pay had to be considered. Certainly, in our opinion, neither the existence nor the expression of such an attitude of mind as we have mentioned would justify a reasonable apprehension that a member of the Commission might not bring or be able to bring to the work of the Commission involving the question of equal pay a fair and unprejudiced mind able with judicial propriety to decide the matter placed before it. It is of course the duty of the members of the Commission always to have and to display a willingness, indeed an anxiety, to give full and fair consideration to every relevant argument that may be addressed to them for a revision or even an abandonment of announced opinions. But the mere expression of opinion upon a general question of policy and even the fact that a step has been taken in furtherance of such a policy, if that be the right view of what the Commission did and the President said, give, in our opinion, no reasonable ground for lack of confidence in the integrity of future decisions upon or involving the question of equal pay.
>
> Accordingly, in our opinion, this motion should be dismissed.[11]

I leave the subject of the High Court and the Commission and come back to my own thoughts. With the role which the Commission has come to play in our community life it is natural that its ability to handle the complex questions which come before it is often questioned. With a Commission comprised of both judges and laymen, the problem centres on the qualifications which a judicial training confers upon its members. Why should industrial relations in Australia be so much the province of lawyers and even if lawyers should be used why should they not be assisted by the co-membership of professional men and academics? A short answer to this implied criticism is that the lay members of this Commission have had considerable experience in the world of industrial relations. It is this experience as well as their own particular

[11] *Supra* n. 9 at 151-153.

abilities and qualifications which enable them to perceive the exigencies of the particular situations with which they must deal. Thus, industrial disputes, in the first instance, are handled by people with a practical knowledge of the factors involved in such disputes. The Commissioners and Conciliators come from a wide variety of backgrounds but they have one thing in common with each other. They have been involved either as protagonists, analysts or in some other form of participation, in the world of industrial relations. They have come generally speaking directly from employment with the government, the unions or employers in that world. Thus their specialised knowledge of the conditions of particular industries is of assistance to the Presidential Members of the Commission. Their most important qualification, to my mind, is their knowledge of human behaviour in the work situation and their knowledge of why employers and employees have disagreements about particular aspects of this situation. Their abilities are not confined to or even primarily based on arbitration imposing a final solution but are, in first instance, more those of men understanding the nature of human conflicts in these particular circumstances and the desirability of bringing disputing parties into agreement.

Unfortunately, at the present moment, there is insufficient appropriate training at the tertiary level for such qualifications. Industrial relations has hitherto been regarded as a demi-monde lying somewhere between the worlds of economics and law. To my mind it should be a field of study complete in itself, as is recognized in the United States, where many fine schools specializing in the teaching of industrial relations have been established for quite some time. In Australia it would appear that the practitioners before the Commission are, if not union officials or industrial officers of employers' organizations, by and large members of the legal profession, whereas the academics who write and analyse the workings of our system are largely those with formal training in economics. The union officials or industrial officers who, as it were, come between lawyers and academics have usually had first-hand experience in industrial relations.

Since I have been giving talks to university students in economics, political and other social sciences I have become aware that our institutions of higher education are providing more comprehensive programmes dealing with the history and practice of our own system of conciliation and arbitration, and other methods of dealing with industrial relationships. I hope that this will lead soon to faculties dealing directly with industrial relations.

The work of the industrial relations' societies in our various States and the Australian body must not be forgotten here as an essential

element in bringing together the various participants concerned with the workings of our institution. The Australian society publishes a most highly thought of journal three times a year and the various societies "bring together representatives of management, the trade unions, the government services and the professions, together with specialists in the various academic disciplines concerned with industrial relations, and seek in their activities to develop an integrated approach to industrial relations."[12] In my view any lawyer or advocate who practises or would practise before the Commission should actively belong to one of these societies. I see the day when a degree in a faculty of industrial relations (under any name) and active membership of an industrial relations society may be conditions precedent to appointment to the Commission or an industrial bench.

However at this very moment we face a difficult question, namely why should the Presidential Members of our Commission have the rank and status of Judges and why should these members be appointed from among the ranks of the legal profession? After all the arbitral function may, in one view at any rate, be in so many cases a quasi-legislative function because its exercise affects social and economic factors within our society. More fundamentally, do Judges have any greater ability to resolve industrial disputes than other highly respected and educated members of our community? The answer to this question is perhaps difficult and certainly not clear-cut. The question, I feel, cannot be answered entirely satisfactorily on the grounds of particular qualifications and abilities, demonstrated or gained through a particular form of training. These factors are important for the ability to analyse effectively a particular problem situation and to weigh with an open mind the relevant factors involved in this situation, which are very important and very necessary abilities required by the arbitrator. But I believe the crux of the matter lies in the acceptance by the parties to disputes of over-all ethics and of particular solutions to particular problems. In fact, these considerations are the essence of the problem in industrial relations. It is all very well to be able to arrive at a logical and theoretically correct solution to a problem but this solution is not one which remains in a vacuum; it is one which affects the interests and objectives of two conflicting groups and unless these groups accept the solution, its essential validity or correctness is of little importance. I know I am guilty of repetition on this question of acceptability, but the essential factor for some reason peculiar to the Australian ethos, is that decisions of Judges are more readily accepted than the decisions

[12] Description of aims of the Industrial Relations Societies repeated in each copy of its Journal.

of, for instance, economists. It is perhaps not in point to ascertain why this particular situation exists but I am sure it does. It may indeed be a relic of attitudes formed during the 1890's. On the other hand, it may well be a reflection of the Australian ideal of fair play and it may be that for the ethics of the system to be respected, Judges, who, it is assumed have no particular interests to pursue, are the most acceptable final arbitrators of important disputations. Not enough research has been undertaken into this particular aspect of our system and it is my belief that such research would be both interesting and fruitful. I myself have touched lightly on it in my Sir Robert Garran Oration of 1967.[13]

There is also the question of the role of the lawyer as an advocate. In most situations in this community when people have a dispute to be decided by any tribunal they tend to look to lawyers to conduct their case. In fact this tendency even extends to disputes in sporting and similar fields.

However legislation, federal and state, has from time to time prohibited or limited the appearance of lawyers in arbitral proceedings. It is often argued that the exclusion of professional advocates from the workings of the arbitration tribunals would leave the advocacy to people steeped in the knowledge of industry, would shorten cases and would minimise legalism. But the experience of the years seems to indicate that men trained in the law who also have some knowledge of industrial affairs assist both their clients and the tribunal more than lay advocates. The discipline which they are taught in the law of marshalling facts, presenting arguments in some logical form and being able to see proceedings as a whole give them an edge on people without that training. From time to time lawyers who appear in the arbitration tribunals will introduce legalism, but it is interesting to observe that laymen also do so. Indeed at times laymen have been much more legalistic in their approach than have lawyers. As I have remarked elsewhere "bush lawyers" exist in our city court-rooms as well as in the outback.

It is also argued that the costs involved through the retaining of lawyers may be excessive in industrial proceedings. Cost of course must be considered, but against the tremendous financial issues involved in some arbitral proceedings the cost of using lawyers in them does not seem of great significance. A most important factor towards allowing or even encouraging lawyers to appear is that it would be

[13] The Robert Garran Memorial Oration delivered at Canberra on 20 November, 1967 and published by the Australian Regional Groups Royal Institute of Public Administration.

appropriate if there were some source of supply for those lawyers who might be appointed to the bench and what better source than those with experience derived in our court-rooms?

All in all the present Commonwealth provision, that if objection is taken to the appearance of lawyers the Commission has to make a finding that there are special circumstances before a lawyer may appear, seems to work reasonably well. In practice it is seldom that objection is taken by either side to the appearance of lawyers.

But granted the value of lawyers, should not economists, as such, also find a place in the Commission or on some of its more important full benches? And if there be an acceptable answer to this question why should the Commission not have the assistance of a permanent bureau to which practising and academic economists could belong and advise the Commission generally or specifically on matters involving economics?

On the first question I am not personally against having economists in the Commission or on particular benches but I feel the organized employers and unions are. I am in doubt why this is so. On the whole I think they argue the matter on the "devil you know" basis and feel that economists are too prone from university days onwards to become identified with particular ideological groups.

As to the second question my own belief is that our practice of public hearings is one of the main reasons for our system's general acceptance. Everyone concerned has to stand up and be counted. This applies to those on the bench, the advocates and the witnesses. It applies also to the Government. If we on the bench were to have access to the members of a bureau the public would be in doubt as to how far we were giving our own opinions or merely relying on advice from behind the scenes. The link now between ourselves and economists is well known, is public and acceptable. They advise us in a known manner as oral witnesses or as writers of tendered papers and articles the contents of which are described and debated in public hearing before us. There is no "Star Chamber" method or link. Just as the Government must stand up and be counted so must the economists. All must have their submissions succeed or fail on the tribunal's view of them after vigorous and public testing.

The title of this paper posed the question as to where was the emphasis in Australian national conciliation and arbitration. I hope to have made it clear that the Commission varies its emphasis according to the particular task, times and circumstances. The observer also varies his

emphasis according to the particular angle from which he is examining the Commission's activities. Further I hope the reader is clear that this is the way I think it should be. The Commission's dominant role, according to the Constitution and legislation, is that of a conciliator and arbitrator—a settler or preventer of industrial disputes. However the Commission must also place emphasis on the industrial, social and economic consequences of its actions. Sometimes and in some circumstances the Commission may be thus concerned with inflation; on other occasions with employment or unemployment; or prices, overseas balances or many other facets of our national economy. It appears it will always have with it the tremendous problems of the man on the land who has to sell his products on a world market where prices have nothing to do with his costs of production, yet the prices he receives might and often do drop at a time when his costs of production rise.

Economists, generally speaking, differ as to whether the Commission's decisions on wage levels follow a pattern already set by national economic trends or whether the Commission itself establishes levels of remuneration. As the Commission has to concern itself with trends past present and future it would be difficult for it at any given time to settle this difference of opinion but it is improbable that it would be helpful if it did. This task would still remain for researchers and historians. The Commission should place some emphasis on uniformity in its decisions but not nearly the emphasis that courts of law place on the desirability of *stare decisis*.

Within the Commission the emphasis is pretty evenly divided in importance and responsibility between full benches when dealing with the great national cases on the one hand or on the other hand the general run of appeals and references from single members; the every day bread and butter work of single Commissioners in cases of first-instance has its importance often as great as that of full benches of either type.

It remains to discuss the emphasis on strikes or rather on their avoidance. The graphic words of Higgins in describing the interstate nature of industrial disputes show at least a mental or spiritual disposition to regard the disputes as having in their make-up something akin to strikes. "Just as bushfires run through the artificial State lines, just as the rabbits ignore them in pursuit of food, so do, frequently, industrial disputes."[14] The High Court recognizes the distinction between "paper" or litigious disputation on the one hand and strikes or lock-outs on the other. For the Commission to have cognizance, an argument on

[14] H. B. Higgins, *op. cit., supra* n. 4, p. 2.

paper is all that is necessary or for that matter the dispute may be oral. It must be real but need have no atmosphere or threat of picket lines or physical violence. Nevertheless the Commision places emphasis on the avoidance of strikes. It has been accused by some of being morbidly preoccupied with the strike problem and by others of being too acquiescent towards them. On the whole I think it has been concerned to prevent strikes by concentrating on removing their cause. This has been a pragmatic and ad hoc approach. What has been the result? I leave the answer to Dr. Ian G. Sharp in his paper "Industrial Relations in Australia" prepared for the 1968 Duke of Edinburgh's Study Conference:—

> Australia is not a strike-ridden country. It falls in a middle position among the industrialized countries so far as man-days lost are concerned. Using the figures for international comparison issued by the British Ministry of Labour from International Labour Office information for days lost through industrial disputes for each 1,000 persons employed in selected industries over the ten years from 1958 to 1967 we get the following comparison:
>
> 1,060 United States of America;
> 743 Canada;
> 325 Australia;
> 250 United Kingdom;
> 16 Sweden.
>
> The distinction between Australia and most other countries is the absence of long stoppages. Australia probably has as many stoppages but rarely does it have prolonged ones. By far the commonest stoppage is one of hours rather than days. Whilst it is unwise to generalize too much there is little doubt that the availability of channels into which dissatisfactions, expressed through stoppages, are quickly directed is a powerful influence in maintaining Australia's relatively satisfactory position with regard to time lost through stoppages.[15]

I commenced this paper by stating I would give personal and not official opinions. I conclude with a reminder of this. A group of seven judges, a senior commissioner and some fifteen commissioners together with four conciliators will necessarily have shades and even differences of opinion on matters I have discussed. There is nothing unhealthy or undesirable in this. It even gives point to the aptness of the simile I have mentioned of the bus with its freedom of movement as compared with the tram having to move on its predestinate course. I

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[15] H.R.H. The Duke of Edinburgh's Third Commonwealth Study Conference Australia 1968. Background paper No. 10, 12.

hope that the Commission has made and will continue to make its necessary journeys with as much freedom as modern traffic allows and that members of the legal profession will not, because of this freedom or for any other reason, refrain from giving their continued good offices towards making those journeys successful.[16]

[16] In case there is such an offence as self-plagiarism I must explain that for one speaking or writing on different aspects of the same scene as often as I do, repetition is unavoidable or at least I have found it so. I have therefore not bothered to acknowledge quotations or near quotations of my own but merely make the general admission that I have used previously expressed ideas if I still hold them and if they relate to my present theme. Similarly I have not attempted to rephrase my earlier descriptions of the same things, as for example the parliamentary debate on the 1956 legislation.