

Lawyers and Industrial Relations: a Post Script

By

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My 1974 paper reviewed the development of the 'new province for law order' designed mostly by Justice Henry Bournes Higgins in the early part of the 20th century. The object of the 'new province' was to prevent and settle industrial disputes within its jurisdiction in an orderly way through conciliation and arbitration. In the course exercising this function, Higgins and his immediate successors established certain principles which, with certain modifications, survived through most of the century. My paper was written at a time of full employment accompanied by severe wage and price inflation that saw the Higgins concept of 'law and order' thrown into disrepair and new attitudes developing on how to work the system. In the circumstances, I concluded that

the arbitration system has in fact become a mediation system acting by persuasion rather than compulsion. To admit this in the circumstances is not to denigrate it. Mediation is an important and continuing requirement in industrial relations. But it is not how Higgins and his successors up to the 1950s saw and worked the system. In those areas where union power is still weak or not exercised, the Higgins concept still applies in extending the standards established in the pattern-setting areas on the principle of comparative wage justice. Apart from these areas, has the 'new province for law and order' had its day? and is this a cause for rejoicing?

In one sense, the answer might be in the affirmative. The arbitration system accelerated the growth of unions by recognising them and giving them legal protection. The inequality of bargaining power has been corrected and, therefore, the system has now adjusted itself primarily to a mediating role of conciliation and quasi-arbitration. Using a different route from other countries, by a process of evolution, Australia has come to its own kind of collective bargaining with the mark of the arbitration system ingrained in it. Abandoning national wage increases but retaining the minimum wage would take Australia even closer to those of America and Britain; and some may feel that this is as much as can be expected of the arbitration system. Conflicts of interest are best solved by the parties directly involved. To bring legal intervention and sanctions into such conflict when such sanctions are ineffective, imposes an unnecessary strain on the standing of the law.....:...

However, others may view the passing of the Higgins Province with regret. For did it not lay great stress on the public interest in a deeper sense than the current interpretation of this term?.....Thus what may appear as a good or satisfactory settlement by collective bargaining from the point of view of the parties immediately involved, may be against the general community interest: the sum of the parts may not be equal to the whole. The Higgins concept of the public interest would be alive to this conflict and would not allow the certification of agreements or making of consent awards simply on the grounds that the parties are agreed on the terms of settlement.....

Experience has also shown the impracticability of dealing with inflation through wage determination dissociated from other elements of economic policy. Nevertheless, it is tempting to ask whether Australia, with its well established wage fixing machinery and its tradition of using such machinery, may not have an institutional asset, lacking in many other countries, for providing the basis for dealing with this problem. Of course, the existence of such machinery is not a

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sufficient condition for its success on this matter. What is also needed is the general confidence of those who are subject to its operation that their interest will not suffer.....Yet, it may be that general acceptance of the destructive nature of sectional pay and price pressures upon the social, economic and industrial environment will provide the basis for a consensus between the main union and employer bodies on, among other things, the appropriate rules for wage fixing. And that, further, there may be sufficient confidence that these rules will be applied consistently to individual cases by the arbitration machinery without unduly impairing the initiative of individual employers and employer groups to negotiate freely on other terms of employment. Such an arrangement will mark a move in the direction of the Higgins concept. But its viability will be sustained not by the force of legal sanctions but, more effectively, by the pressures the trade union movement and employers will bring on transgressors.....

Whether this is all too Utopian time alone will tell.

Thirty years on, important changes in the Australian industrial relations system have taken place. These show the continuing capacity of industrial relations institutions, the federal Commission in particular, to adapt to the changing economic, social and political context, a fact that had become evident soon after their establishment. In what follows, the developments, particularly those relating to the Commission¹, are discussed briefly.

Centralisation

In April 1975, the Commission bravely embarked on what, in the context of the times, could be regarded as the Utopian ‘public interest’ route noted above. The destructive nature of sectional wage increases was now acknowledged, even if implicitly, by the trade unions, while the employers were realizing that inflationary price expectations being built into wage demands were self-fulfilling. The wage fixing system was in crisis with serious implications for the economy. It was becoming clear that in order to deal with the crisis, free collective bargaining recently included in the Labor Party’s platform, was not the answer. Wage fixing rules, to be applied and observed generally, were needed. However, there were serious challenges in the way of such a course. The failure of recent wage policy lay in the inability of the Commission to limit the rate of wage increases even of those operating under its own awards. Given the multiplicity of state tribunals and the Constitutional limitation on the Commission to prescribe wage-fixing rules for general application, how was it conceivable that such a centralized arrangement was a practical proposition?

These and other questions exercised the minds of the parties, the interveners and the Commission in the proceedings of the first 1975 national wage case that resulted in the ‘indexation package’ - wages generally were to be indexed by the CPI on a quarterly basis as far as the state of the economy allowed. Increases above these, would have to be small and be based on a comprehensive set of principles.² To meet the requirements for consensus, the package in effect incorporated the traditional norms of the labour market - maintenance of real wages, sharing of productivity improvements and ‘fairness’ in relativities – which had been applied by the Commission over the years in piece-meal ‘palm-tree justice’ fashion. To give the parties confidence that these norms would be

¹ Regrettably, time prevents me from dealing with the State tribunals.

² For a detailed discussion of this decision, see Isaac 1977.

applied consistently to all, the weak and the strong, it was necessary for their application and the procedures involved, to be systematic, Members of the Commission and those of state tribunals would have to observe the principles in determining claims – a requirement which, considering protocol on jurisdictional propriety, could only be hinted at implicitly. Further, since such a wage policy could not be expected to operate independently of economic and social policy, it was necessary for the federal government to ensure that the policies under its control were consistent with its requirements and to apply what became known as the necessary ‘supporting mechanisms’. Later in the year, the Commission agreed to deal with ‘anomalies’ in wage relativities through a special procedure in order to ensure wage increases emanating from it would not flow elsewhere.

The Commission announced the package tentatively, describing it as ‘fragile’, to test the willingness of the main parties and governments to commit themselves to the requirements of the new system. The words from the April 1975 decision (167 CAR 18) are worth quoting:

If we appear to be somewhat over-cautious about introducing indexation, it is because it is a momentous step going well beyond the old system of basic wage cost of living adjustments in scope; it is because we are concerned about the current difficulties which the economy faces and do not wish to add to them; and it is because indexation can have far-reaching consequences – economic, social and industrial – which may be good for the country but which, if the conditions we have set down for indexation are violated, will be seriously detrimental for the country. Violation even by a small section of industry whether in the award or non-award area, would put at risk the future of indexation for all. Moreover, the success of indexation rests heavily on the supporting mechanisms which are outside the Commission’s control. The Commission does not operate in an institutional vacuum and the outcome and the future of indexation will, therefore, depend not only on the Commission’s decisions but also on the extent to which unions, the Australian and State Governments and ultimately the public at large are prepared to lend their weight to the conditions necessary for the success of indexation.

Was this too tall an order?

The response generally ranged from enthusiasm to reluctant acceptance, but there appeared to be a sufficient degree of consensus to give the Commission heart to proceed with it. The President of the Commission, Sir John Moore, instituted the practice of periodic meetings with the heads of the state tribunals in order to facilitate communication on the issues confronting them. However, problems arose along the way. The Coalition which succeeded Labor at the federal level late in 1975, progressively showed less commitment to the necessary ‘supporting mechanisms’, regarding the indexation system as it was being operated as inconsistent with its economic strategy. The economy deteriorated and forced the Commission to award less than full indexation and to reduce the frequency of indexation to half-yearly. A ‘work value’ case in the metal industry generated a flow-on to industry generally, straining the economic viability of the indexation system. Strike activity began to increase greatly in a number of industries. By 1980, the unions were pressing for a 35-hour week while the federal government and the ACTU called for a more flexible (less consistent?) approach to the principles. These developments reflected the lack of commitment of unions, employers and the federal government to the 1975 principles. Accordingly, the Commission abandoned the

centralized system in July 1981, leaving collective bargaining to resume the inflationary rampage of the years before indexation.

In the face of growing unemployment, the unions and the federal Labor Party in opposition came to an agreement - the 'Accord' - for a return of the centralised system based on indexation, this time with a clear understanding that the government would provide the social and economic policy 'supporting mechanisms' to underpin the system. The National Economic Summit convened by the newly elected Prime Minister, R. J. L. Hawke, gave expression of general support for an incomes policy to be administered by the Commission along the lines of the indexation package of 1975. The specific terms of the Accord evolved in successive national wage cases through to 1992.

However, by the mid-1980s, the economic context had changed dramatically. The deregulation of the financial market, floating of the Australian currency and substantial reduction in trade protection, opened the Australian economy to global competition in a way that called for substantial and sustained productivity growth in order to meet such competition without a serious decline in real wages. Wage policy was now to be concerned not only with achieving the macroeconomic objective of holding inflation down but also to encourage greater flexibility and efficiency in work practices. This objective was submitted to the Commission in 1987 by the main parties and governments. Accordingly, the principles were modified in a move to a more decentralized award-by-award application of the nationally determined wage increases, in each case conditional on a commitment from unions to abide by the principles and to cooperate with the employers for improved work practices. (Isaac 1989)

The Accord and its implementation by the industrial tribunals had proved beneficial to the economy as reflected in the movement of prices and employment and in industrial action. (Chapman and Gruen 1991) However, the consensus for this centrally managed decentralized arrangement collapsed in 1991 when the Commission, taking the Higgins high road, refused to agree to the certification of collective agreements in excess of the national wage standard without the test of public interest being satisfied. The Commission was concerned that ratification agreements without this test would open the door to contrived productivity-enhancing arrangements or to terms which were in breach of the principles, and so creating the risk of a wage break-out with inflationary consequences. Perhaps the Commission may have been unduly concerned at such a happening. Competition in the now open economy and a somewhat high margin of unemployment constituted sufficient wage restraint to hold back any serious danger of a wage break-out. However, the Commission had incurred the ire of the unions and the federal government that ended the consensus on centrally managed decentralized system.

Decentralisation

Although the Commission later relented from its public interest stand, the unions and the federal government were not assuaged. Prime Minister Keating made it plain³ that the road ahead lay in collective bargaining in which the Commission would play an

³ In his address to the Institute of Directors, Melbourne, 21 April 1993, Press Release.

increasingly minor role. This objective was apparent in the Industrial Relations Reform Act 1993.⁴ Collective bargaining at the enterprise level would be promoted and facilitated by a special Bargaining Division of the Commission, and provision was made for immunity from penal sanctions against industrial action during the bargaining period. The public interest test on such agreements, was no longer required as a condition for certification by the Commission provided that the agreements satisfied the 'no disadvantage test'.⁵ The Commission's award-making role was mainly to determine the 'safety net' from time to time for those unable or unwilling to engage in enterprise bargaining. The 1993 Act was important not only in what it provided but also in being a departure from a traditional feature of federal industrial legislation. Until then, the Commission had operated within a legal framework which allowed it considerable discretion on procedures and principles. Now this discretion was to be curtailed by the Act.

The election of the Coalition government in 1996 resulted in additional emphasis on decentralization and re-regulation through the Workplace Relations Act 1996.⁶ The award-making jurisdiction of the Commission in relation to the 'safety net' was further restricted to a limited number of 'allowable' matters, provision was made for individual agreements (known as Australian Workplace Agreements), and industrial action was not to be protected in multiple employer collective bargaining. Despite the declining power of unions, reflected in the halving of the proportion of their membership among employees since the 1970s, and the very low incidence of strike activity, the Act generally displayed an unfriendly attitude to unions, including removing the object to encourage unionism that had been a feature of successive Acts going back to 1904.

The consequences of the legislative pressure to extend enterprise bargaining is that in the last 20 years, the proportion of those on awards has halved to just over 20% of wage earners while 40% were covered by enterprise bargaining. Those not covered by such bargaining, mostly employees in less unionized occupations or are in a weak bargaining position (generally the less skilled, women, migrants, casual workers) continue to be covered by awards in annual 'safety net' cases. The justification for this development is the unsubstantiated view that industrial tribunals impose or encourage undue rigidity in work practices and stifle productivity growth. It is also widely believed that enterprise bargaining and a less regulated system would allow greater flexibility in work practices and generate greater productivity. Both views are not supported by hard evidence. While productivity has increased markedly in 1990s, the decentralized system cannot be given credit for it (Loundes, Tseng and Wooden 2003:256). It is arguable that the open economy and the increased insecurity of employment arising principally from new work practices (downsizing, outsourcing, contract work and re-location especially to countries with lower wages) have been more important in productivity growth.

⁴ For a detailed discussion of this Act, see Naughton 1994.

⁵ To ensure that workers were on balance not disadvantaged in trading-off certain benefits for others in the quest for flexibility. This was a rather problematical exercise. See Merlo 1990

⁶ Various aspects of this Act are discussed in Australian Journal of Labour Law, 10, 1, April 1997. The intention of the government to go even further in decentralisation and reducing the jurisdiction of the Commission was thwarted by its lack of numbers in the Senate.

The adjustment of the 'safety net' which is subject to the test of economic capacity, has lagged well behind the pay rates settled under enterprise bargaining thus widening the gap between those on awards and those on agreements⁷. (Australian Centre for Industrial Relations Research and Training 1999:76-79) Productivity increases once shared by workers generally, are now shared on an enterprise basis by those able to engage in enterprise bargaining, leaving the weaker sections of the workforce to have their awards adjusted periodically in 'safety net' cases and, where eligibility permits, to have their incomes supplemented by social security provisions. The present economic circumstances in which wage fixing tribunals operate, are in contrast to those of the 1960s and early 1970s when full employment and high trade protection prevailed. However, so long as governments do not find the political need to promote fuller employment through stimulating demand and rely mainly on weak unionism, monetary policy and the open economy to keep inflation in check, the present decentralized system will do. But it is at the expense of a fairer society.

Concluding observations

The developments discussed above have not reduced the Commission's overall workload although the composition of its work has changed. The opening up to it of unfair dismissal cases in recent years and the call to deal with dispute resolution clauses of registered agreements, effectively by private arbitration (Giudice 2001), have extended the volume of its work. But it has retreated from the nationally prominent place it had occupied as an arm of economic and social policy in the hey-day of the centralized system.

The last 30 years have shown that an equitable and economically responsible centralized system of wage determination, based a comprehensive set of principles can operate successfully in Australia. (Gregory 1986; Chapman and Gruen 1991) That this was possible, owes a great deal to the existence of a longstanding system of legally constituted wage fixing tribunals. Although the judicial background of the system has been important in the public's confidence in the system, its viability does not rest so much on legal force as on the commitment and cooperation of unions and employers generally, and of governments, particularly the federal government. The procedures and practices that developed in the mid-1970s and continued into the 1980s were not something which its founders could have envisaged. Since their time, the economic, social and industrial setting had changed beyond recognition, but the Higgins approach - 'law and order', 'public interest', and 'fairness and consistency' - still had considerable significance in the operation of the new system.

However, such a system called for a distinction between the quasi-legislative role of the Commission and its quasi-judicial role, a point which had troubled Higgins initially and to which I alluded in 1974. (p.327) Experience shows that these different roles called for different procedures. The former was involved in the *formulation* of the principles or

⁷ International evidence shows that wage differentials tend to widen under decentralized wage fixing arrangements. (Aidt and Tzannatos 2002:120)

rules on wage fixing and the associated procedures. This needed to be made in a public forum of debate and inquiry, assisted by experts called by the participants, in order to ascertain the extent of consensus consistent with the public interest. The *application* of the rules required a consistent quasi-judicial approach to sustain the credibility of the system. Experience has also shown that the centralised system, despite its successful economic and industrial record, tends to be unstable and is easily dislodged by changes in political doctrine.

The federal Commission celebrates its centenary this year. That it has survived the 100 years of political, industrial and economic buffeting says something about its capacity to adjust to a frequently changing environment and its continuing hold on the public mind. But the form in which its future will take continues to be the subject of public debate.

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