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TENURE OF APPOINTEES TO COMMONWEALTH TRIBUNALS

REPORT OF THE JOINT SELECT COMMITTEE ON TENURE OF APPOINTEES TO COMMONWEALTH TRIBUNALS

November 1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

TENURE OF APPOINTEES COMMONWEALTH TRIBUNALS

Report of the

JOINT SELECT COMMITTEE
ON TENURE OF APPOINTEES
TO COMMONWEALTH TRIBUNALS

NOVEMBER 1989

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TERMS OF REFERENCE

The Committee's terms of reference are as follows:

> [T]o inquire into and report on the principles that should govern the tenure of office of quasi-judicial and other appointees to Commonwealth tribunals and in particular whether the provisions of sections 24 and 28 of the Industrial Relations Act provide proper and adequate provision for the tenure of office of Presidential members and Commissioners of the Australian Industrial Relations Commission.

(Journals of the Senate, No 132, 28 February 1989, p 1392; House of Representatives, Votes and Proceedings, No 101, 1 March 1989, pp 1037-8)

CONCLUSIONS AND RECOMMENDATIONS

Principles that should govern the tenure of holders of offices and members of quasi-judicial tribunals

1 In order to perform their functions, quasi-judicial tribunals need to be able to attract and have appointed to them people of superior talents and integrity and to ensure that they will not be influenced in their decisions by outside or irrelevant considerations. In particular, they should not be in any way influenced by the government of the day or any alternative government (para 4.19).

2 In order to give effect to these principles, the nature of the tenure must ensure the following:

(i) An adequate term of office should be provided. For the senior members of these tribunals that term is appropriately until a retiring age of 65 or 70. Other members should be appointed for a reasonable period of time (eg 7 years);

(ii) Removal from office before expiration of that term should be for cause specified in the relevant legislation;

(iii) Adequate procedures for removal should be ensured. This may be achieved by establishing a special method of removal as occurs under section 72 of the Constitution in regard to judges. This is appropriate for senior members but a less elaborate procedure may be justified in other cases (eg one involving the Governor-General);

(iv) Where grounds for removal must be established, a proper legal process for doing so must be provided;

(v) Ministers and Members of Parliament and senior officials should not seek to bring any public or private pressure to bear on the members of tribunals, either by threats or promises. This of course would not exclude reasonable criticism of decisions;

(vi) Members must be provided with a reasonable opportunity for performing such work of the tribunal as fits their particular talents, so long as they are able to do so;

(vii) Members must be provided with appropriate salaries and conditions of service in order to carry out their tasks; and

(viii) Members of tribunals should themselves remain independent from party political activity. They should observe the same standard of behaviour and decorum as judges have traditionally followed (para 4.20).

3 The Parliament should not support a Constitutional amendment to limit its power to abolish tribunals and the statutory offices which it has created (para 5.26).

4* Recommendation: The following principles should be borne in mind by the Parliament when considering the abolition of a quasi-judicial tribunal:

* Indicates recommendation

(i) Abolition of a tribunal should not be used to remove the holder of a quasi-judicial office unless the removal procedures applying to that office are followed;

(ii) Legislation to change the structure and jurisdiction of a quasi-judicial tribunal should, if possible, refrain from abolishing the tribunal;

(iii) Where the tribunal is abolished or restructure, all existing members of the tribunal should be re-appointed to its replacement; and

(iv) When a tribunal is abolished and not replaced, compensation should be paid to the members of the tribunal who have lost their positions and for whom no alternative position can be found (para 5.27).

5* Recommendation: Further consideration should be given to embodying these principles in an Act of Parliament (para 5.29).

The adequacy of sections 24 and 28 of the Industrial Relations Act 1988 to provide proper and adequate provision for the tenure of office of Presidential members and Commissioners of the Australian Industrial Relations Commission.

6 Sections 24 and 28 of the Industrial Relations Act 1988 make proper and adequate provision for the tenure of office of presidential members and Commissioners of the Australian Industrial Relations Commission (para 6.33).

* Indicates recommendation

The right to perform the duties of office by appointees to Commonwealth tribunals

7 A tribunal president should have the the power to allocate work and the only interference with that power should be the right of an aggrieved tribunal member to approach an appropriate court to test the ambit of such power. The Committee does not believe the power to allocate work should be used to effect the de facto suspension of a tribunal member (para 7.35).

8 A member of a tribunal who is deprived of work is entitled to receive reasons from the president of the tribunal for such a decision. If the member does not accept the decision, or the reasons for it, he or she, should, in the first place, try to resolve the dispute with the tribunal president (para 7.36).

9 There is no need for a new body to be established to deal with complaints against tribunal members, nor one which could mediate between members of a tribunal and its presiding officer (para 7.37).

Matters relating to former Justice Staples

10 The Committee is unable to reach any conclusion on the relationship which developed between former Justice Staples, on the one hand, and Sir John Moore and Justice Maddern, respectively, on the other. In failing to reach a conclusion on this question, the Committee regrets that it received no assistance on this matter from Sir John Moore or Justice Maddern (para 8.34).

11 The Committee concludes that it should not inquire further into the reasons why decisions were made to remove former Justice Staples from active work. To do so would require a full-scale inquiry into the Staples case, which is clearly outside the Committee's terms of reference (para 8.35).

12[*] *Recommendation: The Government should establish an inquiry to determine the issue of compensation for former Justice Staples, in view of his non re-appointment to the Australian Industrial Relations Commission (para 8.36).*

[*] Indicates recommendation.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AC and AC	Australian Conciliation and Arbitration Commission
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
CAI	Confederation of Australian Industry
The Committee	The Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals
Evidence	Transcript of proceedings of the Committee's public hearings
Section 24	Section 24 of the Industrial Relations Act 1988
Section 28	Section 28 of the Industrial Relations Act 1988
Section 72	Section 72 of the Constitution

CHAPTER 1

INTRODUCTION

Terms of reference

1.1 On the motion of Senator Hill (South Australia) and following debate on a motion by Senator Haines (South Australia), the Senate resolved on 28 February 1989 to establish a select committee of the Parliament, to be known as the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, and that the Committee inquire into and report on a number of matters related to the tenure of appointees to Commonwealth tribunals. The resolution of the Senate was agreed to by the House of Representatives on 1 March 1989.[1]

1.2 The Committee's terms of reference are as follows:

> [T]o inquire into and report on the principles that should govern the tenure of office of quasi-judicial and other appointees to Commonwealth tribunals and in particular whether the provisions of sections 24 and 28 of the Industrial Relations Act provide proper and adequate provision for the tenure of office of Presidential members and Commissioners of the Australian Industrial Relations Commission.

Committee's approach to the inquiry

1.3 The Committee held its first meeting on 13 April 1989. Because of the limited time allowed for its inquiry and report, the Committee advertised its reference nationally in major

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1 *Journals of the Senate*, No 132, 28 February 1989, p 1392; House of Representatives, *Votes and Proceedings*, No 101, 1 March 1989, pp 1037-8.

newspaper and journals, inviting any interested persons and organisations to make written submissions by 31 May 1989. At the same time, the Committee wrote directly to a number of individuals and organisations which it considered had a direct interest in the issues raised by the reference, or had shown by their public comment that they could make a contribution to the inquiry. These invitations were sent to the Chief Justices of Commonwealth Courts, the Presidents and presiding appointees of Commonwealth tribunals and quasi-judicial bodies, legal professional organisations such as the Law Council of Australia, state law societies and bar associations, the Australian Institute of Judicial Administration and to academics and other individuals.

1.4 In view of the specific question asked by the terms of reference regarding sections 24 and 28 of the Industrial Relations Act, all present appointees as Presidential members and commissioners of the Industrial Relations Commission were invited to make submissions. In light of the background to the Committee's establishment, former Justice JF Staples was also invited to make a submission to the Committee.

1.5 In this report, the Committee makes reference to 'former Justice Staples'. This refers to the fact that the person concerned was formerly a justice of the Conciliation and Arbitration Commission. The use of the term by the Committee should not be taken as any indication that the Committee has pre-judged the present status of the person concerned.

Evidence and submissions

1.6 The Committee received 33 written submissions and a number of brief letters providing individual views on the terms of reference. The submissions were published by the Committee at an early stage of its inquiry so as to allow and encourage discussion of the submissions and the issues they raised.

1.7 The Committee thanks those who made submissions to it, as they have aided its deliberations on a difficult area of fundamental concern to the Parliament, the law and the community. The Committee notes, however, that a number of persons and organisations who were invited to contribute their views did not do so. Those who made written submissions or wrote letters to the Committee but were not asked to appear at public hearings may be assured that their views were taken into account by the Committee during the its deliberations.

1.8 A list of written submissions to the Committee appears as Appendix I to this report.

1.9 In addition to submissions and evidence, the Committee had access to a large volume of published material that was relevant to its inquiry. This material was predominantly of recent publication, due in part to the growing concern felt by members of the judiciary, both in Australia and overseas, at what may be characterised as a reduction in the protection offered by current forms of security of tenure, and hence a real reduction in the independence of persons appointed to judicial and quasi-judicial office.

1.10 The Committee held 2 public hearings on the reference in Canberra on 31 July and 1 August 1989. Following its public hearings, a number of witnesses who assisted the Committee provided supplementary material and views in response to the Committee's request.

1.11 Witnesses who appeared before the Committee at its public hearings are listed in Appendix II to this report.

1.12 After the hearings, the Committee invited submissions from Sir John Moore, the former President of the Commonwealth Conciliation and Arbitration Commission, and from Justice Barry Maddern, also a former President of the Conciliation and Arbitration Commission and now President of the

Industrial Relations Commission. Their submissions were sought in relation to several matters which were raised by former Justice Staples in his evidence to the Committee.

1.13 Following its public hearings, it was evident to the Committee that it would need to extend its required reporting date of 31 August to enable its report to be prepared. On 18 August the Senate agreed that the Committee be allowed further time to consider its report and that the Committee table its report by 31 October 1989.[2] This resolution was agreed to by the House of Representatives on 29 August.[3] A further extension to the last sitting day in November was subsequently agreed to by the Senate on 30 October 1989 and by the House on 31 October.[4]

Format of the Committee's report

1.14 The Committee's report deals with three areas: first, the general nature and significance of the tenure currently provided to appointees to Commonwealth tribunals; second, the adequacy of sections 24 and 28 of the Industrial Relations Act 1988; and third, a number of matters highlighted by the case of former Justice Staples.

1.15 Chapter 2 of the report deals with the background to the inquiry, particularly the course of events involving former Justice Staples which led to the establishment of the Committee. It also provides interpretation and definition by the Committee of issues raised by its terms of reference.

1.16 Chapters 3 and 4 deal with the basis of the tenure

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2 *Journals of the Senate, No 176, 18 August 1989, p 1961.*

3 *House of Representatives, Votes and Proceedings, No 133, 29 August 1989, p 1419.*

4 *Journals of the Senate, No 199, 30 October 1989, p 2176; House of Representatives, Votes and Proceedings, No 147, 31 October 1989, p 1550.*

granted to appointees to quasi-judicial Commonwealth tribunals and seek to establish the principles which should govern this matter.

1.17 Chapter 5 deals with the effect of the abolition of a tribunal on the tenure of existing appointees.

1.18 Chapter 6 deals with the specific questions asked by the Parliament in relation to sections 24 and 28 of the Industrial Relations Act.

1.19 Chapter 7 discusses the difficult question of whether tenure of appointees to tribunals may include a 'right' to be given work consistent with their position and their terms of appointment.

1.20 Chapter 8 deals with the case of former Justice Staples and his relations with the present President of the Industrial Relations Commission, Justice Barry Maddern, and the former President of the Commonwealth Conciliation and Arbitration Commission, Sir John Moore. The Committee explains in detail in the report why it considers that this issue, although aspects of it may be strictly considered outside its terms of reference, should be brought to the Parliament's attention as an important aspect of the Committee's deliberations.

CHAPTER 2

BACKGROUND TO THE COMMITTEE'S INQUIRY

Enactment of the Industrial Relations Act 1988

2.1 The Industrial Relations Bill was introduced into the Parliament in 1987 and was enacted as the Industrial Relations Act in 1988. The Act provides an institutional framework for the prevention and settlement of industrial disputes within the Commonwealth's constitutional power by conciliation and arbitration. The Act gives effect to the Government's decisions following consideration of the recommendations of the Report of the Committee of Review into Australian Industrial Relations Law and Systems the Hancock Report),[1] which was presented to the Parliament in May 1985.[2] The Committee of Review, chaired by Professor KJ Hancock, was established in July 1983. The Act also incorporated in amended and consolidated form many of the provisions contained in the Conciliation and Arbitration Act 1904.

2.2 The Industrial Relations (Consequential Provisions) Bill was introduced into the Parliament with the Industrial Relations Bill and enacted as the Industrial Relations (Consequential Provisions) Act 1988. Its purpose was to effect a large number of technical amendments and to provide for the transition from the system governed by the Conciliation and Arbitration Act to a system established and governed by the Industrial Relations Act.

2.3 The Industrial Relations (Consequential Provisions) Act

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1 *1985, AGPS, Canberra.*

2 *See House of Representatives, Hansard, 20 May 1985, pp 2207, 2232-6; Senate, Hansard, 21 May 1985, pp 2207, 2232-6.*

also provides for circumstances in which a Presidential member of the former Conciliation and Arbitration Commission is deemed to have reached pension age for the purposes of the Judges' Pensions Act 1968 if he or she is not appointed to the new Industrial Relations Commission. Section 81 of the Act reads:

> Subject to subsection 5(1) of the Judges' Pensions 1968, a person:
>
> (a) who, immediately before the commencement, was a Presidential Member of the former Commission;
>
> (b) to whom subsection 6(1) of the Judges' Pensions Act 1968 would have applied if, immediately before the commencement, that person had attained the age of 60 years and retired; and
>
> (c) who, immediately after the commencement, does to hold an office of Presidential Member of the new Commission;
>
> shall be entitled to a pension under subsection 6(1) of the Judges' Pensions Act 1968 as if the person had retired and attained the age of 60 years immediately before the commencement.

2.4 The clause accordingly provides that Presidential members of the Conciliation and Arbitration Commission not appointed to the Industrial Relations Commission were not disadvantaged in respect of their entitlements under the Judges' Pensions Act. It only applies to former Presidential members who meet all the other requirements under the Judges' Pensions Act, apart from having reached the age of 60 years and having retired.

2.5 At the Committee's hearings, it was put to representatives of the Department of Industrial Relations that this was a 'peculiar' provision. Though this proposition was not supported by the Departmental witness, the witness conceded that he was not aware of other similar provisions that relate to the

Judges' Pensions Act.[3] It was also acknowledged that the provision was only capable of applying to former Justice Staples and one other judge.[4]

Appointments to the Industrial Relations Commission

2.6 On 27 January 1989, the Minister for Industrial Relations, the Hon PF Morris, announced that the Government would be recommending to the Governor-General in Council appointments to the new Industrial Relations Commission. Justice Barry Maddern was subsequently appointed President of the Commission. He had held the position of President of the Conciliation and Arbitration Commission since 1985.

2.7 All but one of the Deputy Presidents of the Conciliation and Arbitration Commission were appointed to the Industrial Relations Commission. All former Commissioners of the Conciliation and Arbitration Commission, in the order of their former seniority with the Conciliation and Arbitration Commission, were also appointed to the new Commission. At the same time that the re-appointments were announced, the Government announced the appointment of three new Deputy Presidents and a new Commissioner to the Industrial Relations Commission.

2.8 The only former Deputy President of the Conciliation and Arbitration Commission not appointed to that position on the Industrial Relations Commission was former Justice Staples.

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3 *Evidence, p 249 (Mr Scott, Mr Stewart-Crompton).*

4 *Evidence, p 250.*

Public and parliamentary discussion of the Staples case

2.9 The media gave considerable attention to issues raised by the non re-appointment of former Justice Staples.[5]

2.10 After some discussion by professional bodies, the legal profession generally supported the re-appointment of former Justice Staples. The Council of the Law Society of New South Wales adopted a resolution drawing critical attention to 'the means adopted' by the Government 'in its endeavour to remove Staples J from office'. The Council's resolution specified three grounds of objection to such 'removal'. They were that it constituted:

(a) an attack on the independence of the judiciary;

(b) a denial of natural justice; and

(c) a violation of the established conventions of Australian law that replacement of one court by another should not be used as a vehicle for deposing a judge.

2.11 On 23 February 1989, the Australian Section of the International Commission of Jurists issued a statement opposing the Government's action in relation to former Justice Staples. Subsequently, the Victorian Bar Council, the Law Institute of Victoria and the Law Council of Australia issued statements expressing their concern at the apparent departure from the conventions which had previously been followed on the reconstitution of courts or of Commonwealth arbitral tribunals.

2.12 In a statement, the President of the Law Council of Australia said that the Government's action represented a 'gross

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5 *See, eg, Sydney Morning Herald, 25 January 1989, pp 1, 6, 10; Age, 26 January 1989, pp 1, 13; Australian Financial Review, 8 March 1989, p 14.*

interference with the independence of the judiciary'.[6]

2.13 A number of members of the judiciary also remarked critically on the perceived threat to judicial independence. For example, Judge PT Allan, a Deputy President of the Industrial Court of South Australia, wrote to the Prime Minister on 2 February 1989 criticising the Government's failure to appoint former Justice Staples to the Commission.[7]

Debate in the Parliament

2.14 Debate in the Senate followed the introduction of a motion by the Leader of the Australian Democrats, Senator Haines (South Australia). Senator Haines argued that the non-appointment of former Justice Staples was both a personal attack and 'a breach of the British tradition that Australia inherited wherein the judiciary was held to be totally independent from the Crown, totally independent and free from interference by the government of the day'.[8]

2.15 Senator Haines moved that 7 matters be referred to the Senate Standing Committee on Legal and Constitutional Affairs, 3 of which related to the personal position of former Justice Staples. The other matters concerned the appropriateness of section 72(ii) of the Constitution, the provisions of the Conciliation and Arbitration Act 1904, and alternative mechanisms for the removal of judges from office.[9]

2.16 Senator Haines argued that these terms 'would have gone a long way indeed to determine whether natural justice had been

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6 *The Australian, 10 March 1989, p 4.*

7 *See submission no 3.*

8 *Senate, Hansard, 28 February 1989, p 54.*

9 *Senate, Hansard, 28 February 1989, pp 53-4.*

denied Mr Justice Staples'.[10]

2.17 The Leader of the Government in the Senate, Senator Button (Victoria) argued that the application of section 72 of the Constitution was irrelevant to former Justice Staples' situation and that Senator Haines' motion did not give 'a sound basis for looking at some of the general issues associated with this problem'.[11]

2.18 The motion was supported by Australian Democrats Senators and Senator Dunn, but was defeated.[12]

Establishment of the Joint Select Committee

2.19 Senator Hill (South Australia) moved, on behalf of the Opposition, for the establishment of a joint select committee. Senator Hill's motion focused on the principles that should govern the tenure of office of quasi-judicial and other appointees to Commonwealth tribunals and, in particular, whether sections 24 and 28 of the Industrial Relations Act provided proper and adequate provision for the tenure of office of Presidential members and Commissioners of the Australian Industrial Relations Commission.[13] This motion was agreed to without further debate.[14] It was subsequently agreed to by the House of Representatives.[15]

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10 *Ibid, p 58.*

11 *Senate, Hansard, 28 February 1989, p 61.*

12 *Journals of the Senate, No 132, 28 February 1989, pp 1391-2.*

13 *Senate, Hansard, 28 February 1989, pp 65-6.*

14 *Journals of the Senate, No 132, 28 February 1989, p 1392.*

15 *House of Representatives, Votes and Proceedings, No 101, 1 March 1989, pp 1037-8.*

Interpretation of the Committee's terms of reference

2.20 In addressing its terms of reference, the Committee has had particular regard to the debate in both Houses in the course of debating the resolution to establish the Committee. In view of the rejection of Senator Haines' motion, the Committee has concluded that the Parliament did not desire a detailed examination of the matters which led to the non re-appointment of former Justice Staples to the Industrial Relations Commission in February 1989. However, the Committee has dealt with the case of former Justice Staples in Chapter 8, due to the fact that former Justice Staples raised a number of matters regarding the nature of the tenure that he held on the former Conciliation and Arbitration Commission, particularly as it was affected by his dealings with the former Presidents of the Conciliation and Arbitration Commission, Sir John Moore and Justice Barry Maddern, in the period from 1980 to 1985.

2.21 The Committee had difficulty in clearly understanding the limits of its inquiry under the particular wording of its terms of reference. They appear to confuse quasi-judicial appointees to a tribunal with appointees to a quasi-judicial tribunal. However, it appears to the Committee that it is not required to consider the tenure of office of appointees to the numerous Commonwealth tribunals which either do not have quasi-judicial functions (eg the Remuneration Tribunal) or are only required to exercise such functions to a limited degree (eg the National Companies and Securities Commission).

2.22 The members of tribunals, the functions of which require them to act judicially, are not properly described as quasi-judicial members. All the members of such a tribunal are required to act judicially. Therefore, the difference between 'a quasi-judicial' appointee to a tribunal and 'other appointees' thereto would seem to refer to a distinction between the types of the tenure enjoyed by different members of the tribunal.

2.23 In these circumstances, the Committee has decided to restrict its inquiry to those tribunals which are predominantly required to act judicially (eg the Administrative Appeals Tribunal) or which have historically been seen as equivalent to a judicial tribunal (eg the Australian Industrial Relations Commission).

2.24 The Committee interprets the phrase 'quasi-judicial appointee' as referring to those appointees whose tenure is similar to that accorded judges under section 72 of the Constitution.

2.25 'Other appointees' is assumed to refer to the members of quasi-judicial tribunals who do not have that security of tenure but are appointed for a term of years (eg part-time members of the Administrative Appeals Tribunal and members of the Trade Practices Commission and the Copyright Tribunal).

2.26 There is yet one further distinction between tribunals which may arise under these terms of reference. There are a number of subordinate tribunals within the system of administrative review, such as the Social Security Appeals Tribunal and the Veterans' Review Boards. As an appeal lies from these bodies to the Administrative Appeals Tribunal, the Committee does not propose to consider the appropriate tenure of office for appointees to these bodies, other than to state that they clearly do not require quasi-judicial status.

2.27 Clearly, the Committee's terms of reference require it to formulate principles which should govern the tenure of office of members of quasi-judicial tribunals. These principles may require that all the members of a given tribunal should have tenure similar to that provided for judges under section 72 of the Constitution. The Committee refers to this tenure as 'judicial-type tenure'. In other cases it may be sufficient that tenure be limited to a term of years or until cause is proved,

with redress by ordinary legal remedy. The most difficult problem arises as a result of the undoubted right of Parliament to amend or repeal legislation under which tenure has been granted. That, of course, goes to the heart of the case of former Justice Staples and is dealt with in a separate chapter of this report (Chapter 5).

2.28 The Committee also decided that the concept of tenure embraced the performance of the duties of the particular appointment as well as its period of time. This raised the question of whether an appointee to a quasi-judicial tribunal was accorded the right to perform the duties of that office and, if so, what (if any) qualifications could be placed on that right. This issue arose in the case of former Justice Staples, although the evidence before the Committee suggested that similar problems had occurred in other cases as well. The Committee has considered this question in Chapter 7 of the report.

CHAPTER 3

THE JUDICIAL POWER OF THE COMMONWEALTH, THE COMMONWEALTH JUDICIARY AND COMMONWEALTH TRIBUNALS EXERCISING QUASI-JUDICIAL FUNCTIONS

Introduction

3.1 The Committee believes that the independence of appointees to Commonwealth tribunals is of fundamental importance to the effective workings of those tribunals. In a number of submissions, to which reference will be made later in this chapter, and in other material considered by the Committee, independence from external influences, particularly from influence by government, was stressed as being fundamental.

Constitutional background

3.2 One of the most important guarantees of judicial independence is security of tenure. It is generally accepted in English constitutional history that the Revolutionary Settlement in 1688 achieved two results of fundamental significance: the pre-eminence of Parliament and the securing of the independence of the judiciary. The Act of Settlement 1700, in section III, provides that judges commissions are not to be at the pleasure of the Crown, but are guaranteed

> quamdiu se bene gesserit [during good behaviour] and their salaries ascertained and established but upon address of both Houses of Parliament it may be lawful to remove them.[1]

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1 *See Plucknett, TFT, Taswell-Langmead's English Constitutional History (11th edition), 1960, Sweet and Maxwell Ltd, London, p 463.*

3.3 The provision of the <u>Act of Settlement</u> in turn gave rise to the principle of the separation of powers. This principle is embodied in the United States Constitution and in the Australian Constitution, whereby the judiciary is regarded as a separate branch of government, independent of the executive and of the legislature.

The judicial power of the Commonwealth

3.4 It is axiomatic that provisions which govern the terms of appointment and the removal of judges should ensure that they are provided with the ability to exercise independence in their decisions from both the Executive and the Parliament.

3.5 Two issues are raised by the separation of powers under the Commonwealth Constitution: first, whether judicial power should be vested in bodies other than courts, such as tribunals; second, whether it should be possible to vest non-judicial power in courts.

3.6 Professor Crawford has given a description of the 'core' of judicial power as follows:

> The core of 'judicial power' probably lies in two things: the determination between parties of disputed issues of law with binding effect on those parties, and the enforcement by court order or decree of rights or liabilities ascertained according to a pre-existing standard. The making of an arbitral award, though a binding settlement of a dispute between parties, was held not to be judicial because it involved broad elements of discretion, and because there was no pre-existing rule which the arbitrator could be said to apply. On the other hand, the making of an eviction order between landlord and tenant on specified grounds was a form of enforcement, and was judicial. To restrain parties to an agreement in restraint of trade from

> performing the agreement was not a judicial power, where the order operated only prospectively, and was made on an assessment of general considerations of public policy. But to punish violation of such an order would be judicial.[2]

3.7 In relation to the first issue, as a matter of constitutional law, it is not possible to vest the judicial power of the Commonwealth in a body which is not a court of law. It has been noted that the alternative view would permit the judicial power of the Commonwealth to be exercised by persons who are not given guaranteed tenure by the Constitution, and whose decisions would not be subject to the guarantee of appeal.[3]

3.8 As to the second issue, the doctrine enunciated by the High Court in the Boilermakers' case[4] says that the Parliament may not invest a federal court, being a court established under Chapter III of the Constitution, with a power that is not part of the judicial power of the Commonwealth or ancillary or incidental to the power. The Advisory Committee on the Australian Judicial System to the Constitutional Commission noted in its report to the Commission that:

> The rule has generated a complex body of case law, concerned both with defining judicial and non-judicial power and with elaborating a number of exceptions to the rule. In practice the courts have accepted various refinements to the rule which give considerable scope for flexibility, and there have been few decisions in the past 15 years holding legislation unconstitutional for infringing the separation of judicial power. Nonetheless it has been argued that greater flexibility is required, for example

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2 *Crawford, J, Australian Courts of Law (2nd edition), 1988, Oxford University Press, South Melbourne, p 28.*

3 See, eg, Report of the Advisory Committee on the Australian Judicial System to the Constitutional Commission, 1987, AGPS, Canberra, p 65.

4 *R v Kirby; Ex Parte Boilermakers' Society of Australia (1956) 94 CLR 254 (HC); (1957) 95 CLR 529 (PC).*

> in the field of industrial or human rights tribunals, or family law, to allow a vesting of both judicial and non-judicial powers in the same body.[5]

3.9 Strict interpretation of the judicial power of the Commonwealth has major implications for many decisions that are made by a number of Commonwealth tribunals. In this regard, the Advisory Committee further noted:

> The courts will no doubt continue to apply the doctrine flexibly, as they have done since 1956, so as to avoid the inconvenience that a rigid separation of powers doctrine could entail. Indeed, it is possible that the High Court could overrule the Boilermakers' case, although if this occurred, it is very likely that some alternative doctrine, such as a prohibition on vesting inconsistent or incompatible judicial and non-judicial powers in the same body, would be adopted. The need for some such doctrine reflects the Constitution's treatment of judicial power as distinct in principle from executive and legislative power, and as requiring certain institutional protections to safeguard its independence. The separation of judicial power is thus an important constitutional value, especially at the federal level where decisions as to the distribution of power between the Commonwealth and the States are finally made.[6]

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5 *Report of the Advisory Committee on the Australian Judicial System to the Constitutional Commission, 1987, AGPS, Canberra, p 66.*

6 *Report of the Advisory Committee on the Australian Judicial System to the Constitutional Commission 1987, AGPS, Canberra, p 67.*

Exercise of quasi-judicial powers by Commonwealth tribunals

3.10 The Committee has adopted the view put to it in several submissions[7] - a view which is accepted by the courts[8] - that bodies which may be required by statute, or by practice, to act in a judicial manner (ie. 'as if' the body was judicial) may accurately be described as 'quasi-judicial'.

3.11 The Committee notes in this regard the discussion in Drake's case,[9] in which the Federal Court recognised that a tribunal may be given purely administrative functions by statute but be 'under a duty to act judicially, that is to say, with judicial detachment and fairness'.[10]

3.12 In his submission to the Committee, Mr RK Todd, a Deputy President of the Administrative Appeals Tribunal, explained the elements of a tribunal's duty to act judicially as follows:

- to offer each party a reasonable opportunity to be heard and to present its case (see for example s.39 AAT Act);
- to weigh the evidence or other information placed before it;
- to construe and apply the relevant law;
- to expose its reasoning processes to the parties;

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7 *See, eg, submissions from Mr RK Todd (no 10), pp 1-2; Health Insurance Commission (no 13), p 4; Justice Peterson (no 18), p 5; Mr LD Freeburn (no 30), pp 2-3.*

8 *See, eg, Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation (1926) 38 CLR 153; Shell Co of Australia Ltd v Federal Commissioner of Taxation (1930) 44 CLR 530 (HC); [1931] AC 275 (PC).*

9 *Drake v Minister of Immigration and Ethnic Affairs (1979) 2 ALD 60.*

10 *Ibid at 65.*

- to avoid bias or the appearance of bias.[11]

3.13 A number of submissions to the Committee also made a particular point of stressing the importance of the role of contemporary tribunals. The New South Wales Bar Association, for example, submitted:

> Modern Tribunals are similar to a court of law in that both must act fairly and be seen to act fairly in order properly to fulfil their social roles.[12]

The Law Council of Australia echoed this view,[13] a view which has been also expressed by the courts.

3.14 It was also submitted to the Committee, as a related point, that the tenure of appointees to tribunals has been made equivalent to judicial tenure because such appointees are expected by Parliament, and by those appearing before such tribunals, to exercise demonstrable autonomy and independence in their decisions. This independence is needed for two main reasons. First, in a large number of cases government is either the defendant (as in the case of the Administrative Appeals Tribunal) or a principal party (as in the Australian Industrial Relations Commission) to proceedings. Second, the decisions of those tribunals are not subject to review except on questions of law and may have important economic and policy implications for government.[14]

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11 *Submission no 10, p 1.*

12 *Submission no 12, p 1.*

13 *Submission no 19, pp 4-5.*

14 *See submissions from Mr RK Todd (no 10), pp 2-3; Mr AN Hall (no 6), pp 1-2.*

3.15 Particular mention should be made of the historical role of the Australian Industrial Relations Commission in any discussion on Commonwealth tribunals.

3.16 Jurisdiction under the industrial relations power of the Commonwealth (section 51(xxxv) of the Constitution) was originally vested in a Commonwealth Court of Conciliation and Arbitration in 1904. The *Boilermakers'* case in 1956 decided that a court could not exercise the wide non-judicial powers which were given to that body. Following this decision, two bodies were created, namely the Conciliation and Arbitration Commission, to exercise the arbitral and non-judicial functions under the industrial relations power, and the Industrial Court, which exercised the judicial power in this area, eg in the enforcement of awards.

3.17 A number of former judges of the Conciliation and Arbitration Court were appointed to the new Commission but retained their judicial status and title. However, that is not the only reason why the members of the former Conciliation and Arbitration Commission and now the Australian Industrial Relations Commission are given the same protection and status as judges, even though some of them do not have the title. From its inception, the arbitral function has been seen as separate from and independent of government, to the extent that until 1956 it was thought to be appropriate that it should be exercised by a court.

3.18 The powers and functions of the Commission extend not only to the prevention and settlement of individual disputes but involve decisions of major social and economic significance for the nation. Although the Parliament has imposed various limits on the jurisdiction of the Commission (and has the power to impose further limits) it has been careful to acknowledge the Commission's independence from the legislature and the Executive despite the major role which the government plays in the National Wage case in particular.

3.19 In submissions to the Committee, Presidential members of the Australian Industrial Relations Commission, and others, have stressed the importance of ensuring independence of members of the Commission because of the diverse and competing interests which are involved in hearings before the Commission, particularly in industrial disputes which might involve harsh or unfair treatment of employees, or unreasonable and unacceptable behaviour by a trade union or association. In addition, as the Committee has already noted, the Commission's decisions have both social and economic importance which makes it critical that the Commission be seen to be independent of any of the major interest groups, including government, which appear before the Commission.

3.20 The courts, to which Commonwealth tribunals are accountable through judicial review, have consistently required the independent exercise of their functions. Thus the Angliss Group case[15] laid down the principle that members of the Conciliation and Arbitration Commission were under a duty to act in a judicial manner, and that the common law principles of natural justice were applicable to the Commission, although those principles 'are not to be found in a fixed body of rules applicable inflexibly in all times and all circumstances'.[16] The High Court pointed out, however, that:

> 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.[17]

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15 *R v Commonwealth Conciliation and Arbitration Commission and Others; Ex parte the Angliss Group (1969) 122 CLR 546.*

16 *Ibid at 552.*

17 *Ibid at 553.*

Constitutional protection of judicial independence

3.21 The rationale for judicial independence has been stressed since the Act of Settlement. It results from the central function of the judiciary in determining disputed rights according to law. In the words of Sir Ninian Stephen,

> given just and equal laws, only an independent juduciary can ensure that in their impact on the citizen such laws do operate with that fairness which their text demands.
>
> The independence of the judiciary then stands guard between the individual and the potentially absolute power of the organs of the modern state.[18]

3.22 Judicial independence is secured by specific constitutional provision and by other provision The basic provision in the Constitution is section 72, which provides:

> The Justices of the High Court and of the other courts created by the Parliament -
>
> (i) Shall be appointed by the Governor-General in Council:
>
> (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:
>
> (iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

3.23 This section has been interpreted by the High Court as

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18 *'Address by his Excellency the Right Honourable Sir Ninian Stephen', (1986) 15 MULR 746, p 747.*

requiring life tenure for Federal judges,[19] but the section was altered in 1977 to provide a term of up to 70 years of age for Justices of the High Court and a term to a specified age (being not more than 70 years) for judges of other Federal courts.[20] By statute, Parliament has set the term of Family Court judges to a maximum age of 65 years.[21]

Protection of independence of appointees to Commonwealth tribunals

3.24 In addressing the question of protection of the independence and tenure of appointees to Commonwealth tribunals, the Committee has considered the form of protection provided by statute to current appointees of a number of bodies.

3.25 Tenure as a form of protection for members of quasi-judicial tribunals has three aspects:

(i) A substantial term of office, which may be to a specified age (eg 65 or 70) or for a reasonable number of years. These fixed terms may be as long as 7 years but in some cases could be less than 3 years.

(ii) Removal from office during this term is subject to processes which may range from the elaborate, such as full judicial protection (eg section 72), to that of a Minister acting alone. Usually the higher form of protection is accorded, or at least the involvement of the Governor-General is required.

(iii) Removal must be for cause. These may range from the

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19 *See, eg, Alexander v Donohue (1906) 4 CLR 781; Shell Co of Australia Ltd v Federal Commissioner of Taxation (1930) 44 CLR 530.*

20 *Constitution Alteration (Retirement of Judges) Act 1977, s2.*

21 *Family Law Act 1975, s23A.*

section 72 grounds ('proved misbehaviour or incapacity') to more specific and detailed grounds.

3.26 The question of what should be the appropriate tenure for appointees to Commonwealth tribunals was consistently raised in submissions and evidence.[22] A consistent theme also was the need for the tenure of office to be equivalent to the tenure currently provided to holders of judicial office. The view put by representatives of the legal professional bodies,[23] by present and former Presidential members and Commissioners of the Conciliation and Arbitration Commission and it successor,[24] by present tribunal heads[25] and by present and former Deputy Presidents of the Administrative Appeals Tribunal,[26] was that section 72 type tenure was essential for full-time members of important or what are characterised as 'peak' tribunals, such as the Industrial Relations Commission and the Administrative Appeals Tribunal and the Trade Practices Tribunal. This type of tenure was needed to ensure properly qualified and experienced appointees of adequate capability to carry out the work of tribunals, particularly when the tribunals are not subject to appeal, except on questions of law.[27]

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22 *See, eg, submissions from Mr AN Hall (no 6), pp 2-3; Confederation of Australian Industry (no 7), p 2; Australian Council of Trade Unions (no 16), p 7.*

23 *See, eg, submissions from New South Wales Bar Association (no 12), p 5; Law Council of Australia (no 19), p 2; Australian Society of Labour Lawyers (no 21), p 6; Law Society of South Australia (no 29), p 1.*

24 *See, eg submissions from Commissioner Sheather (no 8), pp 1-2; Justice Munro (no 11), pp 2-4; Justice Peterson (no 18), p 2; Justice Evatt (no 22), pp 2-3; Justice Polites (no 24), p 2.*

25 *See, eg, submission from Australian Broadcasting Tribunal (no 15), p 1.*

26 See, eg, submissions from Mr AN Hall (no 6), pp 2-3; Mr RK Todd (no 10), p 6.

27 *See Evidence, pp 170-2 (Mr Todd).*

'Judicial' type removal for appointees to Commonwealth tribunals

3.27 The Committee has examined the tenure presently provided for members of a number of tribunals. With the assistance of the Attorney-General's Department, the Committee has found that a large number of appointees to Commonwealth tribunals, which exercise quasi-judicial powers have section 72 type requirements for protection for the method of their removal. Following a request for an indication of such numbers at its public hearing,[28] the Department advised the Committee as follows:

> So far as we can detect, there are 154 non-judicial tribunal-type office holders who are entitled to the protection of an address *from* both *Houses of* Parliament before they can be removed for misbehaviour or incapacity.
>
> The 154 office holders who, subject to the *above qualifications*, are entitled to 'section 72 Constitution' type protection are as follows:
>
> . Administrative Appeals Tribunal members - 87
> . Industrial Relations Commission members - 47
> . Merit Protection Agency - 4
> . Ombudsman - 4
> . Federal Police Disciplinary Tribunal - 3
> . Repatriation Commission - 3
> . Security Appeals Tribunal - 3
> . Comptroller-General - 1
> . Statistician - 1
> . Public Service Commissioner - 1.[29]

3.28 In addition to the information provided by the Attorney-General's Department, the Committee has examined legislation governing other tribunals, which show that a number of other appointees have the benefit of 'section 72 type'

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28 *See Evidence, pp 266-7 (Senator Durack, Mr Skehill).*

29 *Letter from Attorney-General's Department to Committee, dated 16 August 1989, p 2.*

protection. There appears, however, to be no consistent approach, or guide to which appointees are provided 'section 72 type' tenure. Indeed a number in the above list do not exercise judicial type functions (eg the Ombudsman).

Prerequisites for independent tribunal membership

3.29 Submissions to the Committee also stressed that three basic elements of appointment are essential so as to ensure that appointees to Commonwealth tribunals, which are required to act judicially, have a necessary degree of protection of tenure to ensure independence:

- security from dismissal by the executive government
- explicit statutory protection against removal from office except for specific cause
- a minimum fixed term of appointment, desirably to a specific age.

3.30 The Committee notes that several means of ensuring protection of independence were recommended in submissions. The Law Council of Australia, for example, suggested that a 'general Act' was required to cover all appointees to tribunals, so as to ensure that tenure would be on standard conditions and would be protected in the event of abolition of a tribunal.[30] The Committee deals with this question in Chapters 4 and 5 of the report.

3.31 The Committee makes 3 points which have also been a theme of submissions to it regarding independence:

(i) Independence is not guaranteed by statutory tenure, unless tenure and other elements, such as remuneration,

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30 Submission no 19, pp 5-6.

automatically continued upon abolition of a tribunal, in the case of the non re-appointment of tribunal members;

(ii) True independence is not guaranteed by short-term appointments to tribunals; and

(iii) As independence and tenure may be of considerable importance in recruiting appointees to tribunals, particularly from areas of private legal practice, a perception that statutorily guaranteed tenure was capable of termination by the Parliament before completion of the term of appointment is undesirable.

CHAPTER 4

TERMS OF APPOINTMENT TO COMMONWEALTH TRIBUNALS

Introduction

4.1 Commonwealth tribunals are characterised by a range of periods of tenure, as well as differences between conditions of appointment and methods of removal. In the course of its inquiry, the Committee has noted important differences between the presidential members of quasi-judicial tribunals and other members.

4.2 In this chapter, the Committee discusses current statutory provisions regarding Commonwealth tribunals and what guarantees independence in decision-making, while also attracting the range of qualified, talented and experienced people that the tribunals require to ensure their effective operation. The Committee also enunciates principles that should govern the tenure of office of members of Commonwealth tribunals.

Present tenure conditions of Commonwealth tribunals

4.3 In its submission to the Committee, the Attorney-General's Department noted that the expression 'tenure of office' is sometimes used in a similar manner to the expression 'term of office'.[1] The Department also noted that, on occasions, the expression is used to denote the security with which an office is perceived to be held.[2]

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1 *Submission no 20, p 1.*

2 *Ibid, pp 1-2.*

4.4 In its submission, the Department provided the Committee with examples of Commonwealth legislation governing 'security of tenure' with which a number of offices are held. In providing the Committee with the examples, the Department put different forms of tenure into a number of categories which the Committee considers accurate and of some assistance. The categories are as follows:

(a) constitutional protection requiring an address from each House of the Parliament praying for removal on the ground of proved misbehaviour or incapacity

- applicable only to Justices of the High Court and of other courts created by the Parliament

(b) legislative protection requiring an address from each House of the Parliament praying for removal on the ground of proved misbehaviour or incapacity

- Administrative Appeals Tribunal Act 1975, s13 (non-judicial member of AAT)
- Australian Capital Territory Supreme Court Act 1933, s33D (Master)
- Australian Security Intelligence Organisation Act 1979, s49 (Security Appeals Tribunal)
- Complaints (Australian Federal Police) Act 1981 s62 (non-judicial member of Federal Police Disciplinary Tribunal)
- Industrial Relations Act 1988 s24 (presidential member - non-presidential members may also be removed for bankruptcy etc - see s28)
- Ombudsman Act 1976 s28 (Ombudsman)
- Trade Practices Act 1974 s35 (member of Trade Practices Tribunal) Note: s35 provides a

power of removal <u>unless</u> a House of the Parliament passes a resolution

- <u>Veterans' Entitlements Act 1986</u> s188 (Repatriation Commission)

(c) removal by Governor-General on prescribed grounds without an address from Parliament

- <u>Defence Force Discipline Act 1982</u> s186 (non-judicial Judge Advocate General or Deputy Judge Advocate General)

- <u>Human Rights and Equal Opportunity Commission Act 1986</u> s41 (member of Commission)

- <u>Family Law Act 1975</u> s26L (Judicial Registrar)

- <u>Copyright Act 1968</u> s144B (Copyright Tribunal)

- <u>Remuneration Tribunal Act 1973</u> s9 (Remuneration Tribunal)

- <u>Social Security (Review of Decisions) Act 1988</u> s228 (National Convenor or a senior member of the Social Security Appeals Tribunal)

- <u>Veterans' Entitlement Act 1986</u> s164 (Veteran's Review Board)

(d) to hold office during the pleasure of the Governor-General

- <u>Royal Commissions Act 1902</u> (no provision made for removal)

- <u>Magistrates Court Ordinance 1930</u> s10J (Special Magistrate)

(e) removal by Minister

- <u>Student Assistance Act 1973</u> s2 (Student Assistance Review Tribunal)[3]

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3 *Submission no 20, pp 2-3.*

4.5 A comparison of the terms of tenure for members of the principal quasi-judicial tribunals, such as the Administrative Appeals Tribunal, the Industrial Relations Commission and the Trade Practices Tribunal, shows that there are a number of different provisions affecting tenure depending on the nature, history and functions of the tribunal in question. An examination of tenure provisions also suggests that the tenure of part-time members is characterised by appointments for varying terms of years.

Issues raised by tenure

4.6 Submissions to the Committee stressed the importance of providing secure tenure to all members of tribunals, not only to those members of tribunals who are judges and who are consequently subject to removal only under the procedure required by section 72 of the Constitution.[4]

4.7 As the Committee noted in Chapter 3, the notion of 'judicial-type independence' has been accepted for a considerable period of time as a fundamental protection for members of Commonwealth tribunals, particularly within the administrative review area of the tribunal system. Principles governing such independence are:

- independence in decision making,
- attraction of properly qualified, committed and experienced persons for appointment, and
- appropriate mechanisms for the removal or suspension of members of tribunals.

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4 *See para 3.26 above and submissions referred to therein.*

Independence in decision-making

4.8 Submissions to the Committee stressed that independence in decision-making entailed two aspects: freedom from undue influence by government and other interests and freedom from retaliation by way of non re-appointment to a tribunal.[5] For example, the Administrative Review Council submitted:

> Independence in decision-making from government or administration is critical if a tribunal is to retain the confidence of applicants and of the public generally in its capacity to fairly and impartially resolve disputes. This is particularly the case where the dispute is over a government decision, where government is always a party to the dispute and where the tribunal is required on occasion to examine government policy directions when reviewing decisions.[6]

4.9 In her submission, the Chairman of the Australian Broadcasting Tribunal, Ms Deirdre O'Connor, noted:

> It is clearly necessary for persons holding office as members of quasi-judicial tribunals to have the protection of legislative provisions guaranteeing their status as such. Their duties in resolving difficult and often highly contentious questions of policy, of fact and of law demand that every effort be made to preserve their independence. This is in the interests of good administration and of the industries subject to regulation by such tribunals.[7]

4.10 The Attorney-General's Department noted that the Parliament has evinced a clear intention that decision-makers on tribunals are to be independent and are to have security of tenure, which is only to be removed in specific circumstances

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5 *See, eg, submissions from Judge Allan (no 3), pp 2-3; Mr AN Hall (no 6), p 2; Justice Peterson (no 18), pp 6-7.*

6 Submission no 28, pp 12-3.

7 Submission no 15, p 1.

and in specific ways, so as to ensure that the Parliament is fully informed of any grounds for the removal of a tribunal member because of misbehaviour or incapacity.[8]

4.11 The Department drew the Committee's attention to second reading speeches relating to legislation governing the Administrative Appeals Tribunal, the Ombudsman and the Australian Industrial Relations Commission, indicating that the aim of security of tenure is to secure proper independence of tribunal members from the executive government and to ensure that members' independence is protected.[9]

Suitability of appointees

4.12 Submissions to the Committee also emphasised the importance of ensuring that suitably qualified and experienced persons are appointed to tribunals.[10] The Administrative Review Council noted that the wide range of decisions reviewed by the administrative review tribunals, for example, make it important that tribunal membership includes both lawyers and non-lawyers, and that tribunals should desirably reflect the perspectives of both.[11]

4.13 As a related matter, submissions to the Committee suggested that it has proved extremely difficult to attract appropriately qualified people to serve on courts or tribunals, whether lawyers or non-lawyers, particularly where persons with experience and qualifications in the area of commerce and accountancy are sought. It was suggested that there were 2 reasons for this problem. First, salaries offered for such

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8 *Submission no 20, pp 3-4.*

9 *Submission no 20, pp 3-4.*

10 *See, eg, submissions from Justice Evatt (no 22), p 9; Administrative Review Council (no 28), pp 12, 14; Mr HM Selby (no 31), p 2.*

11 *Submission no 28, p 14.*

positions were often much lower than those currently available in the private sector and second, doubt has arisen as to the certainty that an appointment for a fixed term was a guarantee that a person would serve out the full term of appointment.

4.14 The Administrative Review Council submitted:

> It is possible that the need both to attract quality people and to overcome salary problems could be met by promoting use of fixed term full-time appointments to tribunals, with appropriately tailored remuneration packages. ... Serving for a fixed term appointment could be provided in addition to the present form of tenured appointments and become accepted as a worthwhile and satisfying thing to do for a relatively short period during a person's career.[12]

4.15 In his submission, Deputy President Munro of the Industrial Relations Commission observed:

> There has developed a credibility gap between manifest Parliamentary intentions as to security of tenure of certain public officers at the time of their establishment and the actual level of the security of tenure achieved.
>
> ... such disquiet must inevitably impact upon willingness to accept appointment to statutory office, and upon willingness to continue in office once appointed. More importantly, such disquiet impacts upon public perceptions of the capacity of statutory office-holders to maintain the degree of independence expected of them.[13]

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12 *Submission no 28, p 15.*

13 *Submission no 11, p 5.*

4.16 The Chairman of the Australian Broadcasting Tribunal, Ms O'Connor, submitted:

> An appointee who has left secure employment *in public administration or in private* enterprise to serve for a fixed statutory term may be seriously disadvantaged by being displaced prematurely by the abolition of a statutory body. It would be appropriate for *appointees to be given some form of security* such as a guaranteed continuation of salary until the end of their appointed term or re-employment in some other capacity for at least the balance of that term.[14]

Appropriate mechanisms for removal or suspension of members

4.17 The large number of submissions to the Committee that dealt with appropriate mechanisms for removal or suspension of tribunal members who are not judges stressed the importance appointees attach to this matter. A number of submissions noted that the conditions of appointment and tenure provided by legislation (set out in para 4.4 above) show variation amongst appointees particularly in relation to terms of office and the procedure for suspension and or removal from office.

Conclusions

4.18 The Committee is required to 'report on the principles that should govern the tenure' of holders of offices on quasi-judicial tribunals. The Committee concludes that **in order to perform their functions, quasi-judicial tribunals need to be able to attract and have appointed to them people of superior talents and integrity and to ensure that they will not be influenced in their decisions by outside or irrelevant considerations. In particular, they should not be in any way influenced by the government of the day or any alternative government.**

4.19 Further, the Committee concludes that **in order to give**

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14 *Submission no 15, pp 1-2.*

effect to these principles, the nature of the tenure must ensure the following:

(i) An adequate term of office should be provided. For the senior members of these tribunals that term is appropriately until a retiring age of 65 or 70. Other members should be appointed for a reasonable period of time (eg 7 years);

(ii) Removal from office before expiration of that term should be for cause specified in the relevant legislation;

(iii) Adequate procedures for removal must be ensured. This may be achieved by establishing a special method of removal, as occurs under section 72 of the Constitution in regard to judges. This is appropriate for senior members but a less elaborate procedure may be justified in other cases (eg one involving the Governor-General);

(iv) Where grounds for removal must be established, a proper legal process for doing so must be provided;

(v) Ministers and Members of Parliament and senior officials should not seek to bring any public or private pressure to bear on the members of tribunals, either by threats or promises. This, of course, would not exclude reasonable criticism of decisions;

(vi) Members must be provided with a reasonable opportunity for performing such work of the tribunal as fits their particular talents, so long as they are able to do so;

(vii) Members must be provided with appropriate salaries and conditions of service in order to carry out their tasks; and

(viii) Members of tribunals should themselves remain independent from party political activity. They should observe the same standard of behaviour and decorum as judges have traditionally followed.

CHAPTER 5

EFFECT ON EXISTING APPOINTEES' TENURE FOLLOWING ABOLITION OF A COMMONWEALTH TRIBUNAL

Introduction

5.1 In the course of its inquiry, the Committee examined the case of a number of tribunals which have been abolished and examined the position of incumbent members of tribunals which are abolished or restructured by the Parliament.

5.2 Submissions to the Committee expressed reservations and raised questions regarding the impact of the abolition of a tribunal on the security of tenure accorded its members. In this chapter the Committee examines this issue, and canvasses a number of possible means by which security of tenure for members of an abolished or restructured tribunal may be protected.

Abolition of a tribunal by the Parliament

5.3 The Department of Industrial Relations noted in its submission that the degree of security of tenure of members of Commonwealth quasi-judicial tribunals and other bodies, including courts created under the Territories power of the Constitution, was a matter for the Parliament. The Department submitted:

> While the Constitutional guarantees for judges and members of the Interstate Commission do not apply to such persons, Parliament nonetheless has chosen to give similar protection in legislation to members of quasi-judicial and other tribunals...
>
> Bodies which have been created by the Parliament may also be abolished by the Parliament. Parliament cannot be constrained in its discretion to constitute, reconstruct

or abolish bodies it has created.[1]

5.4 The Department went on to note the situations which might lead a government to introduce into Parliament legislation with the aim of abolishing or reconstituting a tribunal, namely:

- reconstitution for specific functions which are of fixed duration; and
- abolition of a tribunal which was created for a purpose which is no longer valid, or may have included in its enacting legislation a 'sunset' clause.[2]

5.5 The Department submitted:

> It must be open to a Government, with Parliament's agreement, to abolish or restructure any Tribunal. When this is done through the abolition of the original body and the creation of a new tribunal, there is no obligation to reappoint members of the defunct tribunal. Parliament retains the same discretion in appointing members to a reconstituted body that it has when a tribunal is created.[3]

5.6 The Department did observe, however, that while no standard rules have developed to govern tenure of appointees to quasi-judicial and other tribunals, certain general propositions appear to have been observed. These include circumstances where the holders of such offices should have a degree of security of tenure which ensures independence, both actual and perceived, from government.[4]

5.7 The Committee is concerned that a perception has developed that the Parliament may be ready to assist in the

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1 *Submission no 27, p 1.*

2 *Submission, no 27, p 1.*

3 *Submission no 27, p 2.*

4 *Submission no 27, pp 2-3.*

removal of appointees to a tribunal, by way of reconstitution of the tribunal, without proof of incapacity or misbehaviour and without any reasons being stated for the non-reappointment of an office holder. Such a perception was emphasised in the submission from Justice Michael Kirby, who noted that the capacity of the Parliament to enact legislation restructuring tribunals also implied a capacity in the Parliament to allow the executive government to remove a person from their position on a tribunal:

> [W]hat Parliament gives it may take away. And that renders the promise [of office] defeasible, effectively, at the behest of powerful interests in the Commission, the Government or the market place. In this way by failing to attend to long-standing conventions, an important pillar of the independence of a vital national tribunal has been knocked away. The Parliamentary guarantee of independence, hitherto thought to be a strong protection for such independence, has been shown in the case of Staples J to be a chimera.[5]

5.8 This concern was echoed by Deputy President Munro of the Industrial Relations Commission, who pointed out that the notion of secure tenure in a statutory office of the Commonwealth can easily be undermined if the abolition of a tribunal may bring with it the possibility of non-reappointment to a corresponding position on the tribunal's successor. He suggested that the perception may grow that acceptance of an appointment to a Commonwealth body for a fixed term, or for a term to retirement, is no guarantee of security of tenure at all.[6]

5.9 This point was also made by the Chairman of the Australian Broadcasting Tribunal, Ms Deirdre O'Connor, who noted that the appointees to Commonwealth tribunals, such as the Australian Broadcasting Tribunal, at present have no form of legal protection in the advent of the tribunal being abolished

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5 *Submission no 2, p 66.*

6 *Submission no 11, p 6.*

before the end of their term of office.[7]

Issues arising on the abolition of a tribunal

5.10 The Committee agrees that the Parliament has the power to enact and, therefore, amend and repeal legislation which makes provision for the functions, structure and membership of tribunals. However, the Parliament cannot bind succeeding Parliaments. The only method by which the Parliament's powers in this respect may be altered is by way of constitutional amendment, which would limit or restrict the Parliament's ability to enact legislation in a particular field.

5.11 Several proposals were put to the Committee during the course of its inquiry which might provide a form of protection for appointees to Commonwealth tribunals without a constitutional amendment. The proposals included:

- protection and preservation of terms and conditions of appointment of all appointees to Commonwealth tribunals by a separate Act;[8]
- continuation of rights of office of appointees on abolition or restructuring of an existing tribunal;[9] and
- formal written contracts between members of tribunals and the Commonwealth providing for tenure and other conditions for a fixed term, with appropriate compensation provision should a tribunal be abolished during the term of appointment.[10]

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7 *Submission no 15, p 1.*

8 *See, eg, submission from Law Council of Australia (no 19), p 5.*

9 *See, eg, submissions from Justice Kirby (no 2), p 57; Australian Broadcasting Tribunal (no 15), pp 1-2.*

10 *See, eg, submission from New South Wales Bar Association (no 12), p 6.*

Protection and preservation by Act

5.12 The Law Council of Australia advanced a proposal in its submission that tenure of tribunal members could be protected and preserved by a separate Act of Parliament:

> What we have in mind is a separate Act under which appointments to Commonwealth tribunals would be made. An appointment would be made under that Act to a particular tribunal, but the removal of the jurisdiction conferred on the tribunal by the special Act under which the tribunal was constituted would not affect the appointment. The member could be appointed to a new tribunal, but if he were not, he would nonetheless retain his existing appointment, and the benefits thereof. Provisions such as those referred to in para 1 [ie provisions governing removal, terms and the effect of abolition] could be enacted in the legislation dealing with appointments.
>
> If it were possible to extend the operation of such a general Act under which appointments would be made so that those appointments were, in some way, retained notwithstanding the repeal of the relevant special Act, this would provide a measure of further protection which would be most desirable. We would not go so far, however, as to suggest that appointments under the general Act should be to unspecified offices, as this would produce the undesirable result that the Executive would be able to shift appointees around from tribunal to tribunal according to the extent to which their performance was regarded as satisfactory by the Government of the day. There must be tenure of appointment to the office of member of a particular tribunal.[11]

5.13 In discussions regarding this proposal with the Committee, Mr Downes, on behalf of the Law Council of Australia, suggested that Parliament should enact

> a general Act which would not, I imagine or

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11 *Submission no 19, pp 5-6.*

> apprehend, be very specific in its terms at all but would simply say that - it might list the tribunals, it may not even be necessary to do that - persons appointed to tribunals continue to hold office and to be entitled to remuneration in accordance with their appointment, notwithstanding the repealing of the legislation which set up the tribunal under which they were appointed.

Mr Downes went on to note:

> There is an immediate answer to that; namely, that the Parliament could repeal that legislation just as readily as it could repeal the particular legislation, but there comes a point where perhaps the Parliament would pause before it executed the Act. It seemed to us that it would be a much more blatant, if I can use that word, step if the Parliament were not only to repeal the Act under which a member of a tribunal was appointed, but also to repeal a broad general Act governing the security of tenure of appointees to tribunals.
>
> That is one way, short of a constitutional amendment, that the kind of entrenchment that I have been referring to might be achieved.[12]

5.14 An enactment of the type described by the Law Council could, by amendment, be restricted in its application to particular tribunals or to particular positions.

Continuation of remuneration of office

5.15 A second proposal put to the Committee was directed at ensuring that, even after a tribunal is abolished by the repeal of legislation establishing it, members either continue in office as a matter of convention or at least are entitled to continue receiving a salary and other remuneration.[13]

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12 *Evidence, p 144.*

13 *See, eg, submission from Australian Broadcasting Tribunal (no 15), pp 1-2.*

5.16 The Attorney-General's Department and the Department of Industrial Relations, in a joint submission, advised the Committee that no uniform practice had been followed on past occasions when legislation was enacted restructuring a federal court or tribunal.[14] The Attorney-General's Department, in a separate submission, referred to the result of restructuring the jurisdiction of the Industrial Court upon the establishment of the Federal Court in 1977, when 2 judges of the Industrial Court were not appointed to the Federal Court, though they retained rights to salary remuneration guaranteed to them in their positions as judges.[15]

5.17 In this regard, the Committee has noted that it is common for legislation abolishing or restructuring tribunals, both at State and Commonwealth level, to contain provision for the continuation in office of existing appointees.[16]

Contract engagement of appointees

5.18 A further suggestion put to the Committee was that all non-judicial members of Commonwealth tribunals be offered written contracts providing security of tenure. The New South Wales Bar Association suggested that

> [b]ecause security of tenure cannot be given by legislation alone, the Bar Association suggests that serious consideration must be given to initiating a move for a Constitutional amendment to entrench security of tenure granted by statute to members of the Federal Tribunals. Such an amendment should entrench whatever security of tenure is enacted by Parliament and

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14 *Submission no 26, p 2.*

15 *Submission no 20, p 4.*

16 See, eg, legislation which restructured Western Australian Magistrates Courts (Stipendiary Magistrates Amendment Act 1979); New South Wales Magistrates Courts (Local Courts Act 1982); and Victorian Liquor Control Commission (Liquor Control Act 1987).

whether Parliament legislates for appointments until a retiring age or for a fixed term of years. It is to be hoped that all parties would support such an amendment.

In the meantime the Bar Association recommends that all non judicial members of Federal Tribunals should be offered formal written contracts on the security of tenure conferred by the statute creating their office. Such contracts would not prevent the Parliament repealing altogether the statute establishing the relevant Tribunal, or repealing and re-enacting it without ensuring that existing members are reappointed to the new Tribunal, in either case in breach of the established convention.

However such contracts would at least secure full and proper compensation for members of tribunals whose positions were abolished by statute in either of these ways.

The obligation to pay full compensation will also act as a deterrent against removal from office by repeal of the relevant statute.

Any such contract would have to be prepared in the light of the decision of the Privy Council in Reilly v The King (1934) AC 176 to ensure that a right to compensation survived abolition of the member's office by statute.[17]

5.19 The Committee canvassed this approach in its discussions with Mr Barry O'Keefe QC, on behalf of the New South Wales Bar Association, at its hearings.[18] It is fair to say that he saw it as the least desirable alternative that members whose appointment is terminated by abolition of a tribunal would at least continue to receive remuneration and salary.[19]

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17 *Submission no 12, p 5.*

18 *Evidence, pp 62-3, 90-2.*

19 *Evidence, pp 90-1.*

Conclusions

5.20 The Committee agrees that abolition of a tribunal raises an important question about the security of tenure, which may clearly affect the independence of tribunal members. The reconstitution of a court or tribunal should not be used as a means by which statutory procedures for removal can be avoided.

5.21 The Committee does not believe that the Parliament should seek to limit its sovereign power to enact or repeal legislation, including legislation for the abolition of tribunals which it has created. It does consider, however, that some principles should be borne in mind by Parliament when considering the enactment of legislation to abolish an existing quasi-judicial tribunal.

5.22 First, all members of tribunals should be re-appointed to a restructured tribunal, or a tribunal replacing an existing tribunal, unless demonstrably good reasons are given for their non-reappointment. The Committee concedes that such decisions on appointment must primarily be made by the executive government, but believes that it is a matter on which the Parliament should be assured in the course of dealing with the legislation.

5.23 Second, the Committee notes that the legislation which repealed the Conciliation and Arbitration Act 1904, namely the Industrial Relations Act 1988, could have effected its purpose of making substantial changes to the industrial relations system without actually abolishing the former Conciliation and Arbitration Commission. No major changes were in fact made to the structure of the Commission and the legislation could have just as easily provided for the continuance of the old Commission under a new name.

5.24 The Committee suggests that in drafting legislation which substantially changes the law relating to the jurisdiction of a quasi-judicial tribunal, a presumption should be adopted

that the legislation should refrain from the abolition of the tribunal.

5.25 If the Parliament does not adopt the methods suggested above for preserving the position of appointees, the Committee believes that the legislation abolishing a tribunal should provide for compensation for those members of the tribunal who have lost their positions as a result of the decision of the Parliament. The Committee does not envisage that these appointees would retain their appointments on some unattached list. They should, if possible, be found alternative positions for the balance of their term of appointment. If that is not possible, they should be entitled to reasonable compensation for their loss of office following similar principles according to which damages may be obtained for wrongful dismissal under contracts of employment.

5.26 In the light of the preceding discussion, the Committee concludes that the Parliament should not support a constitutional amendment to limit its power to abolish tribunals and the statutory offices which it has created.

5.27 The Committee recommends that the following principles should be borne in mind by the Parliament when considering the abolition of a quasi-judicial tribunal:

(i) Abolition of a tribunal should not be used to remove the holder of a quasi-judicial office unless the removal procedures applying to that office are followed;

(ii) Legislation to change the structure and jurisdiction of a quasi-judicial tribunal should, if possible, refrain from abolishing the tribunal;

(iii) When a tribunal is abolished and restructured, all existing members of the tribunal should be re-appointed to its replacement; and

(iv) When a tribunal is abolished and not replaced, compensation should be paid to the members of the tribunal who have lost their positions and for whom no alternative position can be found.

5.28 Finally, the Committee recommends that further consideration should be given to embodying these principles in an Act of Parliament.

CHAPTER 6

PARTICULAR QUESTIONS ASKED BY THE TERMS OF REFERENCE - SECTIONS 24 AND 28 OF THE INDUSTRIAL RELATIONS ACT 1988

Introduction

6.1 The Committee's terms of reference require it to report on whether the *provisions of sections* 24 and 28 of the Industrial Relations Act 1988 (hereafter section 24 and section 28) provide proper and adequate provision for the tenure of office of Presidential members and Commissioners of the Australian Industrial Relations Commission.

6.2 In its advertisement seeking submissions and in its invitation to interested persons and bodies to make submissions to the Committee, the Committee requested that submissions address the adequacy of sections 24 and 28.

6.3 The Committee received views from a number of present members of the Australian Industrial Relations Commission on the adequacy of sections 24 and 28, and views from a number of other parties, including the Confederation of Australian Industry, the Australian Council of Trade Unions, and the Law Council of Australia. Submissions on this part of the terms of reference were also received from the Commonwealth Department of Industrial Relations and the Attorney-General's Department. The Department of Industrial Relations also provided the Committee with a history of sections 24 and 28. That material is contained in Appendix III to this report.

6.4 The Committee discusses these submissions, and the provisions in sections 24 and 28, in the context of comments made and conclusions reached in Chapters 2, 4 and 5 of this report.

Section 24 of the Industrial Relations Act 1988

6.5 Section 24 of the Industrial Relations Act provides:

> The Governor-General may remove a Presidential Member from office on an address praying for removal on the grounds of proved misbehaviour or incapacity being presented to the Governor-General by both Houses of the Parliament in the same session.

6.6 Section 24 repeats in substance the provisions of sections 7(4) and 99(1)(b) of the Conciliation and Arbitration Act 1904. Section 99(1)(b), in turn, adopted the language of section 72(ii) of the Constitution. The words used in section 24 differ from those used in section 99(1)(b) of the Conciliation and Arbitration Act in some respects but section 24 does not appear to have a different intended effect.

6.7 Section 24 is one of a number of provisions attaching to the office of Presidential members of the Australian Industrial Relations Commission. Many of the privileges and immunities of members of the Federal judiciary, which the Committee has referred to in detail in Chapter 3, attach to Presidential members of the Commission.

6.8 Section 24 is in similar language to section 72 and has apparently been framed to provide similar protection. A number of submissions to the Committee noted that the terms of section 24 reflect the recommendations made in the Report of the Committee of Review on Australian Industrial Relations Law and Systems (the Hancock Report)[1] and is consistent with the history of affording section 72-type protection to members of the Australian Conciliation and Arbitration Commission. In this respect, the Department of Industrial Relations noted in its

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1 *Vol 2: Report, 1985, AGPS, Canberra; see Recommendations 22-30.*

submission to the Committee that

> [b]ehind the established procedures for the appointment and removal of judges lies the fundamental constitutional principle of judicial independence. This principle is embodied in the separation of powers under the Constitution. The judicial function is that of hearing and determining questions which arise as to the interpretation of the law cannot be impinged upon by either the executive or the and legislature. Without effective guarantees of independence for the courts, public confidence in the administration of justice could be seriously undermined.[2]

6.9 In its submission to the Committee, the Confederation of Australian Industry (CAI) commented that the degree of protection provided by section 24 to Presidential members of the Commission is somewhat less than that provided by section 72 of the Constitution. CAI's primary submission was that the only means available for alteration of this position is amendment of the Constitution. Considering that such a change was unlikely, the CAI suggested that

> [i]t may be appropriate, for example, to provide for term appointments to many federal statutory authorities, although not ... to the Commission. It would not be practical to attempt to distinguish from the point of view of such an amendment between some statutory authorities and not others.[3]

6.10 After noting that, to its knowledge, there had not been any attempt to use the removal procedures provided for in section 24 or similar provisions relating to the Conciliation and Arbitration Court or the Conciliation and Arbitration Commission, CAI submitted:

> While there would appear to be some

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2 *Submission no 26, p 6.*

3 *Submission no 7, p 3.*

> *uncertainty about the meaning of the term* 'proved misbehaviour or incapacity' used in the Industrial Relations Act 1988 and section 72 of the Constitution, there is not in our submission sufficient uncertainty to warrant further legislative clarification.
>
> CAI would not support a proposal that a procedure similar to that recommended in the Final Report of the Constitutional *Commission (recommendation 6.204, p 407)* be included in the Industrial Relations Act 1988.
>
> In our view it is desirable that the present link between section 72 of the federal Constitution relating to holders of judicial office and the provisions of the Industrial Relations Act 1988 relating to members of the Commission is retained. The arguments for tenure *for both would appear to be very* similar and there would in our view be no good reason to change one in the absence of change of the other.[4]

6.11 In its submission to the Committee, the Australian Council of Trade Unions (ACTU) said that a need clearly existed for an independent and impartial tribunal under the Industrial Relations Act *'for the prevention and settlement of interstate* industrial disputes'.[5]

6.12 The ACTU also noted that the Hancock Report had not expressed any reservations or concern about the provisions of the Conciliation and Arbitration Act with respect to tenure of office of members of the Commission.[6] The ACTU's submission stated:

> The ACTU is strongly opposed to any *weakening of the current legislative* provisions in relation to the tenure of office of Commission members. In particular we would oppose the introduction of fixed

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4 *Submission no 6, pp 3-4.*

5 *Submission no 16, p 6.*

6 *Submission no 16, p 7.*

terms of appointment.[7]

6.13 Another point raised by the ACTU submission was by way of reference to a Green Paper prepared by Professor John Niland for the New South Wales Government on industrial relations in that State.[8] The ACTU noted that several of Professor Niland's recommendations were provided for fixed term tenure for members of the New South Wales Industrial Relations Commission, rather than security of tenure from date of appointment to specific age.[9]

6.14 In this respect, the ACTU strongly supported the conclusions of another report, the Report of the Committee of Inquiry, Industrial Conciliation and Arbitration Act, 1961-1987 of Queensland[10] (the Hanger Report), which stressed that independence of members of the Commission could only properly be protected by a set retiring age so as to remove any concern about re-appointment as a factor in decisions.[11]

6.15 In his submission to the Committee, Deputy President Munro of the Industrial Relations Commission stressed that any examination of section 24 should emphasise

> principles of public policy and its enforcement rather than the legal effect of particular statutory formulations of entitlement to tenure.[12]

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7 *Submission no 16, p 7.*

8 *Transforming Industrial Relations in New South Wales - a Green Paper (Volume 1), 1989, NSW Government Printer, Sydney.*

9 *See submission no 16, pp 7-9.*

10 *1988, Queensland Government Printer, Brisbane.*

11 *Submission no 16, pp 8-9.*

12 *Submission no 11, p 1.*

6.16 He noted, however, that there was a pre-eminent justification for according an entitlement to tenure parallel to that accorded the judiciary:

> [W]hile the Commission does not exercise the judicial power of the Commonwealth it is under a duty to act judicially.[13]

It must do so in arbitral determinations in issues that are often of great social, economic and legislative importance. The Commission's awards are judicially reviewable for jurisdictional error, but are not subject to direct parliamentary control and *may prevail over inconsistent* State legislation.[14]

6.17 Deputy President Munro observed, however, that a credibility gap had developed between

> manifest Parliamentary intentions as to security of tenure of certain public officers at the time of their establishment and the actual level of security of tenure achieved.[15]

6.18 He went on to say:

> The non-appointment of Mr Justice Staples to the Industrial Relations Commission has done much to establish and broaden this credibility gap. The instance of Mr Justice Staples provides a substantive basis for disquiet that the promise of security of tenure reflected in legislation may not be realised.[16]

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13 *Submission no 11, p 4.*

14 *Submission no 11, p 4.*

15 *Submission no 11, p 5.*

16 *Submission no 11, p 5.*

6.19 This was a point that was repeated in a number of submissions to the Committee, notably from Deputy Presidents Peterson and Polites of the Industrial Relations Commission,[17] and Judge Allan of the Industrial Court of South Australia.[18]

6.20 A very different view of the role of the Industrial Relations Commission was contained in a submission by Mr RJ Ellicott QC, a former Attorney-General of the Commonwealth. Mr Ellicott expressed the view that because of the high policy content involved in the work of the Australian Industrial Relations Commission, appointments to that body should be for a term of 7 or, at the most, 10 years and should not have judge type tenure. He pointed out that the tenure of arbitration commissioners was a product of the history of the system and should no longer bind the thinking of the Parliament.[19]

Section 28 of the Industrial Relations Act 1988

6.21 Section 28 of the Industrial Relations Act provides:

> (1) The Governor-General may remove a Commissioner from office on an address praying for removal on the grounds of proved misbehaviour or incapacity being presented to the Governor-General by both Houses of the Parliament in the same session.
>
> (2) The Governor-General shall terminate the appointment of a Commissioner who:
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> (a) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit;
>
> (b) is absent from duty, except on

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17 *See submission no 24, pp 2-3.*

18 *Submission no 3, p 1.*

19 *Submission no 27, p 1.*

> leave of absence granted by the President, for 14 consecutive days or for 28 days in any 12 months; or
>
> (c) engages in paid employment outside the duties of the office in contravention of section 25.

6.22 In its submission to the Committee, the Department of Industrial Relations noted that the position of Commissioners of the predecessor of the Australian Industrial Relations Commission was substantially different from the position of Presidential members.[20]

6.23 The Committee has examined legislation governing a number of Commonwealth tribunals and notes, for example, that the provisions of section 28 are similar in several respects to section 35 of the Trade Practices Act 1974, governing membership of the Trade Practices Tribunal, and to section 13 of the Administrative Appeals Tribunal Act 1975, governing membership of the Administrative Appeals Tribunal.

6.24 Commissioner Sheather of the Australian Industrial Relations Commission noted in a submission to the Committee that, in light of the contentious and potentially difficult and conflicting area of industrial relations, which often leads to conflict between powerful and competing groups, the decisions and actions of the Commission, and in particular of Commissioners, must be independent and based on security of tenure. He said:

> Decisions and actions of the Commission can be interpreted subjectively and misrepresented by parties and the media in error or deliberately for tactical or political purposes and Commission members have a right to expect the Government to protect the integrity and independence of the Commission and its individual members from reactions based on real or misconceived perceptions of Commission work and

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20 *Submission no 26, p 6.*

decisions.[21]

6.25 Commissioner Sheather also observed that the principles governing tenure of office on the Australian Industrial Relations Commission and its predecessors

> have applied for over eighty years and have been able to cope with a variety of pressures and problems and even periods of significant dissension within the Commission without at any time placing the independence of the Commission in question.[22]

6.26 The views of the CAI and the ACTU on section 28 were the same as their views on section 24, insofar as the section exists to protect Commissioners. Section 28 sets out the protection from removal from office of Commissioners and the circumstances in which a Commissioner may forfeit office. The provisions are appropriate to the extent that they set out the circumstances which may result in removal or forfeiture and, by extension, reinforce the fundamental constitutional principle of judicial independence to the Commission.[23]

Conclusions

6.27 In Chapter 5, the Committee discusses its views on the necessity of ensuring that, if appropriate security of tenure of appointees to Commonwealth tribunals is to be provided by Act of Parliament, then appointees to tribunals should have the security of re-appointment to a new tribunal should an existing tribunal be abolished and a new one established in its place.

6.28 In assessing the adequacy of provisions of sections 24 and 28 of the <u>Industrial Relations Act</u>, the Committee has given careful attention to the views which it has set out in this

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21 *Submission no 8, p 2.*

22 *Submission no 8, p 2.*

23 *Submission no 7, pp 3-4; submission no 16, p 6.*

chapter and to the views on the more general question of the principles that should apply to the tenure of appointees to tribunals.

6.29 The Committee believes that the considerations applying to both the general principle and to the particular questions addressed in this chapter are the same, insofar as the underlying purpose of such provisions must be to ensure that persons who hold office in the positions protected by those sections are able to make decisions in the discharge of powers and responsibilities attaching to the office without fear of retribution by a dissatisfied government.

6.30 Submissions to the Committee on sections 24 and 28 have stressed that members of the Australian Industrial Relations Commission and its predecessor commissions exercise powers and functions under industrial relations legislation which affect the rights of persons or organisations and also affect important elements of the economic and social structure of Australia.

6.31 The Committee is conscious that it is the acceptance of the exercise of such powers and responsibilities, independently and without fear of retribution from government, that has and will measure the worth of the Australian Industrial Relations Commission as an effective institution. The Committee accepts that, as the Australian Industrial Relations Commission is a creature of the Parliament, the independence provided to both Presidential members and Commissioners by sections 24 and 28 of the Industrial Relations Act must be subject to the Parliament's power to abolish it and to provide for the termination of the office of members of the Commission.

6.32 In Chapter 5, the Committee has made a number of recommendations to bolster the independence of members of quasi-judicial tribunals in view of the power to abolish such tribunals. The Committee has also recommended that this power should not be limited by constitutional amendment.

6.33 Subject to those proposals, the Committee concludes that sections 24 and 28 of the Industrial Relations Act 1988 make proper and adequate provision for the tenure of office of Presidential members and Commissioners of the Australian Industrial Relations Commission.

CHAPTER 7

THE RIGHT TO PERFORM THE DUTIES OF OFFICE OF APPOINTEES TO COMMONWEALTH TRIBUNALS

Introduction

7.1 The Committee made reference in Chapter 1 to the question of whether an aspect of tenure of office of a judicial body, or of a quasi-judicial body, includes a right to be given work of a sufficient level of responsibility and importance to accord with the commission of appointment. Such a 'right' would be similar to the 'right' to receive work which has been found to exist, in certain circumstances, in contracts of employment.

The 'right' to receive work under a contract of employment

7.2 The courts in the United Kingdom and Australia have in several cases considered whether there is a right to receive work under an employee's contract of employment. If such a term does exist, it exists as either an express or an implied term of that contract. Clearly, if it is an express term, the question is easily resolved. Difficulties arise when the employee argues that such a term should be implied into the contract.

7.3 It is a long standing principle that there is no general right to work in a contract of employment.[1] The courts have, however, acknowledged that an obligation to provide work existed in 'exceptional cases' including contracts involving payment of commission, or where publicity was involved as in the

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1 *McMullen, J, 'A right to work in the contract of employment', New Law Journal, 31 August 1978, 848.*

case of actors and singers.[2]

7.4 Decisions by Lord Denning in two major English cases, Nagle v Feilden[3] and Langston v Amalgamated Union of Engineering Workers,[4] strengthened the notion in the United Kingdom that an employee had, by implication, a right to be given work when 'it was there to be done'. Referring to these decisions, Halsbury's Laws of England concludes:

> It now seems probable that all contracts of employment by implication give to the employee not merely the right to be paid his agreed wage, but also the right to have the opportunity of doing his work when it is available.[5]

7.5 In Australia, however, the situation is less settled. The most recent case in which such a right was argued was Mann v Capital Territory Health Commission.[6] In that case, Dr Mann, a salaried surgeon, argued that it was a term of his contract of employment that he be given enough work of a sufficient level of difficulty to enable him to maintain his professional competence.[7]

7.6 The matter eventually came before the Full Court of the Federal Court. The majority of the Court, Justices Fox and Kelly, found that there was neither an express nor an implied

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2 *See Collier v Sunday Referee Publishing Company Limited [1940] 2 KB 647 at 650 per Asquith J.*

3 *1 All ER 689.*

4 *[1974] 1 WLR 185.*

5 *(4th edition) 1976, Butterworth and Co (Publishers) Ltd, London, Vol 16, para 557.*

6 *Unreported decision of the ACT Supreme Court (Connor, J), at first instance; (1981) 54 FLR 23, on appeal; (1982) 148 CLR 9?, application to the High Court for special leave to appeal.*

7 *In the ACT Supreme Court, Dr Mann actually argued that it was an express term of his contract, arising out of pre-contractual negotiations.*

contractual term to the effect alleged by Dr Mann. In rejecting Dr Mann's claim in relation to the implied term, their Honours accepted (citing cases involving actors and producers) that, in certain circumstances, it may be correct to imply such a term. Their Honours also referred to the decision by Lord Denning in Langston, citing his Lordship's statement that an employer was obliged to provide a skilled employee with work. However, their Honours found that there was no duty 'as absolute as that relied on [by Dr Mann]'.[8]

7.7 The Committee has neither found nor been directed to any other useful authorities on this point. In any event, the Committee is not greatly assisted by the cases referred to above because, as the Committee notes,

> a judge holds office by Royal appointment and not by contract.[9]

It is useful at this point to consider the nature of appointments to Commonwealth tribunals.

Appointments to Commonwealth tribunals

7.8 Appointments to a number of Commonwealth tribunals, including the Australian Industrial Relations Commission and the Administrative Appeals Tribunal, are made by Commission passed under the Great Seal of Australia and given under the sign manual of the Governor-General. This form of Commission differs from other methods of appointment, such as by Executive Council Minute, although it is similar to that used for appointments to the High Court and the Federal Court and is similar to Letters Patent used by the Crown in the United Kingdom to establish Patent Offices. Lower level statutory office holders are appointed by Executive Council Minute, or by Ministerial approval

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8 *[1981] 54 FLR 23 at 30.*

9 *Terrell v Secretary of State for the Colonies [1953] 2 QB 482 at 499 per Lord Goddard CJ.*

followed by notification in the Commonwealth Gazette.

7.9 Several submissions to the Committee suggested that an aspect of appointments by Commission to a position was that any decision by a principal or presiding officer of a tribunal to make arrangements without the consent of the person appointed to a position on a tribunal, which had the effect of reducing the work available to that person, affected the standing and reputation of the office holder and was an unacceptable diminution of the terms of a person's commission of appointment as well as his or her reputation, standing and status.[10]

7.10 The Committee believes that this issue is one of concern, in view of the possibility of a conflict between the wide discretionary power given to a number of presiding officers of Commonwealth tribunals to arrange and order the business of the tribunals over which they preside, and the possibility of a decision by a tribunal president which has the effect of excluding an appointee from exercising all, or some, of the functions and duties that might be reasonably expected as being appurtenant to the office he or she holds.

The position of the president of a Commonwealth tribunal

7.11 The Committee accepts that a power should be granted to the principal officer or president of a Commonwealth tribunal to allocate business so as to ensure the efficient disposal of the work of the tribunal and the equitable and efficient distribution of the tribunal's workload in order to ensure the proper administration of tribunals. The Committee has no reason to doubt that, in the majority of cases, presidents of tribunals exercise this discretion in the interests of efficient discharge of business of the tribunal and the convenience of the parties that appear before it.

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10 *See, eg, submissions from former Justice Staples (no 1), p 155; Justice Kirby (no 2), pp 58-9.*

7.12 One aspect of the proper exercise of such a discretion should be a consideration of the particular experience, skills and interests of tribunal members. The Committee heard evidence to the effect that this task can occasionally be extremely difficult for a tribunal president, given the perceptions of tribunal members themselves as the their individual abilities and requirements.[11]

Right to receive work in the position of an appointee to a Commonwealth tribunal

7.13 Questions were raised in several submissions to the Committee that a decision by a tribunal president not to allocate work to a member of a tribunal could be construed as contrary to the terms of the commission of appointment of tribunal member.[12]

7.14 The question that has been raised by the existence and the possible methods of exercise of such a power is whether true judicial independence is affected by such a power. Professor Shetreet, in his article 'The limits of judicial accountability: A hard look at the Judicial Officers Act 1986',[13] notes:

> Judicial independence has a number of aspects which should be expressly mentioned. The independence of the individual judge refers to his personal independence (that is, his personal security of tenure in terms of service), as well as to his substantive independence (that is, in the discharge of his official function). In addition to the independence of the individual judge there is also the collective independence of the judiciary as a whole. This aspect is sometimes referred to as the corporate or

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11 *See Evidence, p 194 (Justice Evatt).*

12 *See, eg, submissions from former Justice Staples (no 1), p 155; Justice Kirby (no 2), pp 58-9.*

13 *(1987) 10 UNSWLJ 4.*

> institutional independence of the judiciary.[14]

And of particular relevance:

> Another significant aspect of judicial independence is the internal independence of the judge, which refers to his independence vis-a-vis his judicial superiors and colleagues.[15]

7.15 Professor Shetreet suggests in this article that this aspect of judicial independence has not attracted sufficient attention. However, he goes on to note that 'the modern concept of judicial independence', as set out in recent legal literature, judicial decisions and international standards, recognises this dichotomy.[16]

7.16 In his evidence to the Committee regarding the allocation of work by a tribunal president, Mr Barry O'Keefe QC of the New South Wales Bar Association told the Committee that he did not regard the right to receive work as an aspect of tenure. When asked what remedy a member of a tribunal deprived of work might pursue, he said:

> There are really two principal roads you can take. You may take the road of defining in a statute what are the powers and obligations of a senior judge, or president or whatever he may be, in the allocation of work. Or you may, without doing that, have a set of guidelines. That is one road. The other road is the flexible road, that is the allocation of work is within the discretion of that senior judge or person. Coming back to the first road: if you have it in a statute, one of the problems we see is that these sorts of statutes tend to arise out of a given instance, be it the Staples case or

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14 *Shetreet, S, 'The limits of judicial accountability: A hard look at the Judicial Officers Act 1986' (1987) 10 UNSWLJ 4, p 7.*

15 *Ibid.*

16 *Ibid.*

> some other like case, and so the draftsman, and the Parliament as a consequence, tends to concentrate on the circumstances of that case. It is very difficult to see, in advance, the whole range of factors that may operate. The statute binds you in a way that is, we think, undesirable.[17]

Mr O'Keefe went on to say:

> A power is given by a statute in accordance with the terms of the statute. You would normally read any power so given as being designed to effectuate the purposes of the legislation, and you would impute to the Parliament such an intention in enacting it.[18]

Mr O'Keefe suggested:

> If somebody were to bring to bear considerations that were outside the ambit of the statute then, in terms of the decided cases, you are bringing to bear a matter that is extraneous and the exercise of the discretion is vitiated.[19]

7.17 By comparison, Justice Elizabeth Evatt told the Committee of her experience as the Chief Judge of a Commonwealth court:

> The head of a court or tribunal may face situations where the head thinks that in the public interest a particular person should not for a short time or for a longer time be sitting. That can happen; it has happened; and it can happen again. The way that is dealt with now, normally, is that by discussions between the head of the tribunal and the member concerned, perhaps with other

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17 *Evidence, pp 68-9.*

18 *Evidence, p 68.*

19 *Evidence, p 68.*

> people joining in - friends or relatives of the judicial officer concerned - probably a consensus or an agreement would be reached. The person would stand down by agreement. If he did not, the head of the tribunal would be faced with making a decision about suspending that person in the public interest; in other words, he may make the decision not to allow him to sit, taking the view that the public interest was better served that way. I am sure that does happen and can happen. But you see that this is a very great power that is vested in the head of the tribunal. I have talked about cases where that power is exercised, perhaps after consultation and discussion, maybe even with the Attorney-General and others concerned. It is exercised in a responsible way in the interests of the community, but you can immediately turn that around and ask what, if the power is there, there is to prevent it from being exercised in an arbitrary way. It is the same power. What is there to control the exercise of that power if you have someone who is the head of the tribunal who takes a strong dislike to or has certain strong views about a person or who even himself or, dare I say it, herself, is verging on a state of incapacity? What is there to control that arbitrary power? There *is nothing at all to control it.*[20]

7.18 The emphasis in these comments, and in others received by the Committee, is that discussion or consultation with a tribunal member was the most sensible and constructive method of resolving difficulties with individual members. The exceptions are cases where a tribunal member is mentally incapable.

7.19 In his evidence, former Justice Staples noted that the law had developed means for dealing with difficult, incompetent or incapable tribunal members:

> What I do know is that I have seen judges who have got too old for the job, or suffered health problems mentally and otherwise; I have seen judges who have been affected overly by alcohol; I have seen

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20 *Evidence, pp 194-5.*

> judges who have simply become quite eccentric in their behaviour and unpredictable in their behaviour. I have seen judges who have been fierce and intemperate in their sentencing of prisoners, offensive in the way in which they impose sentences. I have seen other judges who have been inclined to shirk work and go home early. I have seen judges who have rushed cases through. I have seen all manner of judicial misconduct. But, if I might speak on behalf of my calling, we have ways of managing those problems. It is fixed, it is handled. The problems are handled by discussion, they are handled by hints and suggestions, by relisting cases, by fresh appointments - there are a manner of ways of coping with problems that arise. But in my case it was different, because mine was an outright intellectual conflict and the problem of coping with a position of tension, if you like, that arose as a result of an intellectual conflict meant that we had to resort to the law - 'Overrule him on appeal'. The court provides appeal courts to overrule judges.[21]

Possible public policy grounds for making a 'right' to receive work an aspect of tenure of appointees to Commonwealth tribunals

7.20 In Chapter 8 the Committee discusses its concerns regarding the method by which the President of the Industrial Relations Commission, Justice Maddern, exercised certain discretionary powers under the Conciliation and Arbitration Act 1904 in not allocating work to former Justice Staples in accordance with the normal expectations of the duties of a Deputy President of the Conciliation and Arbitration Commission.

7.21 The Committee does not consider that it should resolve the arguments as to whether the exercise of those powers is subject to examination by the courts. Some witnesses suggested to the Committee that they are.[22]

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21 *Evidence, pp 49-50.*

22 *See, eg, Evidence, pp 68-9 (Mr O'Keefe QC); pp 196-7 (Justice Evatt).*

7.22 The Committee has referred earlier in this chapter to the question of whether the withdrawal of work from a properly appointed tribunal member might involve an unacceptable diminution of the terms of the appointment of tribunal members; what Professor Shetreet has described as the 'freezing out' of members of courts and tribunals or the de facto suspension of them from normal or expected work.

7.23 The Committee believes that a division of the powers of government between the legislature, the executive and the judiciary is fundamental to a free and democratic society. A happy balance between these three arms is necessary for a just and benign community. the legislature and the executive must be kept from bringing undue influence to bear on the judiciary. Individual members of the judiciary must also be guaranteed freedom from unwarranted peer pressure. A chief judge or the president of a tribunal like the Industrial Relations Commission is a first among equals. He or she must not intrude into an area properly the province of another tribunal members.

7.24 The happy balance between the three arms of government is disturbed when one usurps a function of another. The appointment of officers to a court or like body is a matter for the executive. The judicial arm should not attempt to countermand it. Once a person is properly appointed to a judicial or quasi-judicial body, he or she must be allowed to carry out the duties pertaining to it. The administrative head can identify the work the person is to do but must allocate a proper proportion to him or her.

7.25 The Committee considers that a member of a tribunal who is deprived of work is entitled to receive reasons from the president of the tribunal for such a decision. If the member does not accept the decision or the reasons for it, he or she should, in the first place, try to resolve the dispute with the tribunal president. This would almost certainly involve discussions with

other members of the tribunal and is likely to be the most productive way of solving the problem. Although resort to the Minister responsible for the tribunal (probably the Attorney-General) may be undesirable in the early stages of a dispute, it is a justifiable exercise of his or her ministerial responsibility to be consulted, as the question of suspension or removal could well arise.

7.26 The Committee concludes that it is in the interests of sound administration of tribunals with a large and varied workload that a tribunal president have the power to allocate work. The only interference with that power should be for an aggrieved tribunal member to approach an appropriate court to test the extent of such a power. However, in the Committee's view, the Parliament should not express the power in such wide terms as to include a power to suspend a tribunal member de facto.

7.27 It was suggested to the Committee that an independent tribunal should be set up to deal with complaints against members of quasi-judicial tribunals.[23] These proposals are along the same lines as those that have been made elsewhere for an independent tribunal to deal with complaints against the judiciary.

7.28 In Australia, the only precedent for this type of tribunal is the Conduct Division of the Judicial Commission, set up in New South Wales under the Judicial Officers' Act 1986. However, in the United States there are many precedents for the establishment of such tribunals. On the other hand no such tribunal has been established in the United Kingdom.[24]

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23 *See, eg, submissions from Justice Evatt (no 22), pp 6-7; Mr HM Selby (no 31), p 3.*

24 *See, generally, Mahoney, J, 'Procedures for dealing with complaints concerning judges', in The Accountability of the Australian Judiciary: Procedures for dealing with complaints concerning judicial officers, 1989, Australian Institute of Judicial Administration Incorporated, Carlton South, pp 1-6.*

7.29 Proposals for such a tribunal in Australia have usually been related to the question of establishing the facts which could justify the removal of a judge. They are designed to overcome a problem which, for example, emerged in the Commonwealth Parliament as a result of allegations against Mr Justice Murphy, and which ultimately resulted in the setting up of a Parliamentary Commission to ascertain whether there were facts to justify Justice Murphy's removal from the High Court bench.

7.30 The submissions which have been made to the Committee are themselves more concerned about establishing whether or not there are grounds for removal of a member of a tribunal rather than determining what may be called disciplinary measures short of removal. The latter role is a strong feature of the bodies in the United States and such disciplinary action, short of removal, may also arise under the New South Wales Act.[25]

7.31 In this chapter the Committee is dealing with a somewhat different issue, which emerges from the case of former Justice Staples. Nevertheless, if such a body had been in existence it may have given former Justice Staples some avenue of redress. If similar disputes arose between a member of a tribunal and its presiding officer, such a body may be able to resolve it. However, the Committee believes the informal processes are the best way of solving these problems and appear to have been successful in all other cases that have arisen in Australia, except that of former Justice Staples.

7.32 To establish a new tribunal for that reason alone seems to be a classic example of a hard case making bad law. If the informal process does not succeed, as it clearly did not in the case of former Justice Staples, at least some of the questions at issue could be resolved by the ordinary judicial process, eg the ambit of a president's statutory power to allocate work.

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25 *See Judicial Officers Act 1986, s40.*

7.33 The Committee expresses no view about the desirability of a new standing tribunal to determine the facts and to give advice to the Parliament as part of the process of removal of a tribunal member for cause.

7.34 It is firmly of the view that there is no need for a new body to be established in the nature of a complaints tribunal or one which could mediate between members of a tribunal and its presiding officer.

Conclusions

7.35 In the light of the preceding discussion, the Committee concludes that a tribunal president should have the power to allocate work and the only interference with that power should be the right of an aggrieved tribunal member to approach an appropriate court to test the ambit of such power. The Committee does not believe the power to allocate work should be used to effect the <u>de facto</u> suspension of a member of a tribunal.

7.36 Further, the Committee concludes that a member of a tribunal who is deprived of work is entitled to receive reasons from the president of the tribunal for such a decision. If the member does not accept the decision, or the reasons for it, he or she should, in the first place, try to resolve the dispute with the tribunal president.

7.37 Finally, the Committee concludes that there is no need for a new body to be established to deal with complaints against tribunal members, nor one which could mediate between members of a tribunal and its presiding officer.

CHAPTER 8

MATTERS RELATING TO FORMER JUSTICE STAPLES

Introduction

8.1 In the course of its inquiry, the Committee formed the view that a number of matters regarding the case of former Justice Staples raised issues of direct relevance to its inquiry. In particular, the Committee was concerned by the course of events leading to decisions by successive Presidents of the Conciliation and Arbitration Commission which, in the end, amounted to the effective removal of former Justice Staples from day-to-day work as a Deputy President of the Conciliation and Arbitration Commission.

8.2 In this chapter, the Committee gives a brief account of the history of these matters, taken largely from the evidence and submissions of former Justice Staples, but does not canvass the reasons for, or the merits of, the decisions made with respect to him by either Sir John Moore or by Justice Maddern. Such consideration is outside the Committee's terms of reference. The Committee believes, however, that the Parliament should be aware of the course of events leading up to those decisions and of the attempts made by the Committee to discover why the decisions were made.

The restriction of work to former Justice Staples

8.3 On 1 March 1989, in the House of Representatives, the Prime Minister answered a question from Mr Charles, the Member for Isaacs, seeking an explanation as to why the Government did not appoint former Justice Staples to the new Industrial Relations Commission. The Prime Minister advanced 4 facts by way

of explanation of the Government's decision, the first of which was:

> Mr Staples had done little useful work for nearly a decade. Mr Staples only sat on the occasional Full Bench between 1980 and 1986. ... Since 1986 he has not been given any work at all.[1]

8.4 Although the Committee accepts these facts, it notes that no explanation was offered by the Prime Minister as to why this situation had occurred. The following paragraphs set out what the Committee understands to be the background to the situation.

8.5 On 17 March 1980, former Justice Staples gave an address to the South Australian Industrial Relations Society, in the course of which he made various observations about the industrial relations system. As the speech was significant in relation to subsequent events, it is reproduced as Appendix IV to this report.

8.6 On 8 April 1980, following this speech, 8 Deputy Presidents of the Conciliation and Arbitration Commission wrote to Sir John Moore. The letter was in the following terms:

> Some of us have personally expressed to you our concern over the speech given by Mr Justice Staples at Adelaide on 17 March 1980. But whatever may have been the reasons for the speech it was an unprecedented breach of a fundamental convention and threatens the appeal structure of the Commission and the standing of Full Bench decisions. We wish you to know that we are aware of the heavy burden that has been imposed on you and we wish to assure you of our support and loyalty.[2]

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1 *House of Representatives, Hansard, 1 March 1989, pp 211-2.*

2 *Reproduced in submission of former Justice Staples (no 1), p 124.*

8.7 On 1 May 1980, Sir John Moore advised former Justice Staples that, because of recent appointments, he intended to reallocate the various industry panels on the Commission and former Justice Staples would have no panel of industries assigned to him. Such an assignment was normally regarded as an incident of the office of a Deputy President. Former Justice Staples was informed, however, that he would be invited to sit on the Full Bench of the Commission.

8.8 In the year after Sir John Moore's decision, former Justice Staples sat for 85 days. In the second year, he sat for 22 days. In all, he sat on 50 appeals in the 5 years between 1980 and 1985. His participation in Full Benches of the Commission diminished, and terminated when Justice Barry Maddern became President of the Conciliation and Arbitration Commission on 16 December 1985.

8.9 In his discussions with the Committee regarding these matters, former Justice Staples told the Committee that, following his decision in the Telecom case,[3]

> [t]he Government then decided I had to go. ... They went to Sir John Moore and said, 'We want him to go to the Law Reform Commission'. I refused to go ... So a nice little conspiracy was put under way to create a letter rejecting the speech I made in Adelaide. It was a round robin. Everyone signed, including Justice Gaudron, as she then was and as she now is. It was signed on 8 April.
>
> Nothing had been said to me at this stage except by Sir John Moore when I refused to go to the Law Reform Commission. On 1 May, for the first time, I was shown that letter. Sir John Moore handed it to me and said, 'You have lost the confidence of your colleagues. I am going to take you off single judge work'.[4]

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3 *C No 697 of 1979; Print E 252.*

4 *Evidence, p 45-6.*

8.10 Justice Gaudron, then a Deputy President of the Conciliation and Arbitration Commission and a signatory to the letter, later dissociated herself from the use that had been made of the letter. She did so in a letter of resignation from the Commission, which said, in part:

> I do not resile from that position [ie the disapproval of former Justice Staples' speech which was expressed in the letter]. However, I do not believe that the disapproval expressed either was or should have been a factor relevant to your decision to deprive Mr Justice Staples of panel responsibilities.
>
> With the benefit of hindsight, I now suspect that some of my colleagues may have foreseen the use which would be made of our expression of disapproval, a use not intended by me. Accordingly, I feel no longer able to maintain an association with you, them or the commission.
>
> I have therefore forwarded my resignation to the Governor-General to take effect from 31 May 1980. I have selected the date so as to permit the delivery of certain decisions which I have reserved.[5]

8.11 Former Justice Staples was asked by the Committee what contact he had with Sir John Moore regarding his apparent removal from normal Deputy President duties. The Committee was told that:

> I spoke with him [Sir John Moore] on three occasions. The first was when he told me that the Government wanted me to leave the Commission and go to the Law Reform Commission. That was on 10 March when he said, 'The Government wants you to go to the Law Reform Commission'. The second time was on 1 May when he said, 'You have lost the confidence of your colleagues and here is their letter'. They are two of the three conversations. The other one that I had with

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5 *Reproduced in Age, 6 May 1980, p 1.*

Sir John Moore is here.[6]

8.12 From his appointment in 1985, the new President of the Commission, Justice Maddern, did not allocate any work to former Justice Staples. Former Justice Staples told the Committee that Justice Maddern did not explain to him why he was not allocated work. Former Justice Staples told the Committee:

> Not on one single occasion, after 16 December 1985 when Mr Justice Maddern was appointed president did he write to me, ring me, endeavour to contact me, or to speak with me to my knowledge. ...
>
> **CHAIRMAN** - There was never any attempt by Maddern to tell you why you were not getting any cases?
>
> **Mr Justice Staples** - Never. I wrote to Mr Justice Maddern on 8 August 1986 in which I asked for him to give me a panel. He never acknowledged receipt of that letter. Indeed, he told journalists and members of the Commission, so it has been put to me, that he never got the letter.[7]

8.13 Former Justice Staples supplied the Committee with photocopies of a courier receipt which, he said, related to the delivery of the letter to the Conciliation and Arbitration Commission's registry in Darwin, where Justice Maddern was sitting at the time.[8]

8.14 Former Justice Staples also offered the following observation:

> What people know is that the President, Mr Justice Maddern, exercised, as far as we know outwardly, capriciously and without

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6 *Evidence, p 46.*

7 *Evidence, pp 27-8.*

8 *Evidence, p 28; see also submission from former Justice Staples (no 1), pp 175-6.*

> justification, an enormous power which cancelled the commission of the Governor-General, and the Government of the day took no steps to overcome it.[9]

The Committee's correspondence with Sir John Moore and Justice Maddern

8.15 The Committee was greatly concerned by these assertions. As a result, on 9 August 1989, the Committee wrote to both Sir John Moore and to Justice Maddern, forwarding a copy of the transcript of the hearing on 31 July with former Justice Staples and asking for their comments on the allegations made, as they could possibly be taken to reflect adversely on them in their capacity as former Presidents of the Conciliation and Arbitration Commission.

8.16 The Committee advised both Sir John Moore and Justice Maddern that it believed its inquiry would be assisted by the presentation of their considered views on former Justice Staples' statements and comments, and suggested that those views may best be made by way of personal appearance before the Committee, either in public or private session.

8.17 On 16 August 1989, Sir John Moore contacted the Secretary to the Committee by telephone to advise that he declined the Committee's invitation to make a submission to the Committee. He also advised that anything he might be able to contribute to the Committee's inquiry would, in his view, fall outside the Committee's terms of reference.

8.18 By letter dated 15 August 1989 to the Committee Chairman, Justice Maddern stated that he declined the Committee's invitation to appear before it. He suggested that the terms of reference, on his reading, did not cover 'the administration of the then Australian Conciliation and Arbitration Commission

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9 *Evidence, p 57.*

(AC&AC) or [his] capacity as President of that Commission'.[10] Justice Maddern further stated:

> Also, 'I would indicate that I have strenously resisted becoming involved in debate about the matters referred to in the pages of the transcript to which your letter refers. My sole concern has been to allow the Australian Industrial Relations Commission (AIRC) and its Members to conduct their business effectively without being distracted by or becoming drawn into public controversy. Further, except in so far as it is provided for in the Constitution, term of office is a matter for the Parliament.[11]

8.19 As an appendix to his letter, Justice Maddern attached copies of all correspondence, amounting to some 600 pages constituted exclusively of memoranda and circulars to all members of the Commission, which passed between his office and former Justice Staples from the time of his appointment as President of the Conciliation and Arbitration Commission on 17 December 1985, until 1 March 1989, when the Industrial Relations Commission was established. Also attached to Justice Maddern's letter were statutory declarations sworn by 2 members of his personal staff to the effect that no correspondence other than that provided to the Committee had passed between his office and former Justice Staples.

8.20 The Committee was surprised to receive this material, though the Committee noted that former Justice Staples' letter to Justice Maddern of 8 August 1986 was not included or referred to in the material provided by Justice Maddern. The Committee notes that, in providing the material, Justice Maddern appears to be stressing the point that he did not have any contact with former Justice Staples from the time of his appointment as President.

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10 *Letter to Committee Chairman dated 15 August 1989.*

11 *Letter to Committee Chairman dated 15 August 1989.*

8.21 After considering Justice Maddern's letter and the attached material, the Committee wrote again to Justice Maddern on 31 August 1989. The Committee acknowledged, with some disappointment, Justice Maddern's advice that he was not prepared to address it on the matters raised during the Committee's hearing on 31 July by former Justice Staples.

8.22 The Committee noted Justice Maddern's advice, in the final paragraph of his letter of 15 August 1989, that

> all [his] actions in relation to the former Mr Justice Staples were in accordance with [his] responsibilities, consistent with the objects of the Conciliation and Arbitration Act 1904, and in particular in accordance with sections 17 and 23 of that Act.

8.23 In view of this comment, the Committee sought Justice Maddern's written views on 2 matters:

> The first is what, in your opinion, are the responsibilities of the presiding officer of a Commonwealth tribunal in allocating work to tribunal members under his or her discretion?
>
> The second and more specific matter relates to sections 17 and 23 of the Conciliation and Arbitration Act. In exercising the statutory power to constitute Full Benches of the Commission under section 17, what did you regard as your responsibilities in selecting presidential members of the Commission to make up a Bench? Was there, for example, any tradition that all presidential members should be entitled to sit on these from time to time. In respect of section 23 of the Act, what did you regard as your responsibilities in selecting a presidential member to head an industry panel?[12]

8.24 Having regard to Justice Maddern's view regarding the Committee's terms of reference, the Committee also expressed the

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12 *Letter from Committee to Justice Maddern, dated 31 August 1989.*

view that he might choose to address its questions in general terms rather than in the context of his dealings with former Justice Staples. The Committee emphasised in its letter that it would welcome comments in relation to Justice Maddern's dealings with former Justice Staples if he wished to make such comment or if he believed they could assist the Committee.

8.25 By letter dated 4 October 1989, Justice Maddern replied to the Committee's letter and advised, inter alia, that:

> As I said in my earlier letter I have no wish to involve this Commission in debate on matters raised by the former Justice Staples but I am willing to assist the Committee in a general consideration of the duties of presiding officers and in this connection I advise as follows:
>
> In exercising my duties to constitute Full Benches of the Commission, in establishing industry panels, and generally allocating work within the Commission I am, of course, bound to meet the many statutory and administrative responsibilities involved in the Industrial Relations Act 1988; not the least of which are the objects of the Act.
>
> In addition, I find it necessary and desirable to take into account a number of factors such as:
>
> - the particular requirements of an industry or group of industries and/or the nature of the matter before the Commission;
> - the efficient and effective use of the Commission's resources which includes questions relating to the work available and the workload of members individually and in panels;
> - questions relating to the experience of members to perform particular tasks having regard to the nature of panel responsibilities and the nature of the particular matters before the Commission;
> - the expressed wishes and interests of both presidential members and

Commissioner;

- the background of the member concerned having regard to the matters to be dealt with;
- the relationship of members of the Commission with each other;
- decisions of the High Court.

Conclusions

8.26 The Committee intended that its enquiries of Sir John Moore and Justice Maddern, regarding the apparent removal of former Justice Staples from an active role on the Conciliation and Arbitration Commission, would enable it to examine how the powers provided by the Conciliation and Arbitration Act 1904 had been interpreted in the case of former Justice Staples.

8.27 The Committee has given Sir John Moore and Justice Maddern an opportunity to provide the Committee with some assistance as to the basis of the exercise of their power to allocate the work of the Commission to include the removal of work.

8.28 Sir John Moore has chosen not to do so. Justice Maddern has provided the Committee with a broad statement of the general areas of consideration that he regarded as relevant to his decision, without advising the Committee in what areas he saw this as relevant to the removal of former Justice Staples from active work.

8.29 On the evidence before the Committee, former Justice Staples was at all times prepared to carry out the duties of his office but was prevented from doing so by decisions of the President of the day.

8.30 In view of the fact that it has not conducted an inquiry into the Staples case, the Committee believes that it

would be unjustified for it to form an opinion on several of the matters asserted by former Justice Staples.

8.31 It appears that, on the basis of the letter from his colleagues quoted in paragraph 8.6 above, Sir John Moore told former Justice Staples, when he handed him the letter, that he had 'lost the confidence of his colleagues'. Apart from this, no other reasons were ever given for the decisions of Sir John Moore and Justice Maddern from 1980 onwards.

8.32 No evidence has been given to the Committee that former Justice Staples was guilty of any misbehaviour or suffered any incapacity which would have justified his dismissal.

8.33 The Committee is surprised and mystified by the fact that, from 1980, no serious attempts appear to have been made by former Justice Staples, Sir John Moore or Justice Maddern to resolve the problem. After the appointment of Justice Maddern, it seems that there was no attempt to discuss the matter, apart from the letter written in August 1986 by former Justice Staples to Justice Maddern. It appears that this letter was not received by Justice Maddern, but former Justice Staples did not follow it up.

8.34 In the light of the foregoing, the Committee is unable to reach any conclusion on the relationship which developed between former Justice Staples, on the one hand, and Sir John Moore and Justice Maddern, respectively, on the other. In failing to reach a conclusion on this question, the Committee regrets that it received no assistance on this matter from Sir John Moore or Justice Maddern.

8.35 The Committee concludes that it should not inquire further into the reasons why decisions were made to remove former Justice Staples from active work. To do so would require a full-scale inquiry into the Staples case, which is clearly outside the Committee's terms of reference.

8.36 In view of the foregoing and following the Committee's recommendations in paragraph 5.27, the Committee recommends that **the Government should establish an inquiry to determine the issue of compensation for former Justice Staples in view of his non re-appointment to the Australian Industrial Relations Commission.**

Senator the Hon PD Durack QC
Deputy Chairman

DISSENT BY SENATOR AULICH

DISSENT FROM RECOMMENDATION CONTAINED IN PARAGRAPH 8.27 OF MAJORITY REPORT

TA1 In recommending that the Government should establish an inquiry to determine the issue of compensation for former Justice Staples, the Joint Committee has gone beyond its terms of reference and is in direct opposition to the specific wishes of the Senate.

TA2 On 28 February 1989, the Senate rejected a motion by Senator Haines which called for an enquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the question of 'whether any action should be taken to appoint Mr Justice Staples to a position on the Industrial Relations Commission'. Further, Senator Haines' motion required the Senate Committee to report on 'whether any charge of misbehaviour or incapacity within the meanings of the Act has been made against Mr Justice Staples, a deputy president of the Conciliation and Arbitration Commission and if such a charge would be made out to the satisfaction of the Committee'. Senaor Haines' motion was defeated 57 votes to 8.

TA3 Instead the Senate voted on the motion of Senator Hill to support a joint select committee to conduct an inquiry into the tenure of appointees to Commonwealth tribunals, the terms of which specifically omitted to mention the situation of former Justice Staples.

TA4 The terms of reference given to the Joint Select Committee cover an issue that is of vital importance to the proper functioning of independent tribunals and the judiciary.

TA5 The issue is a vexed one. How do we ensure that, for example, judges are not subjected to political pressure but perform their roles with competence and fairness? Who should act if individual judges fall below an accepted standard? What sanctions are available if a judge ignores requests for improved performance? Should all tribunals be totally independent of Government policy? Issues such as these have been addressed adequately by the Joint Select Committee.

TA6 However, it has been unfortunate that the Joint Select Committee's inquiry has been dubbed 'the Staples Inquiry', to the detriment of a proper public debate about the important issues described in the Joint Select Committee's terms of reference.

TA7 I am opposed in principle to the Parliament becoming a de facto court of law in a case where the aggrieved individual, namely former Justice Staples, has taken no steps to seek redress in the civil courts.

TA8 The Parliament cannot be judge and jury. There is neither constitutional justification nor an established procedure for it to do so with fairness and equity. To do so would involve the Parliament in a breach of the accepted constitutional doctrine of the separation of powers. A basically political forum such as the Parliament has no role to play in the judicial process where long established rules such as the rules of evidence have evolved to protect the rights of all those who are compelled to appear.

TA9 I am opposed to the Committee's recommendation for another inquiry on the grounds that Parliamentary enquiries of a semi-judicial nature have increasingly proved to be a bonanza for lawyers yet can be conducted outside the normal judicial rules of evidence that apply in the court system.

TA10 For example, evidence given to Senate Estimates Committee E in 1989 indicated that counsel fees in relation to one matter alone before the Senate Privileges Committee amounted to a total of $160,409.30. In that particular hearing, the Privileges Committee concluded that there was no case to answer.

TA11 The Joint Select Committee did not call tribunal chairmen Moore and Maddern before it to refute claims made by former Justice Staples. I therefore feel unable to judge the degree to which former Justice Staples suffered discriminatory action directed against him. Further, I am unable to agree with the Joint Select Committee that a Parliamentary inquiry is the appropriate forum to examine the issue.

TA12 **Former Justice Staples has been adequately compensated.**

TA13 He is entitled to a pension of $58,708.80 per annum, which will rise to $74,566.20 later this year.

TA14 This pension is his entitlement under the Judges Pension Act, which provides that a judge who turns 60 years of age is entitled to a pension equal to 60% of the appropriate current judicial salary.

TA15 Although former Justice Staples had not turned 60 years of age at the time he was effectively terminated, a special deeming provision in the Industrial Relations (Consequential Provisions) Act 1988 deemed him to be 60 years of age so that he could receive a pension equal to the pensions of other retired judges.

TA16 In addition, former Justice Staples was also entitled to payment in lieu of long service leave under the Judges (Long Service Leave Payments) Act 1979. The minimum payment is an amount equal to his judicial salary for 52 weeks or for a period of weeks calculated at the rate of 5.2 weeks for each completed year of his qualifying service.

TA17 In contrast to the situation of former Justice Staples there are a number of individuals in the Australian community who have suffered real discrimination at the hands of authority.

(a) Lindy Chamberlain was imprisoned for three and a half years for a crime for which she has been exonerated. She and her family suffered extraordinary difficulties and heart-breaks but are currently still seeking financial compensation some 9 years later.

(b) Former police sergeant Mr Phil Arantz, dismissed by the Askin government for publishing statistics emphasising the rising crime rate in New South Wales, has still not been totally exonerated and compensated nearly 18 years later.

(c) A number of Queensland policemen whose opposition to corruption preceded the Fitzgerald Report have suffered forced retirement, blighted careers and personal pressures and may never be compensated.

TA18 In contrast to these people, former Mr Justice Staples has suffered little, if at all. For the Joint Select Committee to recommend yet a further inquiry into the so-called Staples affair is to go beyond our terms of reference and is a waste of resources in a country where many individuals have suffered more at the hands of authority than former Justice Staples.

DISSENT REGARDING REMOVAL OF JUDGES FOR GROUNDS OTHER THAN 'PROVED MISBEHAVIOUR OR INCAPACITY'

TA19 I basically agree with the thrust of the recommendations contained in paragraph 5.27 of the majority report, particularly that there should be no political interference in the judicial system. However, I believe that the

recommendations do not address questions raised by the lack of competence, non-performance or incapacity of some tribunal members. The remedy in these cases should be in the hands of the senior or presiding member of a tribunal, whose managerial responsibility is to ensure performance by all members.

TA20 For this reason, persons appointed to a tribunal for life should be subject to performance review every 5 years. This review should be conducted by the senior or presiding member. Where performance is not adequate, the senior or presiding member should have available, as an ultimate sanction, the option of dismissing the member In such cases, an appeal process should exist to a body comprised of the member's peer group, for example made up of 3 fellow tribunal members.

TA21 The current constitutional provision, which is set out in section 72, only provides the ultimate sanction of dismissal on grounds of 'proved misbehaviour or incapacity', on an address to the Governor-General by both Houses of the Parliament. However, I note that the Constitutional Commission, in its Final Report, recommended that the Constitution be altered, allowing the establishment of a Judicial Tribunal and allowing the Parliament to prescribe additional grounds for removal of certain federal judicial officers (see recommendations contained in paras 6.180, 6.204, 6.214 of the Final Report). I support those recommendations.

Senator T Aulich

DISSENT BY DR KLUGMAN AND SENATOR DUNN

K/D1 We the undersigned wish to dissent, as follows:

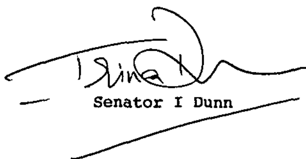
K/D2 There is no evidence that the then Mr Justice Staples made 'no serious attempt ... to resolve the problem' (as stated in 8.33). He has in fact given evidence to the contrary and this has not been denied.

K/D3 In fact we consider it very surprising that in reply to a request, Mr Justice Maddern emphasised the point, with the help of statutory declarations by his staff, that he made no attempt to contact Staples to discuss any problems.

K/D4 We emphasise that a member of a tribunal who is deprived of work is entitled to receive reasons from the President of the tribunal for such a decision.

K/D5 We cannot accept the proposition that a tribunal member who can only be removed by the method and for the reasons outlined in section 72 of the Constitution can _de facto_ be suspended arbitrarily by the senior tribunal member.

K/D6 Mr Justice Maddern dismissed Mr Justice Staples _de facto_ without giving reasons. Neither the Government nor the Parliament would be able to do so. Such behaviour allows a President to act capriciously or to protect what has been alleged to be 'The Industrial Relations Club'.



R Klugman
Chairman

Senator I Dunn

APPENDIX I

INDIVIDUALS AND ORGANISATIONS WHO MADE WRITTEN SUBMISSIONS TO THE COMMITTEE

	Submission Number
AUSTRALIAN COUNCIL OF TRADE UNIONS, Melbourne, Vic	16
ADMINISTRATIVE REVIEW COUNCIL, Canberra, ACT	28
ALLAN, Judge PT, Adelaide, SA	3
ATTORNEY-GENERAL'S DEPARTMENT, Canberra, ACT	20
AUSTRALIAN BROADCASTING TRIBUNAL, North Sydney, NSW	15
AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION INCORPORATED, Carlton South, Victoria	33
AUSTRALIAN SOCIETY OF LABOR LAWYERS, Melbourne, Vic	21
BUCHANAN, Mr SI, Mawson, ACT	32
CHAMBERLAIN, Mr DW, Inverell, NSW	5
CONFEDERATION OF AUSTRALIAN INDUSTRY, Melbourne, Victoria	7
COPYRIGHT TRIBUNAL, Sydney, NSW	17
DEPARTMENT OF INDUSTRIAL RELATIONS, Canberra City, ACT	26
DUNCAN, Mr DA, Sydney, NSW	4
ELLICOTT Mr RJ, QC, Sydney, NSW	27
EVATT, Justice E, Sydney, NSW	22
FREEBURN, Mr LD, Sydney, NSW	30
HALL, Mr AN, Garran, ACT	6
HANCOCK, Deputy President K, Adelaide, SA	23
HEALTH INSURANCE COMMISSION, Tuggeranong, ACT	13
KIRBY, Justice M, Sydney, NSW	2
LAW COUNCIL OF AUSTRALIA, Canberra, ACT	19

LAW SOCIETY OF SOUTH AUSTRALIA, Adelaide, SA	29
MUNRO, Justice PR, East Sydney, NSW	11
NEW SOUTH WALES BAR ASSOCIATION, Sydney, NSW	12
O'SULLIVAN, Mr LG, Canberra, ACT	25
PETERSON, The Hon Justice RJ, East Sydney, NSW	18
POLITES, Justice C, Melbourne, Victoria	24
SELBY, Mr HM, Hawker, ACT.	31
SHEATHER, Commissioner J, East Sydney, NSW	8
STAPLES, Mr JF, Sydney, NSW	1
TODD, Deputy President RK, Canberra, ACT	10
VETERANS' REVIEW BOARD, Phillip, ACT	14
WARREN, Mr JF, Mangrove Mountain, NSW.	9

APPENDIX II

WITNESSES WHO APPEARED AT PUBLIC HEARINGS

Administrative Review Council

- Mr S Charles (Member)
- Professor D Pearce (Member)
- Dr CA Saunders (President)

Allan, Judge PT

Attorney-General's Department

- Mr P Ford (Senior Assistant Secretary, Courts and Tribunals Branch)
- Mr S F Skehill (Deputy Secretary)
- Mr E Willheim (First Assistant Secretary, Justice Division)

Department of Industrial Relations

- Ms B Deegan (Assistant Secretary, Legislation Branch)
- Mr R Stewart-Crompton (First Assistant Secretary, Legislation and Review Division)
- Mr D Ives (Deputy Secretary)

Evatt, Justice E

Law Council of Australia

- Mr GK Downes (Chairman, Administrative Law Committee)

New South Wales Bar Association

- Mr BSJ O'Keefe QC (Senior Vice President)

Staples, Mr JF

Todd, Mr RK

APPENDIX III

HISTORY OF SECTIONS 24 AND 28 OF THE INDUSTRIAL RELATIONS ACT 1988

SECTION 24

When the Commonwealth Conciliation and Arbitration Act commenced in 1904, the federal industrial tribunal was called the Commonwealth Court of Conciliation and Arbitration. It originally consisted of a President only, who was appointed by the Governor-General from among the Justices of the High Court.

The President held office concurrently with his membership of the High Court and consequently was protected from removal from judicial office under the Constitution.

As President, however, he was only entitled to hold office during good behaviour for a term of seven years, but was eligible for re-appointment.

Section 12 of the 1904 Act provided that the President:

> shall not be liable to removal except on addresses to the Governor-General from both Houses of the Parliament during one session thereof praying for his removal on the ground of proved misbehaviour or incapacity

The President also was not entitled to receive any salary for his services on the tribunal and received only his salary as a High Court Justice.

The President was empowered to appoint a deputy 'during the pleasure of the President' from the members of the High Court or a State Supreme Court.

A concurrent power to appoint a deputy was given to the Governor-General in 1914 who could exercise it whenever the President was unable to do so, the term of appointment being 'during the pleasure of the Governor-General'.

In 1918 the power to appoint a deputy was removed from the President and conferred solely upon the Governor-General. A deputy was entitled to hold office during good behaviour for the unexpired portion of the President's term of office but was eligible for re-appointment.

A deputy could not be removed from office during such period except -

> by the Governor-General on an address from both Houses of Parliament in the same session, praying for such removal on the

ground of proved misbehaviour or incapacity

The membership of the tribunal was enlarged in 1920 and was thereafter to consist of a President and 'such other Deputy Presidents as are appointed'.

Amendments in 1921 enabled persons other than High Court or State Supreme Court judges to be appointed as deputies:

- barristers or solicitors of at least five years standing could be appointed 'for the term expressed in the instrument of appointment' or if no such term was expressed then for the unexpired portion of the President's term.

As a result of the High Court's decision in Waterside Workers' Federation v J W Alexander Ltd (1918) 25 CLR 434 which held that judges of the Court could not exercise judicial powers because only persons appointed for life could do so, the following amendments were made in 1926:

- judicial power was conferred on the Court
- the terms Chief Judge and Judge were substituted for the terms President and Deputy President
- the tribunal was to be entirely separate from the High Court:

  the provision that the President must be a Justice of the High Court was repealed

- all Judges were to be appointed by the Governor-General
- Judges were to have life tenure
- Judges could only be removed from office by the Governor-General on an address from both Houses of the Parliament praying for their removal on the ground of proved misbehaviour or incapacity.

These provisions on appointment and removal from office of Judges were retained when the Act was substantially amended in 1947.

Following the Boilermakers Case in 1956 (R v. Kirby; ex parte Boilermakers Society of Australia (1956) 94 CLR 254, which held that the one body could not exercise both judicial and non-judicial (ie legislative, arbitral or administrative) functions, two new bodies were established - the Commonwealth Industrial Court and the Conciliation and Arbitration Commission - and the functions of the old Court were divided between them.

The Commission was to consist of Presidential and non-Presidential members. The President could also be a judge of the Court (and if so would receive a higher salary). Judges

of the Court could be appointed as Presidential members (and if so would remain Judges of the Court). Presidential members had tenure until the age of 70 (reduced to 65 in 1972) and were subject to the same provisions as to removal from office as Judges of the Court, ie they could only be removed from office by the Governor-General on an address from both Houses of Parliament in the same session praying for removal on the ground of proved misbehaviour or incapacity.

In 1972 the qualifications for appointment as a Deputy President were altered to allow the appointment of persons without legal qualifications to enable persons with the widest possible range of skills and experience to form part of the membership of the Commission. Only the President was required to have a legal background.

The preceding provisions covering removal from office have been reproduced in substance in the Industrial Relations Act 1988.

SECTION 28

Section 28 deals with the tenure of office of Commissioners.

Commissioners were not part of the federal industrial tribunal until 1926 when the Court was completely reconstituted to enable presidential members to exercise judicial powers. Amendments in that year provided for the appointment of Conciliation Commissioners by the Governor-General 'of such number and upon such terms and conditions as to remuneration, tenure and otherwise as he thinks fit'.

Under amendments to the Act in 1930, the Conciliation Commissioners were appointed by the Governor-General for a term of five years but were eligible for re-appointment. The Attorney-General was given power to suspend a Conciliation Commissioner from office for proved misbehaviour or incapacity. However within the next seven sitting days following the suspension a full statement had to be laid before both Houses. If an address by both Houses praying for the removal of the Conciliation Commissioner was not then presented to the Governor-General within 60 days the Conciliation Commissioner was to be restored to office. If the address was presented to the Governor-General, he could confirm the suspension and declare the office vacant.

The 1930 amendments also set out the circumstances in which a Conciliation Commissioner could be deemed to have vacated his office, namely, engaging in employment outside the duties of his office (other than employment in the Commonwealth public service), bankruptcy, being wilfully absent from duty for a specified period without leave or being incapable of performing his duties.

Later in 1930 the High Court held that 1928 and 1930 amendments which provided for the appointment of Conciliation Committees

were invalid and the single Conciliation Commissioner whose term ended in 1934 was not re-appointed.

By the end of the Second World War, however, ten Conciliation Commissioners had been appointed.

The role of Conciliation Commissioners was enhanced in 1947 and the Court was confined to judicial functions and arbitration in significant matters. In other matters the Conciliation Commissioners could both conciliate and arbitrate.

Amendments in 1947 provided that Conciliation Commissioners were to be appointed by the Governor-General with tenure of office until the age of 65 subject to this Act. An extension to the age of 66 was possible if it was in the public interest.

The Governor-General was given power to remove a Conciliation Commissioner from office on an address praying for his removal on the ground of proved misbehaviour or incapacity being presented to him by each House of Parliament in the same session.

The Governor-General could also suspend a Conciliation Commissioner from office on the ground of misbehaviour or incapacity but again this was subject to parliamentary scrutiny. A full statement of the grounds of suspension had to be laid before each House within seven sitting days and the Conciliation Commissioner would be restored to office unless each House within the following 40 days presented to the Governor-General an address praying for the removal of the Conciliation Commissioner on the ground of proved misbehaviour or incapacity.

Other amendments in 1947 dealt with the circumstances in which the office of a Conciliation Commissioner was to be vacated, substantially retaining the earlier provisions: engaging in paid employment outside the duties of his office; bankruptcy; becoming permanently incapable of performing his duties, or being absent without leave for a specified period.

An amendment in 1951 allowed the Governor-General to extend the term of office of the Chief Conciliation Commissioner until the age of 70 years if 'in the opinion of the Governor-General it is desirable in the public interest'.

Following the division of the Court in 1956 into the Commonwealth Industrial Court and the Commonwealth Conciliation and Arbitration Commission, s6 of the 1956 Act provided for the appointment of a Senior Commissioner and Commissioners. The previous provisions concerning tenure of office were retained except for the power to extend the term of office until the age of 70. No formal qualifications were required of Commissioners.

The 1956 amendments also made provision for the appointment of Conciliators who were appointed by the Governor-General 'for the purposes of this Act'.

In 1972 two types of Commissioner were created - Arbitration Commissioners and Conciliation Commissioners. This distinction was however abolished in 1973.

The preceding provisions of tenure of office of Commissioners were substantially retained in the Conciliation and Arbitration Act 1904 until it was repealed by the Industrial Relations (Consequential Provisions) Act 1988 and were further retained in the Industrial Relations Act 1988.

APPENDIX IV

ADDRESS BY MR. JUSTICE STAPLES

TO

THE SOUTH AUSTRALIAN INDUSTRIAL RELATIONS SOCIETY

ADELAIDE, 17 MARCH, 1980

You will be given tonight a little material which may aid your understanding of the woolirness that is abroad in industry and in official circles.

Let me first read to you from three newspaper editorials.

The Canberra Times - Tuesday, 11 March, 1980.

"Anybody familiar with the history of the current wool dispute could be forgiven for thinking that Australians are mad, that the inmates are running the asylum. It takes a certain kind of genius to develop a national conciliation and arbitration authority, to make it the centrepiece of an elaborate industrial-relations system, and then appoint an individualist like Mr. Justice Staples to it. Mr. Justice Staples could hardly be called a conformist....

Where is the sense in all of that? One of the commission ignores the guidelines laid down by the institution itself. One of the principals denies the other the right of appeal against an obviously idiosyncratic decision because the decision happens to suit it. And the compromise seems likely to favour the intransigent party. That is not an industrial-relations system. That is systematic anarchy,..."

The Sydney Morning Herald - 14 March, 1980

"Yet the storemen and packers have an understandable grievance. They have been made the butt of mismanagement within the Arbitration Commission.

The backing and filling by the commission was a sure recipe for trouble. The basic ingredient in this recipe was the manner in which Mr. Justice Staples explained how he had arrived at the rises: "For the quantification, then what shall I do?...

../2

I shall simply select a figure as Tom Collins selected a day from his diary, and we shall see what turns up." What turned up was what this style of remark might have been expected to invite - a successful appeal."

The Adelaide Advertiser - Monday, 17 March, 1980.

"It is not surprising, given the extraordinary reasoning advanced by Mr. Justice Staples for awarding pay increases of between $12.50 and $15.90 last year, that those rises were reduced on appeal to $8 across-the-board."

The guidelines in sensible hands represent reason and common sense, in my decisions I have emphasised this many times, but in the hands of greedy agitators they have become a programme for bureaucratic capitalism, for state socialism by stealth. It is in that context that I make a claim for capitalism with a human face.

I would like to read some passages from my decision.

"The parties have vigorously debated the significance of all I have been told and shown in the light of the indexation rules. As I listened to the argument I was reminded of the teachings of the Old Testament. They are constantly invoked for most holy purposes and speak of matters original to the Universe. They show a single solution to every problem and in the hands of each prophet they lend themselves but to his interpretation: yet, there are many prophets, and they speak in many tongues. There is much rancour on matters fundamental to the testament to which each gives his plain allegiance. And just as there are many prophets, so there are sceptics. Facts collide with preconceptions. Interests cut across institutions. The received doctrine, is constituted by guidelines - not mandates. The authors said (Print D2400): "The present principles have served reasonably well to stabilise

industrial relations over the past three years and to help in reducing inflation....In considering whether wages, salaries or conditions should be awarded or changed for any reason either by consent or arbitration the Commission will guard against any contrived arrangement which would circumvent these principles. It would be inconsistent with the guidelines for wages, salaries or conditions to be awarded or changed extravagantly, the effect of which would be to frustrate the Commission's general intentions." There is nothing mandatory here, no promulgation of binding dogmas, only a striving to underline commonsense."

Later I said:

"It is one thing to conclude that new minimum rates should now be prescribed. It is another to quantify the change. What shall be the measure? It may not be discovered in the profitability of the enterprise, not in the increased productivity of the relevant workforce. It may not be an adjustment to the burden of taxation on the wage-earner nor reflect any movement in the cost of living. It may not reinstate any losses due to partial indexation in the real worth of the original rate nor may it derive from a comparison with rates paid in other industries. It must not be extravagant or contrived, nor may it be mindless or consequential upon changes elsewhere. The impact in economic terms must be negligible. It should help to reduce inflation. At the same time, it must stabilize industrial relations. For the quantification, then what shall I do? I am already reeling under the advice of the many prophets. There is no Polonius at hand to give me memorable precepts as he did Laertes when he fled the confusion. I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life."

The uproar over my reference to Joseph Furphy's book 'Such is Life' the classic Australian story of shifting wool from the Riverina to the ports, which was used in total irony to demonstrate the absolute bankruptcy of the dogmatists emphasises what a dull and boring, ignorant and anti-intellectual condition we are in.

We lurch and shuffle from one headline to another, jerking our arms with each screaming slogan and if someone makes a literary allusion, uses our language with a little colour, writes with a certain bemusement, seeks to demonstrate in a pithy way what a pass we have come to in our thinking, we cry out that we are in anarchy wrought by a blundering judge. We substitute the form for the substance. Like Hamlet's ghost, the insubstantial bends our thinking, governs our lives and becomes the source of our incomprehension.

The failure to settle this dispute even by arbitation has very little to do with the unacceptable character of my decision and it has a very great deal to do with the century-old conflict between the squatters and the middle-men, and the struggle between the auction system and sale by private treaty.

Let me give you another scenario to sew into the tangled skein made up so far of bloody-mindedness in the union and eccentricity in the judge:

Graziers don't like wool brokers. No-one likes a middle-man. They sell the squatters' product in the remote markets in the city, fix commission at rates that have had from time to time a whiff of monopoly oppression about them, make deductions from the cheque for storage and this and that. They lend you money to keep you going when times are hard, when there is no grass or water and the market's down, take your land as security and sell you

up if you cannot pay. There is not a lot of love lost between the squatters and the brokers, I learned that early in the case.

It is necessary to grasp the significance of the market for wool sold by private treaty rather than in the auction system. Let me cite some passages from an article entitled 'Private Buying of Wool: an analysis of some pricing aspects' published in the Quarterly Review of Agricultural Economics for April/July, 1978.

> "The objective in this study was to compare private and auction prices for wool, with a view to determining the effects of private buying on growers in the eastern States of Australia and pricing efficiency.
>
> The focus in the empirical analysis was on the average difference between auction and private prices for sampled growers as a group, in the second half of 1977. On the basis of the available empirical evidence and drawing on economic theory, the authors formed the judgment that, after adjusting auction and private prices to a common farmgate denominator, there was no significant difference between private and auction prices, for the woolgrowers sampled. This was so for all wool and generally for each of the 6 broad wool type categories/lines examined. This meant that in the period under study, there was no evidence that private buying made growers relatively worse off or impaired pricing efficiency between the auction and private submarkets. The latter implies a close interdependency between the submarkets."

The authors summarised the history of private buying thus:

> "Prior to 1970-71, private buying of wool accounted for less than 10 per cent of the national clip. During the 1970s there was a upsurge in wool sold directly at the farmgate, with the proportion of wool purchased by private treaty increasing from about 12 per cent of the clip in 1970-71 to about 24 per cent in 1976-77. The growth in the eastern States was from 7.6 per cent of the clip in these States to 18.0 per cent, over this period."

The new phenomenon of sale by private treaty explains a great deal, dictating tactics and strategies in this dispute. In a very real sense, this strike is a contest between the wool brokers, the wool growers and the private treaty buyers with the storeman the meat in the sandwich and myself being claimed as the sacrificial lamb.

Now brokers have to deal not only with graziers who are enjoying good times and don't need them so much and who are going to private buyers. They have to do business with their workforce. The brokers pursued negotiations with the union during a fair part of last year for the making of a new award. A great many matters were settled by negotiation. Four matters were left for arbitration. A claim for overtime to be paid at double rates after two hours instead of three, for rates for storemen putting wool in containers to be set by reference to other awards covering container work, for the term of the agreement and settlement to be limited to one year instead of the two claimed by the brokers and for more money. They were the issues. The brokers won on 3 out of 4 from me.

I received about the end of September a request of the union and the employers to grant them an arbitration, so that a whole negotiation could be wound up and laid to rest, I agreed to do it and finish it, as was indicated would please the parties, before Christmas.

The employers told me, in the presence of the union, that they would not consider the wage question in the negotiations because they feared the wrath of the National Employers Industrial Council if they broke ranks. They wanted the two separate questions, whether there was a case for more money and how much it should be, left for someone else to decide. At no time did I understand that they had offered anything, nor, indeed, did I know whether they had refused any movement. But I did know, and I had already gone on record about this abnegation of responsibility, in the Telecom case last year, that they were appointing me the paymaster of their business. As a plain matter of principle I am opposed to the Arbitration Commission becoming the national paymaster. I am a judge, appointed to resolve disputes. The duty to manage is in others.

"Our commission is not and ought not to allow itself to be manoeuvred into becoming the financial manager and paymaster of industries under federal awards and those under state law that tend to adopt our determinations. We ought not to be a court of first resort. Our task is not to step into the shoes of those who would abdicate their responsibility to manage the resources in their charge, and to face in their place a claimant workforce. We ought to be a court of last resort. If we have a role to prevent disputes from occurring, it is surely not to be fulfilled by foreshortening or abolishing separate negotiations between parties where this can be achieved. If discussion and negotiation comes to naught and what is in dispute can be identified and is such as is fit for arbitration according to the law, our role assumes then the character of dispute settlement by arbitration which is to take place after parties have failed to resolve for themselves their differences by resort to statement, definition and clarification, to investigation, analysis and proof and to argument, bargaining and counter-claim.

The resort to this commission at the very earliest moment of the life of a claim, this flattering recognition of ourselves as being the beginning and end of industrial wisdom, may well lead to us becoming a most cherished shelter for the great captains of industry who fear or pretend to fear the wrath of the government or who believe that their affairs are better entrusted to strangers to their industry than to themselves, but out of this abdication of responsibility to be the master of one's servants as far as the law will allow, out of comfort in uniformity, orthodoxy and so called responsibility which it is believed is the sure road to the favour of this commission, there threatens to develop, in the first place, a bureaucratisation of industrial relations and, in train, sterility, apathy and stultification of incentive, initiative and enterprise. In the long run such a course could cause industrial conflicts to become more bitter, more widespread and more protracted and, in the meantime, a misallocation and waste of resources in the labour market may occur which will make the achievement of peace in industry in the future more difficult.

I do not believe that the law, including the constitution, requires or, perhaps, even permits that this commission should assume such a central role in wage fixation as is commonly and popularly ascribed to it and often complained about, or that society will take any long-term profit if we do. I think it is absurd that industries like Telecom should wish to hand over their labour pricing practices to one as relatively untutored as myself in the complexity of the industry, its traditions, its arrangements and its prospects, before every means has been exhausted to settle matters internally. I do not, and would not, shirk from making any decision called for when it is clear that an arbitration is essential, but before that point becomes plain, commonsense requires that the parties most intimately involved in the industry should meet and discuss in detail and in good faith and with all proper thoroughness every point which either side wishes to raise."

The remarks that I have just made touching the role of the Commission are actually a reading from the transcript in the course of a hearing in the ATEA/Telecom dispute in the middle of 1979. It was the decision I took consistently with the concepts that I was discussing that appear to have moved the Government to introduce into the Parliament late last year the amendments to the Conciliation and Arbitration Act which are named by some people as the 'Staples' Amendments'. The wool case attracts the same principles.

At the very outset I made it plain that I was not an eight dollar automaton, that I wanted to make a fair and rational decision on the merits, that I wanted hard information to work with, that I would not be satisfied by ringing proclamation of the guidelines, that I did not wish the parties to concentrate on abstractions and principles, that I wanted relevant facts and figures.

On the first court day when the programme for inspections and hearings was agreed between the parties and myself on the wage question, as appears from the transcript on that day, I told the parties how I saw the issues. I said that there appeared to be three separate questions. Had there been a change in work value as defined in Principle 7A? Was it of such significance as that it ought to sound in money and if so by how much was there to be a wage increase? I then went on to say and I quote from the transcript of 29 October, 1979.

> "I want to make the point to you now that I look to the bar table for assistance on that question. It will be a burden upon me to do what will be expected of me if we come to that third issue if I am not given real assistance going beyond abstract outlines of principle on the task of a proper quantification. I want to make this point right at the outset that no magic attaches in my mind to the figure of $8. No one need assume that this matter will be pursued by me entertaining any reverance for the amount of $8. I am not excluding the figure. I am not proposing that some figure near it or far from it is a figure that will turn my mind in thinking about this question.
>
> Because I approach the matter in that way I am looking to you two gentlemen who represent the parties at the moment to as far as possible try and give me a little exact assistance. As far as possible I think we should try to arrive at a figure which is rational and acceptable but how we do it is a matter that the three of us will have to put our mind to when the time comes if that third question becomes the third issue."

I never got it. I was never told that the range was six to eight dollars, what was the level of over-award payments, what the brokers rates were, how profitable the industry was, what was its capacity to pay, what effect my decision would or could have on profitability, investment and employment, what effect a decision would have on brokerage charges, and upon the competition from the private treaty buyers. Sometimes I pushed my questions. Politely but firmly I was generally asked to bury my curiosity and get on with the job.

Now it is said that I should have awarded eight dollars, that the guidelines dictate eight dollars, eight dollars is in the guidelines and I ignored it. Where may I ask is this reference to eight dollars to be found in the guidelines? Who can show me this magic guideline that speaks of eight dollars?

I venture to suggest that it is nowhere to be found.

It is true to say that eight dollars was given over a year ago to truck drivers who have to work with bigger, heavier trucks,with more horsepower under more difficult conditions of traffic congestion, and with specialised haulage equipment but what is the analogy or the relevance of that to improved techniques and new systems for handling wool bales in multi-level stores.

And if it was eight dollars that the employers were willing to pay, wanted to pay, expected to pay, why did they not offer it and be done with the claim. They tell me now that the union would have accepted eight dollars. If I have done wrong in managing my affairs in the Commission what do we say about all those who hesitated to put down on the table what could not be gainsaid, what could not be refused, what would have been welcomed, indeed.

I could then have spent my days in Sydney with my family and my friends, I would have been saved the absences in Brisbane, Melbourne, Geelong, Portland, Adelaide, Perth, Fremantle, Albany, Launceston and Hobart. I would have enjoyed some respite from the travelling Australia wide just finished in another work value case - which had kept me from my bed for months and months and for my decision in which in the upshot I was condemned in open court by the union for my mean handedness.

Above all, ladies and gentlemen, you would have been saved a fortune, you - the taxpayers - who had to foot the bill for the air travel, the long distance calls, the hotels, the shorthand writers, the transcript, the rent, the power, the Z cars - all that, fellow taxpayers, would have been saved and more, if the employers had had the courage to do that which they are now so anxious to do, if all those who urge them now to show courage, grit and endurance had promised them support when the employers hesitated to flout the National Employers Industrial Council, the Prime Minister, the Treasurer and the Wool Council-when they had so little sense of their own integrity, they feared to be condemned for a sweetheart agreement.

The employers of this country have been reduced to cowardice by the guidelines and the government, a state of ignobility which fortifies, however, their material interests.

Looking back on it now, I can see that the brokers must have known that they would have to raise wages. By any test of productivity growth or profitability of the enterprise some of the brokers at least must have known that there would have to be some movement.

The industry feared, however, to be seen to be breaking ranks with the general strategy of the employers organisations and the government of makin~ the Arbitration Commission the

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paymasters of Australian industry, and above all they feared that the graziers, full of suspicion of sweetheart deals and raids on their current prosperity through higher brokerage charges, would switch to selling by private treaty.

In the upshot, the brokers won three of the four points at issue in the case. I found for them on the question of keeping out the container rates, on stretching the agreement for two years instead of one, and holding down the rates for overtime. The brokers lost the wage question. They had strenuously argued that there ought to be absolutely no movement at all, that any movement would be a breach of the guidelines. We know now, from the press, that that was not their true case, that they were actually offering money. I wish to emphasise, however, that that is something I never was told.

I deliberately sought to protect the weaker brokers from any undue pressure by giving them some latitude in the over-award area.

I said in the decision:

> "Furthermore, it is my intention that any standard detectable in the change I propose shall not be brought to bear, necessarily or at all, upon "over-award" payments. I do not in any manner wish to disturb for myself the bargains struck by employers in this area, nor to see the decision used as authority for an argument to move the over-award rates. These rates ought to remain matters for a free bargain on the merits of the particular circumstance from store to store and person to person as the case requires untrammelled by this decision."

Let me read the concluding words of my decision:

I propose as I have already noted that the rates struck should firm for two years, subject only to decisions taken for the nation. I am anxious to achieve stability and certainty in the industry. In my view, the brokers are entitled to a term of stability as to real wage rates, outside consent. It is quite clear that those who manage the industry have much to be proud of in their recent achievements and they should be encouraged to be ambitious to promote further efficiency and savings in the operation of their stores. Their successes in the recent period in increasing the output of the stores by the new systems and techniques may be gleaned from a perusal of information handed up in the course of argument and attached. Not only has the bale rate per man hour seemed to have increased but so has the average weight of bales risen some 6% since the period of the last inspections. I would wish to see the store managements encouraged to promote these changes. They have done much already but there is plainly much more left to be done. It is in the interest of the whole community having regard to the signal rôle of the wool industry in our economy that further improvements in wool handling should be realised. Wool is an awkward product to handle and there may be limits upon the final elimination of manual labour from the stores.

Employees stand to benefit in many ways from improvements in the stores, not only in wages but in conditions. The elimination of traditional forms of burdensome labour is in prospect. A reduction in the number of work-induced physical injuries has already been noted. The reduction in noise level and air pollution may provide tasks for the future. Of course, semi-skilled workers such as storemen are in this industry have both an interest and a jeopardy in the improvement of the stores but I would wish in this decision to mark the concern of the community to enliven the confidence of employees that there is everything to be gained by them in lending their co-operation to making their work more efficient and productive in the future as in the past.

This page was not read during the address.

The Bench which overruled me said that I had available a standard of about $8-$9 in other industries. It said that "it is, therefore, difficult to understand how he could have concluded that the measure for valuing the change in work may not be derived "from a comparison with rates paid in other industries"" - quoting what I had written.

It is not difficult to understand at all. That is exactly what the employers had urged me not to do. They had begged me not to go outside the industry for a result. They had urged me not to look to the container awards to find a rate for their own container employees or for any other. I upheld them. I rejected the sedition to which.the traditional isolation of the industry was subject by Simon Crean's claim.

The Full Bench in the wool case said that there was nothing to suggest that the increase in the work under consideration was greater that the increases found in other industries. Reference was made to the decision in the metal case, which has since been given special prominence by the National Wage decision of 4 January, 1980. My decision was of course handed down before then.

If one seeks to test the matter by the metal trades result, not only have we by the wool decision and the National Wage decision reinstated the metal industry in all its glory as a pacesetter, but we have reintroduced comparative wage justice in all its bland and fulsome force, the very phenomenon that the guidelines were originally intended to outlaw and repress.

For it must be plain to anyone who runs and reads that the metal trades $7.30-$9.30 was not an exercise in establishing upon internal evidence the actual worth of work changes in the non-specialist metal industry, not at all, not in any way, no such enquiry was e\ r even bruited, let alone pursued.

That result was a deliberate equating and accommodation of rates in the non-specialist metal workplaces to rates already established in oil, motors and aluminium to name those explicitly cited and to others referred to generally. In no way were the new metal rates fixed by any attempt to assess the worth of the changes to the metal industry itself.

> "...we are satisfied that changes in work value have been established and that increased rates are justified...in assessing the rates to be adopted in the light of our finding we have had regard to the rates established for comparable classifications in the various oil industry, motor vehicle manufacturing and aluminium manufacturing awards referred to by the parties and we have also considered other recently assessed awards... for the above reasons we fix rates which, for tradesmen and above are $9.30 in excess of the existing rates, and for those below tradesmen $7.30 in excess of existing rates."

The Full Bench of the Commission lifted the general level of rates paid to persons in the non-specialised metal industry to the level of rates prevailing in the oil industry, motor vehicle manufacturing, aluminium manufacturing, among others, without any analysis of what the changes meant in the context of metals alone. Was that within the spirit of the guidelines? I do not think so.

That Full Bench threw the guidelines out the window by making the same adjustments for all classifications in express and explicit defiance of the rules propounded in principle 7A which says in effect that such a move might be made only in rare cases. The inconvenience of doing otherwise, the Full Bench emphasised, was plain and troublesome, They may have been right, but was it guideline-goodness. If such a trespass is virtue, what is my sin?

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Setting rates by external standards was the very kind of exercise that the employers feared in the wool case and argued vehemently to me I should not carry out in their industry. Tradition forbade it. So did the guidelines, they argued. I agreed with them.

What kind of uproar would have followed if I had gone to container terminals and elsewhere to find a rate for the men in the stores now working for the first time with containers? I venture to suggest that $12.50 might have turned out to be peanuts in setting what was due.

Yet I was overruled precisely because I kept my gaze firmly upon the wool industry, permitting no outside distraction just as the employers prayed that I should do.

I make no complaint that there was an appeal -

I have a view about appeals which I have already recorded in two places e.g. in my wool decision I said:

"Other people have said in decisions recorded in this Commission how difficult it is to make the judgments called for on these occasions. It would be far better in my view if these matters could be resolved in direct negotiation between parties and arbitration imposed compulsorily only when industrial peace was threatened and all legitimate endeavours for reconciliation had been exhausted. It is a fact that the parties have agreed to accept a decision at first instance subject to a reservation of a right of appeal if it was considered to be "extravagant or unfair". Parties cannot contract out of their rights under the Conciliation and Arbitration Act and I have never approached this matter upon any basis other than that it must show a result that would stand scrutiny in the public arena at the hands not only of those most directly interested but of others."

On an earlier occasion in May of last year in a case between the B.W.I.U. and the State Electricity Commission of Victoria I had written:

> "Institutions such as ours, however, should be structured so as not to afford even the appearance of arbitrariness of judgment, fickleness of decision or other waywardness. That is why an appeal tribunal is put here behind the arbitrator within reach of a dissatisfied party. Law systems that do not provide opportunities for appeal invite suspicion. Thus, the existence of the opportunity to appeal may serve from time to time to condition the manner and the terms in which a decision is brought down. The presence of an appeal tribunal gives confidence to parties to enter into a procedure having a binding result. A decision is more authoritative if it has been confirmed on appeal; it may sometimes fetch authority precisely because it has not been appealed."

And so my decision was overruled. The men have struck because they believe that the appeal was a breach of a promise made to them by the employers in a businesslike negotiation and which they accepted because of the political difficulties of the employers. They have struck because they claim the rates set by me.

Last week the brokers were in a dilemma. Most of the wool continued to move to the ships. None of the wool which is sold by private treaty has so far been stopped by the dispute. The vast majority of the stores that are in dispute remain at work and the wool continues to move through them.

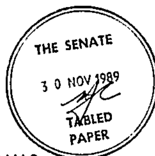
But growers are now switching to the private treaty market to get their wool away and the brokers' competitors are getting a foothold amongst their customers, luring them away from the auctioneers.

This explains the bargain that was struck in Canberra on Friday and which was reported in the Sydney Morning Herald of 15 March, thus, and I quote selectively what in print one would set in italics:

> "The Federal Government agreed to introduce regulations (which) would freeze the export of wool from Australia, thus preventing private sales ... the export controls will prevent any wool from leaving Australia. This action would prevent any private sales.
>
> The Prime Minister, Mr. Fraser, four Ministers and representatives of wool growers and wool brokers agreed on the plan after ten hours of talks at Parliament House."

The graziers are betraying the brokers. The brokers have demanded protection from the Prime Minister.

Ladies and Gentlemen, it was an honest decision, I accept no responsibility for subsequent amazing scenes.



PARLIAMENT OF AUSTRALIA

JOINT SELECT COMMITTEE
ON TENURE OF APPOINTEES TO COMMONWEALTH TRIBUNALS

SUBMISSIONS RECEIVED

THE SENATE
CANBERRA A.C.T. 2600 4544
PRESENTED
30 NOV 1989

No.	Date	Organisation/Individual
1	5/5/89	Mr JF Staples
2	8/5/89	Justice Michael Kirby
3	12/5/89	Judge PT Allan
4	18/5/89	Mr DA Duncan (Coal Industry Tribunal)
5	22/5/89	Mr D Chamberlain
6	29/5/89	Mr Allan Hall
7	30/5/89	Confederation of Australian Industry
8	30/5/89	Commissioner Sheather (AIRC)
9	31/5/89	Mr JF Warren
10	31/5/89	Deputy President Todd (AAT)
11	31/5/89	Justice Munro (AIRC)
12	1/6/89	NSW Bar Association
13	1/6/89	Health Insurance Commission
14	1/6/89	Commonwealth Veterans Review Board
15	1/6/89	Australian Broadcasting Tribunal
16	5/6/89	ACTU
17	5/6/89	Copyright Tribunal
18	5/6/89	Justice Peterson (AIRC)
19	9/6/89	Law Council of Australia
20	14/6/89	Attorney-General's Department
21	16/6/89	Society of Labor Lawyers
22	19/6/89	Justice Elizabeth Evatt
23	21/6/89	Deputy President Hancock (AIRC)
24	21/6/89	Justice Polites
25	23/6/89	Mr LG O'Sullivan
26	3/7/89	Commonwealth Department of Industrial Relations
27	12/7/89	RJ Ellicott QC
28	12/7/89	Administrative Review Council
29	17/7/89	The Law Society of South Australia
30	3/8/89	Mr Lloyd Douglas Feeburn LLB
31	17/8/89	Mr Hugh M Selby
32	4/9/89	Mr SI Buchanan
33	8/9/89	Australian Institute of Judicial Administration Inc