Judicial Independence & Justice Staples

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An Alarming "Removal"

In February and March 1989 the Australian legal community was alarmed by steps which accompanied the abolition of the Australian Conciliation and Arbitration Commission and the consequential creation of the Australian Industrial Relations Commission.

The unusual feature of this legislative development, achieved by the Industrial Relations Act 1988 (Cth), was the purported extinguishment of the old commission of one of the Deputy Presidents of the old Commission (The Honourable Justice J.F. Staples). He alone of the Deputy Presidents and available Commissioners of the old Commission (numbering 43) was not appointed to the new Commission. He was originally commissioned in 1975. By 1989 he was one of the most senior of the Presidential members of the Commission. The purpose of this note is to record some of the main developments in what has become known as the "Staples affair".

The Australian Conciliation and Arbitration Commission was set up in 1956 when the High Court of Australia held, in the Boilermakers' case, that the old Arbitration Court (which had preceded it and which had existed in various forms from 1904) was constituted in a way which was incompatible with the Australian Constitution. Because the "Court" was performing functions held not to be strictly "judicial" in character (such as devising compulsory awards for the settlement of industrial disputes), it was held that it could not be a "court" strictly so called. This required the urgent re-structuring of the Federal bodies dealing with industrial relations disputes. The result was the creation of the Conciliation and Arbitration Commission and the Commonwealth (later Australian) Industrial Court.

Nevertheless, many of the judges of the old Arbitration Court were appointed in 1956 to the new Conciliation and Arbitration Commission. By the Act of Parliament establishing that Commission, all Deputy Presidents of the new Commission continued to have the same rank, status, precedence, salary and immunities as judges of the old Court. Those who were legally qualified were also to enjoy the same designation as Federal Judges - i.e. the honorific "Mr. Justice" or "Justice".

Following a national enquiry in 1978 by the Hancock Committee, the new legislation was passed by the Australian Federal Parliament in 1988, as mentioned above.

Apart from abolishing the Conciliation and Arbitration Commission, this legislation established the new Industrial Relations Commission. It clearly contemplated the appointment of members of the old Commission to the new, as in fact occurred. The President of the old Commission was appointed the President of the new. So were all of the other members except Justice Staples.

The Isolation of Justice Staples

Following a speech which Justice Staples made in 1980 to an industrial relations conference and remarks he made in the course of giving decisions in the Conciliation and Arbitration Commission, the then President of the Commission (Sir John Moore) thereafter declined to assign the normal duties of a Deputy President to him within the commission. Initially, he was excluded only from sitting at first instance. Later, when Justice B.J. Maddern was appointed President in 1985, Justice Staples was excluded totally from all duties as a Deputy President of the Commission including sitting on Full Benches. From 1985 he did not sit in a single case.

Although no public reason was ever given for this differential treatment, privately, this exclusion of a person with the rank of a Judge from the performance of his statutory duties was justified by various commentators as being based on Justice Staples' tendency to be a "maverick" and to express his opinions in colourful and unorthodox language. It was also pointed out that industrial relations, including the settlement of large national disputes, requires particular sensitivity and confidence in the decision maker on the part of both parties to the arbitration. It was suggested that neither the employers' nor the employees' national organisations supported the appointment of Justice Staples to the new Australian Industrial Relations Commission.

Following the abolition of the old Commission in 1989, a question has arisen concerning whether its abolition has the effect, in law, of abolishing Justice Staples' personal commission. Upon that question, which may come before a court, I express no opinion. Under the former Act, he could only be removed, namely by an address to the Governor General by both Houses of Parliament asking for his removal on the ground of proved misbehaviour or incapacity. Although the Australian Constitution protects judges of Federal Courts from removal except in this manner, the constitutional provision may not, as such, apply to protect persons such as Justice Staples whose tribunal has been declared not to be a court strictly so called. The Federal authorities claim that the guarantee in his case was extinguished with the abolition of the Arbitration Commission and the repeal of the old Act.

Three Aspects of Concern

Nevertheless there are a number of aspects of the Staples affair which have caused concern to the Australian Section of the International Commission of Jurists, the Law Council of Australia, the New South Wales Law Society, the Victorian Bar Council, the Victorian Law Institute, the Law Institute of Victoria, individual judges and other citizens in Australia. These include:

- The refusal or failure of the President of the Commission to assign duties to Justice Staples over more than three years although he was still a member of the Commission, had the rank and title of a judge and had not been removed by the Parliamentary procedure as the statute provided;
- The failure of the Government, the Minister or any other Federal official to state the reasons for the decision not to appoint Justice Staples, alone, to the new Industrial Relations Commission. Ordinary rules of natural justice would seem to require that he should know and be given an opportunity to respond to alleged criticisms of him before a decision was made, in effect, depriving him of his office; and
- The failure of the Government to initiate any steps for his

removal on the grounds of misconduct or incapacity as was provided under the statute pursuant to which he had been appointed in 1975.

Departure from International Principles

Although some lawyers in Australia, notably at first the New South Wales Bar Council, laid emphasis on the technical point concerning the suggested distinction between "real judges" and Deputy Presidents of the Arbitration Commission, this was not the view adopted by most lawyers. If an Act gives a person the title of a Federal judge; provides that he or she should have the same "rank, status and precedence" as a judge; provides for the same immunities, protections and mode of removal as a judge and the same salary and pension rights, most legal observers would conclude that that person is, for the purpose of independence and tenure, a judge. The U.N. Basic Principles of the Independence of the Judiciary were developed in a number of international meetings of jurists held in recent years. They have been adopted by the United Nations General Assembly, supported by Australia. They and associated international resolutions apply to set out the principles which civilised countries recognise to limit the removal of judges from office. It is submitted that at least those persons who are by local law given the status, title and privileges of judges are covered by the Basic Principles.

The Basic Principles are to be observed as much in the case of Justice Staples as in the case of other undoubted judges upon whose removal the Australian legal profession has lately been most vocal. (e.g. in Fiji, Bangladesh and Malaysia). They require that judges be guaranteed tenure and only suspended or removed for incapacity or misbehaviour that renders them unfit to discharge their duties.

On the eve of the abolition of Justice Staples' commission, an outcry occurred in many quarters throughout Australia concerning the treatment of Justice Staples and the breach of Australian conventions and international rules involved in the procedures adopted. On 29 February 1989 five senior judges of the Court of Appeal of New South Wales (including myself) took the "unusual course" of issuing a public statement expressing concern about the precedent set in the Staples case. The Prime Minister (Mr. R.J. Hawke) dismissed the expressed concern by "members of the legal fraternity" as "contrived nonsense". The Australian Labor Party Government and the Liberal and National Parties Opposition in Federal Parliament defeated a proposal by the Australian Democrats in the Senate for an investigation of the treatment of Justice Staples. Nevertheless, a Joint Parliamentary Enquiry was set up by Parliament to investigate "the principles that should govern the tenure of office of quasi judicial and other appointees to Commonwealth tribunals". This was a compromise. But the terms of reference of the Joint Committee may permit exploration of related questions concerning Justice Staples.

An Unfortunate Precedent

The significant outcry over the Staples affair may itself inhibit similar procedures being adopted in Australia in the future to remove judicial and quasi judicial office-holders by the reconstitution of their courts or tribunals. But, perhaps ominously, within days of Justice Staples "removal" a proposal was made public to "restructure" the Industrial Commission of New South Wales. The relevant Minister has since given an assurance that all Presidential members of the old Commission will be appointed to the new.

Meanwhile, Justice Staples is contemplating other measures defensive of his position. He has declined to leave his office. He is reported to be considering legal proceedings in the High Court of Australia to require the recognition of his commission until he is removed from office following a Parliamentary enquiry such as he was promised on his appointment. Another avenue open to him may be a challenge to the failure of the Federal authorities to accord him natural justice and to confront him with the accusations which were thought sufficient to justify his "removal" from an office with the status and title of a Federal Judge. An analogous challenge succeeded in New South Wales when brought by magistrates not appointed to the restructured Local Court. See Macrae v. Attorney General (1987) 9 NSWLR 268.

The public controversy about the affair continues. It has already attracted attention overseas, notably in the Centre for the Independence of Judges and Lawyers in Geneva. It is a matter for close attention by all Australian lawyers concerned about the independence of judicial office and of offices declared by Parliament to be equivalent to judicial office. ❑

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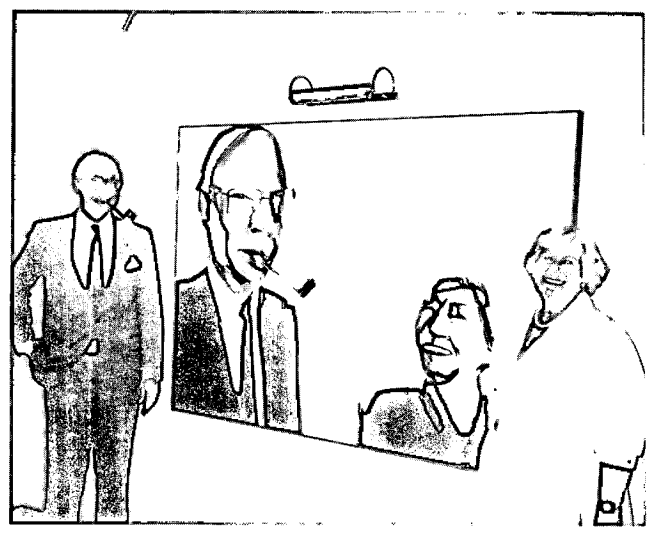

Real people with character, Sir Ninian and Lady Stephen.