

**'Moving Forward' Conference on the Employment Contracts Act
1991**

**Freedom in the Labour Market: Some Australian
Reflections**

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FREEDOM IN THE LABOUR MARKET: SOME AUSTRALIAN REFLECTIONS.

It is a great honour to be invited to speak at this fifth anniversary conference of the introduction of the Employments Contract Act 1991 (ECA). I wish to say at the beginning how much those of us in Australia who have been arguing for workplace freedom have found inspiration and encouragement from what you have achieved over here. Australia and New Zealand together inherited the common law freedoms embodied in the law of contract, property and tort, which the great common law judges of Britain developed during the 18th and 19th centuries. But at the turn of this century we turned our back on that inheritance and began a process of steady subversion of the rule of law in our working lives.

With the 1991 ECA, New Zealand took a giant step back to the rule of law in the workplace. In Australia, the Dollar Sweets case, a common law action taken at the end of 1985 in the Victorian Supreme Court, eventually resulted (in April 1988) in the payment of \$175,000 by the Federated Confectioners' Association to Dollar Sweets Pty Ltd. This company had been subjected to a prolonged period of picketing, attempted arson, violence directed against truck drivers who crossed the picket line, and death and bomb threats. Dollar Sweets became a very important symbol in the decade-long struggle to bring back the rule of law into industrial relations.

In May 1991 your parliament passed the Employment Contracts Act. Sixteen months later we had a state election in Victoria. The Kirner government fought the election very largely on the terrible fate which would befall our state if the then Opposition was elected and introduced New Zealand-style labour market reforms into Victoria. Every night on television we were shown some new heart-rending story of increasing poverty and spreading social misery in New Zealand - the direct consequence, we were told, of New Zealand's economic reforms generally, but of the ECA in particular.

I was immensely cheered by all this. It was no accident that the Kirner government, arguably the most disastrous government in Victoria's history, should find New Zealand a harbinger of dreadful portents, and since that election the public mood about what kind of rules should govern our relationships in the labour market has moved steadily against what we in Australia have grown up with, an extraordinary degree of hierarchical control, and towards the freedom you have established here.

The brief given to me was to say something about the state of labour market reform in Australia. I can discharge this obligation in one sentence. At this moment there is, at least in legislative terms, no reform. But the debate about reform is intense and the new federal government, elected on 2 March last with a very large majority in the House of Representatives, is on an unequivocal promise to deliver reform. So I will have something to say about that in due course.

To set the scene, however, I wish to tell the story of Jim Staples, formerly a Deputy President of the Commonwealth Conciliation and Arbitration Commission, but also entitled to the rank and style of a judge, including the appellation 'Justice'.

This story will be of interest to you in New Zealand because it demonstrates, in a comic but nevertheless compelling fashion, the great follies of specialist tribunals,

established by statute, with exclusive jurisdiction in labour market law and regulation. This is now a matter of importance in New Zealand, as the very great benefits of the ECA are increasingly threatened by the Employment Court, a judicial body whose capacity to gratuitously interfere in the lives of people was, regrettably, extended by the Act.

Jim Staples was born in very humble circumstances in Sydney in 1929 at the onset of the depression. Because he was intellectually very gifted he did very well at school and won scholarships to the University of Sydney where he graduated in law. He graduated despite intense commitment to political activism as a member of the Communist Party. He was expelled, in due course, from the Communist Party because of his activity in distributing Khrushchev's secret speech to the XXth Party congress.

After some not very financially successful years at the Sydney Bar, he was appointed to the Conciliation and Arbitration Commission as a Deputy President by the Whitlam government in February 1975. Once there he quickly became a scandal within the world of the Industrial Relations Club.

The beginning of wisdom in this particular world is the understanding that the whole edifice is built on total intellectual confusion. This confusion is very evident in the writings and judgments of the Club's founder, Henry Bournes Higgins, High Court Justice and the second President of the Arbitration Court, and it has been compounded from generation to generation.

The source of this confusion can be simply stated. In an economy characterised by the division of labour, and the wide variation in the risks people are prepared to accept in their choices in life, there are, ultimately, only two ways of organising the daily working life of the community. The first is the market method, in which people make their own arrangements, by agreement with each other, about what they do, how they do it, and what price is to be charged for their services to each other.

The second is what we can call the hierarchical method, in which the decisions of daily working life are made at the top of the hierarchy and then handed down and elaborated as they go down the line. This model is typical of families, of military units such as naval ships and army battalions, and used to be more or less typical of industrial and commercial corporations, particularly large corporations.

Socialism is a political doctrine which espouses hierarchy, and opposes the market, as a method for arranging economic life, and it achieved intellectual and political hegemony in New Zealand, Australia and Great Britain after the Great War of 1914-18. H B Higgins, particularly, was very critical of the market. In his decision in the 1909 BHP case he attacked bargaining between employer and employee, and what he called the "higgling of the marketplace".

The great problem of hierarchical organisation, a problem which we now understand much more clearly than our grandparents could, is that running a family on a hierarchical basis is difficult enough; maintaining a naval ship in service requires very great skill, unusual intellectual and political capacity and much professional dedication; running a business corporation as a hierarchy is now seen as being highly

problematical; but to control a nation's economy in a hierarchical mode is, manifestly, beyond all bounds of possibility.

But the whole intellectual basis of the life of our labour market tribunals in Australia, now stretching back to 1904, has been the necessity of imposing hierarchical control over and above the contractual basis of labour market transactions, the "higgling of the marketplace". In the early days this hierarchical control was offered to employers as a remedy against strikes, picketing and other forms of trade union violence. It was offered to the early trade unions as a certain road to higher wages. The latter turned out to be true, at a social cost of high unemployment amongst the lower skilled sections of the workforce. The former turned out to be an illusion.

The institutions of hierarchical control, the arbitral tribunals of labour market regulation, having been established, wanted a continuing role in the political and economic life of the nation. Further, as their belief in the doctrines of hierarchical efficacy increased in intensity, the reach of their decision making also increased. At first it was minimum weekly wages. Then it was annual leave. Then it was time allowed for coffee breaks. And most recently it has been detailed control over the causes and procedures of terminations of employment. The amount of detail now set out in the awards which are handed down as a routine matter is quite extraordinary in its complexity and scope.

It has been obvious for decades that this is no way, as the Americans say, to run a railroad, let alone an economy which has to provide sustenance for a nation of 18 million people. The only way for the members of the Industrial Relations Club to carry on, then, given the quite absurd nature of their situation, was to maintain a tight solidarity in the face of any questioning or derision. And this is where Jim Staples comes in. Having been appointed to the Arbitration Commission, he began to apply his mind to the issues before him, acting as if in fact he were a real judge, supposed to be deciding real cases. He clearly did not understand that the whole thing was a charade. He was an innocent abroad, not appreciating that his required role was that of a fixer, of running with the pack, helping to keep everyone - unions, employer organisations - more or less together, so as to maintain the illusion of judicial impartiality, and therefore the fitness of the statutorily established hierarchical authority for imposing decisions on labour prices, hours of work, tea breaks, sick leave, overtime and penalty rates, etc etc.

Judge Staples never understood this. He began his judicial career by castigating our largest corporation, BHP, for some misdemeanour or other with the following words:

Let them [i.e. BHP], then, twist slowly in the wind, dead and despired, as a warning to the Commission of the limits of persuasion by a public authority upon those who zealously uphold the privileges of property and who exercise the prerogatives of the master over those of our citizens whose lot falls to be their employees.

For this he was removed from heading the maritime industry panel in the Commission, and was sent on a global mission to study human rights in several countries.

When he came back he soon achieved fame again by awarding to the wool storemen and packers a rise in wages to \$12.50 and \$15.90 an hour when the Club had agreed amongst its members that the going rate in these cases was \$8. His judgment contained the following gem:

For the quantification, then, what shall I do? I am already reeling under the advice of 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.

Such candour threatened the very existence of the whole industrial relations edifice in Australia. A very large and expensive institution, complete with the trappings of judicial rank and style, was being held up to public ridicule by one of its own, through the innocent procedure of taking seriously the ideas which legitimised the institution. Judge Staples was never given any further briefs by the President of the Commission, and in the fullness of time the Hawke government passed a new Industrial Relations Bill in 1989 which abolished the Conciliation and Arbitration Commission and set up in its place the Industrial Relations Commission. The judicial personnel of the new body were identical to the personnel of the extinguished body, save one. Judge Staples was not appointed to the new Commission; instead he was offered a judicial pension of \$90,000 a year.

The Jim Staples story, I think, is very persuasive in the argument that specialist tribunals are everywhere and always politicised bodies designed to achieve a politically desired outcome. That outcome, of course, may be at odds with the government of the day. But the argument that a political institution, erroneously described for a long time as a court, should be abolished because it is not, in fact, fulfilling a judicial function but is engaged in political fixing of an economically damaging kind, is a very important argument and one which has to be maintained.

It is clear from my reading of the current literature that the judicial members of the New Zealand Unemployment Court, as it should be referred to, clearly believe that the ECA was an aberration in New Zealand history. Furthermore, they are clearly convinced that it is an aberration which will not endure. In the meantime they are pursuing, with every legal device at their disposal, a policy of returning to the hierarchical or socialist paradigm which dominated New Zealand political and intellectual life for nearly a century.

Given the trauma of the collapse of that paradigm in 1984, and the dramatic recovery of New Zealand since then, we have to ask the fundamental question: "Why are they doing that?".

The most interesting example of that question comes from Prince Metternich, who served a succession of Austrian Emperors from the early 1800s until 1848, and was a key architect of the Congress of Vienna. One of his great adversaries over many decades was Talleyrand, the extraordinary French statesman and diplomat who was consecrated Bishop of Autun at the age of 34, subsequently excommunicated by the Pope, elected to the National Assembly in 1789, served the Directorate as foreign minister, then as foreign minister to Napoleon, and then later, as foreign minister to

Louis XVIII, represented France at the Congress of Vienna. Talleyrand eventually died in 1838, prompting Metternich to ask: "Now why did he do that?".

It is easy and tempting to reply to this question with the answer: "They (i.e. the judges of the Unemployment Court) don't know any better". I think that is inadequate. I believe that the learned judges of the court do have some comprehension of the consequences of their actions. And it is patently clear to even the most casual observer that unfair dismissal laws impact most severely on those people who are at the bottom of the social ladder, especially people who are young, unskilled, poorly educated; people who have no family or political connections to draw upon; people who have no track record of employment experience.

In New Zealand the people who occupy this market niche, if you can call it that, are predominantly people of Maori or part-Maori descent. What the unfair dismissal laws, and the operations of the Unemployment Court do, is deny these people, particularly in the crucial years after leaving school, a chance to get their feet on the bottom rung of the employment ladder. Short of abolition of the Unemployment Court the next best thing would be to amend the ECA so that the unfair dismissal clause did not apply to anyone under 25.

Why do the judges of Unemployment Court disregard the tragic consequences of their thinking and decision making on these poor, often ill-educated, often Maori, people. The answer is, I think, pride. For many years these judges have been an influential part of a culture and an intellectual paradigm which is so hierarchical in its modes of thought and behaviour that to break away, to recognise the folly of many years of intellectual endeavour and judicial practice, would be the equivalent of the conversion which St Paul experienced on the road to Damascus. Such conversions are rare.

My reference to St Paul's Damascan conversion is more pointed than might appear at first sight. As one who was somewhat left wing in my student youth, I have long since been curious about the continuing appeal of socialism, particularly British socialism, which was the tree from which antipodean socialism sprang.

I have been reminded recently of the continuing influence of the Old Testament in English Puritanism and how that Puritan influence played an important part in the development of British socialism. I think it was Harold Laski who often said that British socialism owed more to Methodism than to Marx. But Marx and Methodism are joint heirs of the Old Testament. What distinguished Methodism from Marx was the overlying imprint of the New Testament.

The Old Testament is the story of a people who were all closely related, and whose family trees were a very important part of their culture. Their society was organised on strictly hierarchical lines and economic behaviour was subordinated to social obligations which were at the same time religious obligations. This is set out most clearly in Deuteronomy Chapter 15 where the obligations to release debtors from their debts, and bondmen from their bondage, every seven years, are laid down. This injunction applies only to kinsmen, i.e. fellow Jews. Foreigners do not receive any such consideration (Verse 3). Verse 9 is particularly interesting:

Beware that there be not a wicked thought in thy heart, saying, The seventh year, the year of release is at hand; and thine eye be evil against thy poor

brother, and thou givest him nought; and he cry unto the Lord against thee, and it be sin unto thee.

Instead of socialism in one country, we have, in the Old Testament, socialism in one very large extended family. This doctrine, socialism in one family, worked very well for a people who spent many centuries living as a diaspora, maintaining their existence and identity as an unassimilated minority amongst foreigners, who often hated and not infrequently persecuted them.

But once that doctrine, which we might call extended family socialism, is extended to a nation, as in the State of Israel, economic decline immediately sets in.

The primary reason why New Zealand, I believe, was able to maintain a broad socialist policy and an extraordinary welfare system for so long, and still retain even until 1984 a decent if frugal standard of living, was the strong homogeneity, and the small size, of the New Zealand community. The idea of New Zealand as a very large family was not unreasonable. Accordingly the idea of New Zealand socialism, rather like the family socialism of early childhood, was not, at least in the early part of this century, obviously absurd.

The Unemployment Court is still trying to create, I believe, here in the Antipodes, the world of Deuteronomy Chapter 15. It doesn't work in the State of Israel. Despite the small size and strong homogeneity of New Zealand, it did not work here either. But the judges of the Unemployment Court have not yet caught up with that, and we have to hope and pray that these judges will undergo the Damascan conversion which St Paul experienced.

The extraordinary achievement of St Paul was to bring Christianity to the Gentiles. This meant, of necessity, abandoning within the Gentile churches the socialism practised by the Jewish Christians in Jerusalem, which is described in Acts 4 v 34 - 37 and Acts 5 v 1 - 10. The Jerusalem Church was kept going, financially, by subventions from the churches established by St Paul. I suspect that is why, when the great struggle over circumcision was enjoined, the Jerusalem Church had to give way. But they must have hated doing it.

It is this step which the judges of the Unemployment Court have to take, nearly 2000 years after St Paul showed the way.

Let me move now to the Australian situation and the prospect of effective labour market reform. This is important to New Zealand because our two economies are becoming increasingly integrated. It would be easy for New Zealanders to think that the longer that we in Australia maintain our own version of Old Testament socialism in our labour market, the more investment will flow to New Zealand with clear benefits to your country. I suggest that is a very short-sighted view. New Zealand will benefit much more from a rapidly growing and economically dynamic Australia than from an economically stagnant, if not declining, Australia.

The Coalition campaigned strongly, prior to the March 1996 election, on a programme of industrial relations reform. The key issues were:

- legitimising workplace agreements arrived at without union participation;

- the confining of the Industrial Relations Commission to decisions about basic minima in labour market contracts;
- urgently needed reform to the unfair dismissal procedures brought in by the Commonwealth Industrial Relations Reform (*sic*) Act (the Brereton Act) of 1993; and
- the restoration of sections 45 D and E to the Trade Practices Act.

(Sections 45 D and E were statutory embodiments of the common law sanctions against the torts of inducing breach of contract, intimidation, and conspiracy. They were located in the Trade Practices Act because they are completely general in their effect. They have become known as 'industrial torts' because trade unions have been ubiquitous as offenders.)

The problem with this reform programme is that it was accompanied by election guarantees that no one would be worse off under the new regime, and so the workplace agreements which are to be recognised as lawful under the new Act are so hedged about with constraints and qualifications that even if the government gets its bill through the Senate, these AWAs (Australian Workplace Agreements) may not be worth seeking. These constraints include minimum hourly rates, hours of work, leave loading, penalty rates and overtime, allowances, annual leave, sick leave, parental leave, piece work rates, etc.

The freedom to negotiate a tailor-made employment contract has thus vanished. The only freely negotiated contract which is legitimised under the AWA package is the standard size, designed by the Industrial Relations Commission, with the possibility of wider lapels and deeper pockets.

The consequence of all this is that our tragic unemployment situation, which amongst young people is over 30 percent, will be barely touched by the reform bill, even if it is passed by the Senate.

The new government, despite its very large majority in the House of Representatives, will be two votes short of an absolute majority in the Senate after July 1 next. As well as the ALP there are two Greens, one independent from Tasmania, and seven Democrats, who are strenuously positioning themselves more and more to the political and cultural left of Australian politics.

The IR Bill, with all its faults, is the centrepiece of the government's reform agenda and my reading of the play is that the Democrats and the Greens will combine to block the IR Bill in the Senate, thus leaving the government with four choices.

- first, it can accept amendments from the Democrats which will gut the Bill of its most important provisions;
- second, it can obtain a double dissolution of the Parliament and put the defeated Bill to a vote of the two chambers sitting jointly after the election;

- third, it can abandon its ambitions for statutory change and put a referendum to the people proposing the removal of industrial relations from the powers listed in the constitution as belonging to the Commonwealth; and
- finally, it can give up on its ambitions for industrial relations reform.

The first and last options mean complete loss of legitimacy for the Howard government. However, the double dissolution option is always very unpopular with a recently elected government, especially one which has been in opposition for 13 years. The third option, that of constitutional change brought about through referendum, would, in my view, produce the best industrial relations and economic outcome. But the idea that important powers of regulation should be handed back to the states seems to be deeply offensive in Canberra, regardless of which party is in office.

The Bill itself has not been released. But the essential elements are widely known and already the debate over the options in the event of a Senate veto is developing. I am hoping that centralist pride (of which there is plenty around) will not prevent the first best option in the Australian context, constitutional amendment, from receiving close and serious consideration.

I regret having to take up time with what must be to outsiders the dreary detail of Australian constitutional practice. But how this political struggle is resolved is very important to New Zealand. This is not just because the health of the Australian economy is very important to New Zealand's prosperity, but also because New Zealanders are moving towards an election based on an entirely new system of representation. The outcome of that election seems very difficult to predict and it could turn out that the future of the ECA becomes a bargaining chip in the process of deciding who is to form a government. If Australia is seen to be heading as rapidly as possible down the same road which New Zealand took five years ago, then I believe it would make the future of the ECA here much more secure.

The most obvious benefit which the ECA has brought to New Zealand is jobs. The unemployment rate here is pushing down towards 6 percent. Our official unemployment rate is pushing back up to 9 percent, despite the new confidence which the federal and Victorian election results have brought. Overtime is up, and unpaid overtime particularly has increased. This is consistent with a labour market regime in which employing someone who is unknown, unskilled and inexperienced, is a high risk venture.

One of the most important papers on the labour market and unemployment in Australia was the 1994 paper entitled 'Youth Suicide and Youth Unemployment' by Barry Maley. A graph in that paper depicts male suicide and unemployment data for 20 - 24 year olds, from 1966 to 1990.

The correlation is a striking one, and when the statistical analysis is done the R^2 value comes out at 80 percent. There is, of course, only one way in which causality can flow here.

Another important statistic which Maley gave was an international comparison of suicide rates for 15 - 24 year old males. Iceland and Finland had the highest suicide

rate, but New Zealand was third with 37.9 per 100,000 and Australia was next with 26.7. The figure for New Zealand was a 1989 figure. For Australia it was a 1991 figure. I would predict that as unemployment for young males has fallen in New Zealand, the suicide rate will have fallen in sympathy. When the debate about the ECA gets going in an election context here I believe it will be important to have those figures to hand.

Politics, Edmund Burke tells us, is morality writ large. Unemployment is a moral issue, as well as an economic one, and those who cause it, whether in Australia or in New Zealand, should be judged in moral terms.