

An Australian Industrial Judge Reflects on Modern Industrial
Law

A prominent Australian employers' leader has expressed the opinion that "next to war and acts of God, nothing can disrupt the social and economic fabric more than industrial conflict." Allowing for the natural enthusiasm of a man so closely involved in resolving industrial conflict as is Mr Fowler, there is still much truth in his comment.

Of course industrial conflict in this sense has a very recent origin as have, too, the social and economic fabrics to which he refers. Before the industrial revolution - only a couple of centuries ago - brought mass capital and mass labour into a work relationship, there was no doubt that it was proper for the rule of law to develop and protect whatever social and economic fabrics were needed for the pursuit of human progress. The pace of events in those days was such that the evolutionary processes of law making and law enforcement could provide changes within stability. In modern times, however, the use of mass labour and capital has produced a continuing acceleration of changes in the social and economic fabric with which orthodox jurisprudence has found it difficult to cope. So, it is not surprising that two almost contradictory trends run side by side in recent times. The first has been the attempt to continue to use well-tried processes of law to extend orderliness to the new economic and social relationships. The second is the conflict which this attempt constantly runs into, of reconciling this process of order which is the essence of the rule of law with the need for almost perpetual change which is the essence of economic advance.

Australasia exhibits this historic process better than any other area of which I have knowledge. You will forgive me if I limit my remarks to Australia rather than include New Zealand. This is only because of limited personal knowledge. I am sure others could illustrate equally well from New Zealand sources this historic adventure of harmonizing what so often appears to be conflicting elements of law with social and economic requirements in an expanding community.

Expressed in its simplest form, this adventure is that of keeping industrial conflict, which experience has shown us to be inevitable, within the reasonable bounds which will enable the economy and society in general to function most efficiently. This was the need which Henry Bournes Higgins the second President of the Australian Arbitration Court wrote about in his Harvard Law Review article entitled "A New Province for Law and Order" in 1915. He said:

Is it possible for a civilized community so to regulate these relations as to make the bounds of the industrial chaos narrower, to add new territory to the domain of order and law? The war between the profitmaker and the wage-earner is always with us; and, although not so dramatic or catastrophic as the present war in Europe, it probably produces in the long run as much loss and suffering, not only to the actual combatants, but also to the public. Is there no remedy?

Industrial society may hope for the millenium but in the meantime accepts that conflict between the parties to industry may be in order, and is thereafter forced to prescribe what are acceptable, and what are bad, forms of such conflict. The practical question then becomes how far society can in fact go in proscribing any forms of conflict between the two "combatants". This raises a whole lot of questions. What price will society be willing to pay to avoid discomforts and anti-social behaviour? What can be done to settle the acceptable conflicts? How far in a free society can the state provide for some disputes to be settled by requiring the observance of law but others not? The answers to these questions depend on social, economic and political factors peculiar to each particular society and each particular economy. Neither the social modes nor the economic needs are eternal but vary from age to age. It is

necessary to bear these factors in mind as background to any analysis of the Australian system of industrial law.

An example of this variableness is the distinction in approach drawn by one distinguished visitor to Australia from the United States. Professor Mark Perlman in his book on Australian labour relations entitled "Judges in Industry" purports to see two separate approaches in industrial relations in my country which he designates "the administration minded" and "the institution minded". The former most frequently think in terms of social justice and economic efficiency in industry; they have sought to give to industrial societies bills of human rights and to provide a judicial protection for those rights. Frequently these "planners" have talked in terms of political enactment by the normal legislative bodies to bring to industry the benefits of parliamentary democracy. The order which they aim at establishing is a system of due process administered impartially by a disinterested third party. The "institution minded" are alleged to base their systems on the assumption that the parties themselves through trial and error can evolve a sufficient basis of trust or balance of forces to enable peaceful industrial government to prevail. The role of the outsider is limited to that of assisting the process rather than controlling it.

It is fair to say that, by and large, we in Australia have adopted the approach that is identified with the "administration-minded" theorists. But this is not to say that there is no area left wherein the parties involved may bargain amongst themselves. Indeed, I have on many occasions emphasised that so called compulsory arbitration and collective bargaining do, in fact, go hand in hand in some, if not many, areas of industrial relationships in Australia. I shall elaborate on this point later, but at this stage let me develop a bit further the background to Australian industrial law.

The basic condition influencing all the industrial government in Australia, is of course, the Australian culture. This is not the place for an exhaustive analysis of all the disparate elements that have resulted in the formation of the Australian cultural system. It is sufficient to recognize that Australian history from just before and at the turn of the century is characterised by a reliance on the paternalistic role of the state in matters economic, social and political. This attitude contrasts with the "rugged individualism" born in the American Frontier and the consequent distrust in the United States of the activities of central governments and their agencies. When this attitude of governmental paternalism is coupled with the economic egalitarianism which is another feature of the Australian culture, the events which precipitated the birth of the Australian Arbitration system are more easily understood.

In the last couple of decades of the last century there had been a wave of strikes, the important ones running beyond State boundaries so that they passed beyond the control of a particular State. New Zealand and some Australian colonies had legislated to prevent strikes and had favoured some sort of arbitration system to do so and promote industrial justice. According to Mr Justice Higgins "the theory generally held at the time of our constitutional convention was that each State should be left to deal with its own labour conditions as it thought best. But an exception was made, after several discussions, in favour of labour disputes which pass beyond State boundaries and cannot be effectually dealt with by the laws of any one or more States". The Constitution following the conventions gave to the federal parliament power to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The learned Judge went on to say: "Just as bush fires run through the artificial State lines, just as the rabbits ignore them in pursuit of food, so do, frequently, industrial disputes. In pursuance of this power an Act was passed in 1904, constituting a Court for conciliation, and where conciliation is found impracticable, arbitration. The arbitration is compulsory in the sense that

an award, if made, binds the parties. The Act makes a strike or a lockout an offence if the dispute is within the ambit of the Act - if the dispute is one that extends beyond the limits of one State. In other words, the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public." These words of a great Australian spoken with the knowledge gained as one of the authors of our Constitution and also as second President of the Arbitration Court need only be changed because of the passing of the years, in one respect. The Parliament repealed the legislation prohibiting strikes and lock-outs and there later followed the present methods of sanctions which consist first of the insertion in an award of a bans clause forbidding breaches of the award which may be followed by Court action in the event of breach.

The growth of the Australian system of industrial law has thus been accompanied by the willingness, by and large, of both parties to submit a dispute to a referee, in the interests of industrial peace. However when it comes to the sanctions and penalties which should secure enforcement of the referee's decision we find far less unanimity. In this regard a fundamental change made in 1956 requires mention. Two bodies were then created as successors to the powers and functions of the Commonwealth Arbitration Court. In this one Court there had been reposed dual powers of which one was to prevent and settle disputes by conciliation and arbitration, generally called the arbitration power; the other was the power to interpret and enforce obedience to awards which was the judicial power. The arbitration power and the judicial power had over the years been conjointly exercised by the Arbitration Court but in 1956 the High Court in the Boilermakers' Case held that the two powers could not be so exercised by the one body. Parliament therefore created the Conciliation and Arbitration Commission on the one hand confining its duties to conciliation and arbitration and the Commonwealth Industrial Court on the other hand which was confined to the exercise of the judicial power. Although the High Court's decision had made this creation and separation inevitable the Government had quite independently decided that this should happen as a matter of policy. The Commission so established consists of Judges and Commissioners who may be laymen. In the main Commissioners sit at first instance and Judges on full benches in some cases with Commissioners and in other cases without them. Mixed full benches deal with matters of importance in the public interest which come to them from single members either by way of appeal or by way of reference by the President. Benches of three or more Judges sitting without Commissioners deal with national questions such as alteration of the basic wage, standard hours of work and long service leave. The mixed benches have made the processes of the Commission more informal and relaxed and very early in the Commission's life the old practice of Judges wearing wigs and gowns was discarded. In 1956 by way of experiment the separate office of Conciliator was created. This was because the person who may eventually have to arbitrate might on occasions by reason of that possibility have had his value as a Conciliator lessened.

Similarly, if in the event he has been unsuccessful in his conciliation he may have less value as an arbitrator. The model Conciliator may often hear things which the arbitrator should not. The parties are not as free and easy in their discussions when trying to reach agreement in the presence of a person who may at the drop of a hat become an arbitrator. Thus the Conciliator is confined by the Act to conciliation and except in specified instances not allowed to arbitrate. The legislative experiment of 1956 has been successful and we are likely to have conciliators, as such, always with us.

The Arbitration Commission exercises, if not economic powers,

powers which result in important economic sequels. These in some cases can appear to have as great an impact on Australia's existing economic destiny as an important part of a Government's budget. Moreover the decisions of the tribunal are not in any way under the control of the government of the day. The only line of communication between the government and the Commission so far as decisions are concerned is the right of the Attorney-General to appear before the Commission "in the public interest".

A question frequently posed and certainly relevant to this address is whether the legal profession is best qualified to administer industrial law, given the important economic effects of this type of law. There are differing views within the legal profession over this question, with, for instance, the late Mr Justice Higgins and the late Sir Robert Garran, our first Solicitor-General, on the one hand, and Sir Owen Dixon, our retired Chief Justice, on the other. Sir Owen's views, taken to the extreme, are that not only Judges as such but lawyers generally should not as a matter of policy engage in the constructive activities of the community. This Dixonian opinion, shared by many both in Higgins' days and at the present time, would of course ex hypothesi mean that Judges should not participate at all in the very important public sphere of conciliation and arbitration; and possibly practising lawyers also. On the other hand Higgins by his actions and Garran by his words in many places have obviously had the strongest possible conviction that Judges and the legal profession generally should engage in the very importantly constructive work in this field. I still have that view but I hasten to add that I accept, as I must, the decision of the High Court that my brother Judges of the old Court and myself could not under the Constitution continue to exercise judicial and arbitral functions conjointly.

Many in the legal profession and out of it share Sir Owen Dixon's view that Judges and the legal profession should not participate in the industrial relations sphere. Some would place the restrictions merely on Judges, leaving lawyers generally free to serve the community and earn their money by appearances before the industrial tribunals. As I understand it those who would not have Judges administering industrial law rely on two main grounds - first, on the fundamental difference involved in the two functions, namely, that the judicial function is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of parties at the moment the proceedings are instituted, whereas the arbitration function in relation to industrial disputes is to ascertain what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other and by award legislate so that those shall be their rights and liabilities in the future.

The second ground against judicial participation held by legal purists is based I think on their view that the use of Judges to decide quasi-political, social and economic issues tends to undermine the dignity, aloofness and prestige of the judiciary and thereby detract from the administration of justice. According to this viewpoint it is more important that the administration of justice should be beyond public debate than that Judges should be used to decide other great public issues. It is, as most things are, a matter of balancing one concept against the other and making a decision. Is it more important for the public that those who decide these issues of great social and economic significance should bring to their task all that the concept of a Judge implies? or should Judges be left confined to the purer and more rarified atmosphere of the administration of pure law?

This double barrel question is an easy one to ask but a difficult one to get general agreement on the answer. For myself I feel confirmed in my partisan view that the difficult if disputatious field of industrial relations should not be deprived of the assistance of those trained in the discipline of one of the learned professions.

You might think that some corroboration of this comes from Mr Justice Isaacs and Mr Justice Rich writing in a slightly different connotation in a judgment written almost half a century ago. They said:

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 today - practically an impossible hypothesis, - would certainly be less suitable a month hence. Nevertheless, if 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.

I would add that the hearing and investigation both of law suits proper and of industrial litigation require for very practical purposes that the hearing or the investigation be public. The bias against the Star Chamber method, which we were all taught at school, still exists in both areas and for the same reasons. This thought leads me to remark also that the old idea that the work and decisions of Judges in the true courts of justice should be beyond criticism is fast fading, and you might think properly so. It has become the practice, progressively increasing, for the judgements of the High Court and other courts to be criticised adversely as well as favourably by academics and others who think they are qualified to do so.

After giving consideration to the description by Mr Justice Isaacs and Mr Justice Rich of what is involved in deciding industrial disputes you might think that the decision in those cases, although different in nature from ordinary legal decisions, requires qualities just as great. Should we in the industrial field be deprived of the assistance of those trained in a profession which is not only learned but extends, as the law proper does, to all aspects of community life?

There are many in the legal community both on the bench and otherwise who, though not against participation by the legal profession in our field, consider that lawyers who preside or sit on the industrial benches should not have the title and status of Judges. They argue that use of the judicial title for industrial benches might lead to confusion in the popular mind and derogate in some way from the dignity accorded to the title and status of Judges on courts of law. There is no doubt a great deal to be said for this view, but on the other hand members of the Australian public have been wont over the years to have regard for judicial attributes; they feel more confident in the administration of industrial relations when the administrators are not only members of the learned profession of the law but also are proclaimed by their title so to be.

Then again Judges by their tenure of office and traditional training, are used to disregarding political pressures. In the disputatious field of federal industrial relations there is the further safeguard against political pressures which I mentioned earlier, namely, that there is only one line of communication between the Government and the Arbitration Commission in regard to the latter's decisions; the Attorney-General has the statutory right to appear himself or by Counsel and make submissions in the public interest before the Commission. When this is done submissions made publicly on behalf of the Government must stand or fall of their own weight, just as must the submissions of all parties and interveners.

Perhaps the answer to this question of participation by Judges in the field in which I preside has already been supplied by the latest legislation which uses both lawyers and laymen. Each bring their different gifts, qualities and attributes to the task, some issues

being decided by Judges only and others by mixed benches of Judges and Commissioners who may be laymen and yet other issues by the Commissioners sitting alone subject to appeal to full benches.

I myself hope that any tendency to disparage judicial participation in our Australian province of conciliation and arbitration will not discourage those with the best talents of the legal profession from following in Higgins' footsteps. However if Judges do participate they must, I admit, put aside for this work thoughts that they must not be constructive or that they should be excessively legalistic. Worship of past decisions and adherence to stare decisis can be over-done in a field where, as Justices Isaacs and Rich observed in the passage already quoted, there are "so many possible divergencies and changes involved". It is my view that the attributes of the trained and disciplined mind of the lawyer as well as his objectivity are needed for much of industrial relations work. In addition, his training and his profession bring him into contact with human life itself in a very practical way. Just because he is legislating for the future and not interpreting the law as it is does not lessen the value and need of his gifts for acting fairly, for ascertaining existing facts and for defining issues with clarity. Nevertheless he should be conscious of the fact that a scientific approach based on law, economics or any field of learning will not on its own solve the very human problems bound up in industrial relations.

I come now to 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. "Bush lawyers" in my experience exist in our field just as they do in others.

It is also argued that the costs involved through the retaining of lawyers may be excessive in industrial proceedings. This of course is a factor, but when one considers the tremendous financial issues involved in some arbitral proceedings the cost of using lawyers in them does not seem of great significance.

All in all the present Australian federal 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.

It is well nigh impossible in my country to discuss our system of compulsory arbitration without appearing to join issue on the respective merits of that system and collective bargaining. To my mind such discussion is not fruitful unless we bear in mind that the two systems are not mutually exclusive and that there are so many grey areas in both systems as practised in various countries, that comparisons based on strike statistics are mostly irrelevant. But without embarking on a comparative examination let me very briefly comment on one or two of the arguments used in such discussion.

Those who support collective bargaining as against arbitration

usually assert that collective bargaining encourages a sense of responsibility in the persons who do the bargaining on behalf of employers on the one hand and employees on the other. Because failure to bargain successfully will result in the use of industrial might either in the form of lock-outs or strikes, it is imperative, the argument runs, in their own and the community interest that they should successfully compose their differences. The converse is argued in the case of a compulsory arbitration system where it is claimed this sense of responsibility is discouraged because the arbitrator is present to take the load of responsibility off their shoulders and impose his will on both parties. Responsibility is also discouraged, it is said, by the fact that once the arbitrator's will is imposed, both sides are by human nature itself inclined in their reports back to their principals or in their public statements to blame the arbitrator for the faults of the award, relieved of the necessity to explain and justify its terms as they would be in the case of an agreement for which they themselves were responsible.

I incline to the view that this argument overlooks many human aspects. True, the arbitrator is nearly always wrong in the view of the parties, but I am sure the advocate, and those who instructed him to put his case in a particular way, get their share of censure on both the employers' and trade union sides.

Arbitration cases, particularly the national ones, have become such a public feature of Australian life that the main arguments are described in the daily press comprehensively, and generally speaking, lucidly. Both the trade union spokesmen and those of the employers have to stand up and be counted in public forum in respect of these arguments. Also, as I have implied earlier, the question of how a case should be argued and conducted must be the subject of live debate, before and after and no doubt during hearings, and I should imagine there would be a lot of "I told you so's" after cases have been won and lost.

An important feature of our system must not be lost sight of. In the years in which I have been associated with arbitration I have become deeply impressed with the emphasis given to economics in national cases by the advocates of both sides. This, together with the intelligent publicity given to those cases in learned journals and in sections of the press, has progressively over the years led to a realisation of the importance from the employers, the trade unions and the community viewpoint of the value of research into industrial relations. This particularly applies to the economic aspects both from a national and group point of view. So that in Australia once the arbitration system has fulfilled its particular function of prescribing minimum wages there is room for collective bargaining. It is well-known that a great deal of bargaining, for example about over-award margin, is done in particular industries such as those in the metal group. The totality of these payments represents, it is claimed, a significant portion of the increase in the "average weekly earnings" figure over recent years. But our system encourages the play of bargaining between employers and employees in another important way. I refer to the emphasis the system puts on conciliation not just as a part of the process of arbitration but as a means of avoiding the very necessity to arbitrate. It follows from what I have said that arbitration and collective bargaining do go hand in hand in this country. When noting that this is partly due to the fact that our arbitration system does not prescribe maximum as well as minimum wages, we should also note that the only call for such an autocratic adjunct of arbitration was during Australia's participation in war.

Finally, I recall again Mr Justice Higgins' words:

The process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public.

Both the interested and the merely cynical will ask: "Has the system of conciliation and arbitration brought about this millennium?" The answer must be: "Of course it has not; strikes and stoppages still occur unfortunately to quite a significant extent." But the incidence and extent of strikes is a world-wide problem. Strikes occur to a greater degree in Australia than in some countries and to a lesser degree than in other countries. Perhaps the real question to ask, as far as this particular aspect is concerned, is whether we now have more or less conflict than we would have had if we had not had a system of conciliation and arbitration. I think that we have fewer strikes and stoppages than we would have had without the system. I must admit, however, that the opinion is intuitive rather than calculated.

I think it is common ground among all critics that the Australian public has so far supported the system and, although it is claimed that this has now become merely a matter of habit, I myself feel that there is more to it than this. I personally regard the fact that the public, the major political parties, the organised trade unions and the organised employers wish to retain the system as some evidence of its success.

The Honourable Sir Richard Kirby