



Legislative Council

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INDUSTRIAL RELATIONS BILL

INDUSTRIAL COURT BILL

INDUSTRIAL LEGISLATION (REPEALS, AMENDMENTS

AND SAVINGS BILL

Second Reading

Extract

The Hon. J. W. SHAW [11.48]: Madam Deputy-President, honourable members, it is with some sense of relief that I receive the call in this Chamber to make my first speech. I am particularly pleased to be doing so in defence of the statutory system of industrial arbitration, because I regard the established system of industrial arbitration in this State as having been a very successful mechanism for the resolution of industrial disputes. I regard the established Industrial Commission of New South Wales as having a good track record over many years in dealing with industrial matters. Consequently, I regard changes to that system as needing to be approached cautiously, with a due sense that if we do make such changes, we are structurally altering, by and large, a system which has been successful and which is perceived as legitimate by the major participants in industrial relations in this State.

The present Government of New South Wales plans to transform the established system of resolving industrial disputes in this State. Transformation is the word used in the green papers and which has been embraced by government policy. I would contend that it is a radical transformation, not merely incremental or evolutionary but one which makes root and branch alterations in the existing industrial arbitration structure. Those transformation plans are embodied in the present bills before the House. I desire to present an argument which is profoundly sceptical as to both the need for, and the efficacy of, many of the proposed changes. There are, of course, elements in the bills—largely those referred to by the Hon. M. F. Willis—which are unexceptionable and which will not be the subject of significant opposition or amendment. But it would be wrong, with respect, to overlook some of the many flaws which are to be found in this proposed legislation, and which represent a dangerous experiment in the industrial system, ironically perhaps at a time of unprecedented co-operation on the part of the trade union movement.

I would contend that the present mechanisms of dispute resolution are broadly satisfactory, and deny that any persuasive case has been made out sufficient to support the radical changes which are on the legislative agenda. Nothing that I say is intended to deny the scholarship which lies behind Professor Niland's two volumes of green papers, but I would argue that, as modified by governmental decision, the changes represent a challenge to the role of the traditional trade union movement in an era of unprecedented levels of trade union co-operation, a destabilising element in New South Wales industrial relations, and a threat to the administration of a coherent national wages policy. Any countervailing benefits, I would contend, are speculative or illusory.

To illustrate the vagueness and the amateurishness of the state of government policy which lies behind these bills, I shall take as an example the purposes of the New South Wales industrial relations system which have been spelt out by the relevant Minister in an 11-page policy document that was issued before the bills became available in April of this year. Obviously, any such ministerial statement of purposes will necessarily be generalised in nature, but the purposes which the Minister has specified as presumably being the core theme of his legislative agenda are a curious mixture of the banal and the tendentious. They merely hint at a critique of the present system, and provide no sound bases for the advocacy of fundamental change.

May I deal with these purposes that the Minister set out in his statement. First, to promote greater industrial stability, harmony and co-operation in industry, commerce, and the public sector. This, of course,

is a motherhood declaration and no one could be heard to attack it. What is conspicuously absent is any empirical data showing instability, disharmony, or lack of co-operation causally linked to the current system. It was next said that a purpose was to emphasise conciliation in the prevention and settlement of disputes without the need to take industrial action. This is exactly what the current Industrial Arbitration Act 1940 does. It requires conciliation as a first step, and encourages tribunal members to resolve the real cause of the industrial dispute.

Industrial tribunals regularly order that any industrial action must cease forthwith. Admittedly there are occasional examples of such orders being defied, but my impression is that any such defiance is extremely rare, and I know of no empirical material which points to a significant level of non-compliance with orders or directions. I am not aware of any statistical basis for asserting that non-compliance with the orders of the present system is widespread or a substantial problem which requires the massive changes contemplated by these bills to redress any such problems. Then it was said that the purpose is to give more flexibility and teeth to the Industrial Relations Commission and to the Industrial Court. It is hard to see where greater flexibility is needed than is to be found at present, and it is difficult to see where the proposed scheme injects such greater levels of flexibility. Indeed, as I shall argue, there are quite unnecessary procedural and substantive constraints built into the model contained in the proposed legislation, and there are unnecessary restrictions on the role of the tribunal in the Government's industrial relations policy.

It is then said that the scheme would provide a modern system of registration of unions of employers and employees. This is merely a statement of the obvious. It is said that the bills would ensure open, democratic and efficient operation of all unions of employees and employers. No one would argue against that as an aim. It is said that the legislation would allow greater scope for enterprise-based industrial relations. This, as I shall argue, overlooks the considerable scope for the attention to enterprise problems inherent in the present system, subject to safeguards contained in the existing legal framework. It is then said that the bills would permit voluntary enterprise agreements when people want this approach. This is, of course, one of the contentious aspects of the scheme which allows an escape route from the current system when people desire it, to use the Minister's terminology; and, as I shall submit, at least in the form contemplated by these bills whereby one can have tiny enterprise associations entering into these enterprise agreements, this is calculated to inject a real element of unpredictability and volatility into New South Wales industrial relations.

It is then said that the bills would provide powerful and appropriate penalties against unlawful industrial action. It appears that virtually all industrial action will be unlawful. The penalties can certainly be described as powerful in that the proposed Industrial Court may impose monetary penalties of up to \$1,000 a day for individuals and up to \$100,000 a day for registered organisations. This punitive regime is on top of, or in addition to, common law injunctions and damages, which are not in any way displaced or interfered with, and, of course, the injunctions and damages based upon the secondary boycott provisions, which are proposed to be introduced, paralleling sections 45D and 45E of the Trade Practices Act 1974. Whether those penalties are appropriate or not is obviously a value judgment, but many will argue that penalties of that dimension, which can justly be described as massive penalties, frequently exacerbate and broaden rather than resolve industrial conflict. Once the imposition of such penalties is successfully defied by any party, then the system as a whole, and the legitimacy of the court imposing that penalty, is destroyed.

The next stated object is to promote equal opportunity in employment, which is plainly a laudable object. Finally, it is said that the legislation would protect the rights of individuals at the workplace against unscrupulous employers and unions. That again, of course, is an unexceptionable purpose provided it is clear that the protection is truly against the unscrupulous—a word which obviously involves subjective opinion. May I go back to give a brief description of traditional conciliation and arbitration which, as I have argued, is fundamentally altered by the provisions of these bills. The traditional approach is to have an independent tribunal analogous to a court—in the case of our State, the Industrial Commission of New South Wales—with full power to adjudicate between contending parties in relation to industrial matters. As a result of proceedings before the arbitral tribunal, awards are made which bind employers and trade unions registered in respect of a particular industry. Those awards are legally enforceable and can be varied or interpreted by the same tribunal. Disputes can rapidly be notified, and a conciliation commissioner, deputy president or judge is allocated urgently to preside over conciliation proceedings—in effect, mandatory negotiations. If these fail, arbitration is embarked upon.

This system is harmonious with the Federal system of conciliation and arbitration, first enacted in 1904, which operates in a comparable way making Federal awards binding employers and registered organisations of employees. Most of the participants in the State system of industrial arbitration regard it as satisfactory. It is reasonably expeditious, perceived as being above the immediate interests of the contending parties, flexible, and capable of either an industry-wide or an enterprise-based approach to the resolution of conflict. Often a combination of both perspectives will be found useful.

Most importantly, for all the blemishes of the system which could be pinpointed by careful study, it has at least represented a protection for the unorganised or the non-unionised, the weak, the unskilled, the poor, and the new arrivals to the Australian community. By setting reasonably-based minimum award standards, applicable across industry as a common rule prescription, the arbitration system has ensured fairness in many areas where collective bargaining would not have done so because of the disparity of power between those with the capacity to employ and those who need a job. The system has prevented sweated labour. Moreover, the traditional system has encouraged trade unionism. According to a recent article in the *Journal of Industrial Relations* by Craig Littler and others entitled "Australian Workplace Industrial Relations—Towards a Conceptual Framework", published in December 1989:

A key effect of arbitration has been the mandatory recognition of trade unions in the workplace and the provisions of various forms of union security such as right of entry, protection from victimisation and preference for unionists. It remains to be seen whether this effect will withstand recent legislative changes which have been either proposed or actually introduced in Queensland and New South Wales.

Presumably this protection or enhancement of trade unionism is seen as no bad thing, because volume 1 of the green paper made it clear that recognition is given to trade unions as an integral part of a free society. Professor Niland went on to say:

Their essential legitimacy should go unchallenged as long as they remain accountable to their members and to the broader balance of interests in society.

The system, particularly in its centralised mode over the past couple of decades, has lent substantial protection to employers facing claims for overaward payments via the method of union undertakings to comply with the wage fixation principles. I would ask rhetorically: Why change this system? One reason has been advanced. The argument is that productivity—output per worker—can only be increased by a system which concentrates on the individual enterprise and which allows groups of workers at that enterprise—called the enterprise bargaining unit or the enterprise association—to deal directly with the employer without undue, or perhaps any, involvement by the industry-wide trade union or by an independent industrial tribunal. It is argued that inefficiencies will be broken down more rapidly by following such a deregulatory approach. I want to point to a number of fundamental problems with that rationale which, I emphasise, is the only expressly articulated rationale of this legislative scheme.

Some of the problems are as follows. First of all, productivity enhancement is not only possible but also encouraged under the current system. Wage increases are obtained through structural efficiency exercises involving fundamental reviews of existing terms and conditions of employment. Any competent employer can and should raise problems of inefficiency or arbitrary delineation between classifications as part of the structural efficiency negotiations, first, at the bargaining table, and, where necessary, during the arbitral process. This approach has yielded positive results. A variety of different statistical figures confirm a reasonably good productivity performance. In relation to output, non-farm gross domestic product has grown by 4.2 per cent per annum over the period 1984-85 to 1988-89, compared with growth rates of 2.3 per cent during the 1970s and 2.4 per cent in the period 1979-80 to 1983-84. Over the period 1983-84 to 1989-90, manufacturing output increased by 3.4 per cent per annum, about five times the rate of 0.7 per cent per annum which was achieved between 1976 and 1982. Economic Planning Advisory Council estimates of manufacturing productivity indicate an annual average rate of growth between 1983-84 and 1987-88 in relation to labour productivity of 3.5 per cent, and in relation to capital productivity of 3.9 per cent. Since output growth is the ultimate test of our productivity, it is important to note that Australia has clearly doubled the rate of output growth over the past five years. Productivity growth during the period of the accord, that is, since 1983, is well in excess of that recorded under the previous Federal Liberal Government.

In the article by Littler and others, to which I made earlier reference, it is argued that:

More recently, work practices have been addressed in a more systematic and sweeping fashion as a direct outcome of the restructuring and efficiency and the structural efficiency principals introduced in recent National Wage decisions. The full implications of these decisions for workplace industrial relations have yet to emerge. Nevertheless, although the resulting negotiations have predominantly been conducted at industry level, this has in some instances entailed a higher level of workplace involvement than was previously typical for those industries. It has even led to a consideration of work arrangements in workplaces where union organisation was weak and had little, if any, involvement in sustaining such practices.

Michael McGrath, a senior lecturer in economics at the University of Technology, Sydney, has argued that:

Within a centralised wage fixing system we will experience the types of changes within the workplace that are necessary to improve productivity in the medium term. At the same time, the risk of a wages breakout, that might be warranted by the underlying strength of the demand for labour, is being contained.

I would contend that the established system is perfectly capable of focusing upon a particular enterprise and correcting industrial relations problems in that enterprise. The vogue expression "enterprise focus" or "enterprise bargaining" usually overlooks the enormous capacity in the existing legal framework to come to grips with those problems at that level. Many examples could be given. In manufacturing, the Kelloggs plant at Botany has had a number of enterprise-based proceedings before the Industrial Commission of New South Wales, resulting in large boosts for productivity, multiskilling, career path inducement and significant reductions in unit labour costs. All of this has undoubtedly assisted the acquisition of major export markets in New Zealand and Japan. In the construction field, the Sydney harbour tunnel agreement, negotiated by the Labor Council of New South Wales and employer bodies, has proved a sound industrial prescription tailored to the need of the particular undertaking. The Broken Hill Propriety Company Limited steelworks at Newcastle and Wollongong have, for many years, been covered by awards of the Industrial Commission of New South Wales, specifically directed to the needs of those undertakings. To use the jargon of those favouring labour market deregulation, they demonstrate an enterprise focus. These achievements, which are merely illustrative of a not uncommon situation, have occurred in the context of the protective legal framework facilitating industry unions and industry awards. Notwithstanding the foibles found in any human institution, the system works and is flexible.

I would argue also that the proposed changes take insufficient account of the relative weakness of groups of employees without the benefit of a large industrial organisation supporting them when dealing with a major corporate employer. It was to redress this inequality of bargaining power that the trade union movement was formed in the nineteenth century. It is the established trade union movement which provides the countervailing power, restoring equity in an employment relationship. The formation of tiny, enterprise-based unions, or pseudo unions, without resources and small in number, is a manifestly inadequate substitute for the provision of the expertise of full-time employees, full-time union officers, and an industry-wide perspective that the conventional registered trade union can bring to bear on an industrial problem. These proposals, in my contention, greatly underestimate the positive role which a national or statewide trade union can play in encouraging efficiencies and streamlining industry relations.

Often the greatest resistance to change is to be found at the shop floor level, not at the level of the union. I know this might seem odd or iconoclastic to those who have not participated in practical industrial relations, but I think that if members on the Government side of this House make inquiries from major corporations and, perhaps more particularly, from registered employer bodies, they will find that in structural efficiency exercise after exercise it is the rank and file at the shop floor level who have to be persuaded, often by the trade union officers, to make changes in the interests of efficiency and ongoing employment opportunities. Experienced trade union officials, without endangering basic safeguards of health and non-excessive workloads, can encourage the abandonment of artificial practices in exchange for a positive package of benefits. The assumption that it is the broadly-based trade union which provides an obstacle to enhanced productivity is largely a myth. It must be accepted that some trade unions cling to old and inefficient ideas, but the processes of change and education sweeping through the industrial relations system at present are sufficient to substantially overcome such relics of the past. Dr J. E. Isaac, a distinguished labour market economist, now holding a university post—as he did for many years—and who

was also a Deputy President of the Australian Conciliation and Arbitration Commission for many years, speaks with not only a substantial academic background but also a background of practical experience in resolving industrial disputes. In Dr Isaac's article entitled "The Second Tier and Labour Market Flexibility" published in the *Australian Economic Review*, first quarter 1989, he said:

Centralised negotiations on awards covering a large number of employees . . . have in many cases facilitated negotiations at the establishment level by laying down the framework for such negotiations. Such centralised negotiations involving personnel, experienced in negotiations—tribunals, national union and employer representatives and, at times peak union and employer organisations—have been critical to the implementation of the (restructuring and efficiency) principle in many multi-employer awards.

I would go on to argue that the supporters of the proposed reforms underestimate the value of the existing system in containing aggregate wage outcomes in the interest of the national economy. They banker after a system with less equity, with high wages in high profit industries and depressed wages in struggling industries. This is the economists' dream of the market providing differential rates depending upon the capacity of individual employers to pay. But clearly that reduction of equity detracts from the fairness and justice of society as a whole, condemning some workers to near poverty or at least to the substantial downgrading of existing standards of living.

I turn now to the general question of what the reformers are seeking to do. The two volumes of the green paper prepared by Professor Niland represent the intellectual underpinning of the Greiner Government's scheme. Having regard to Professor Niland's writings and also to the announcements of the Government, a number of key features of the supposed new era can be summarised. First, enterprise bargaining units or associations would be formed as a new type of industrial association representing employees, an alternative to the traditional trade union where 65 per cent of employees who would be bound by an enterprise agreement vote in favour of forming such a separate association. The association would be registered without any real scope for objection by existing unions or a proper hearing, and yet it would have many of the attributes of a trade union under the present scheme. It is plain that tiny pseudo-trade unions can inject a large element of instability into the relationship between the employees and the employer. Most important in industrial relations is the establishment of personal links and of a channel of communication between the union and employer representatives. That channel of communication can attain great benefits for both parties, but I contend that if one has these tiny units without resources, expertise, or assets, one will have fluctuations which introduce instability into existing relationships.

One can readily contemplate the formation of a bargaining unit which is in a sense under the strong influence of the employer. To use the trade union jargon one would have tame-cat outfits or bargaining units without any real independence or ability to stand up and represent the work force. One could imagine that such situations would be encouraged by the strategic making of overaward payments perhaps to selected employees, such as delegates, or more general payments outside of the system of national wages policies. On the other hand, and I contend it is a realistic possibility, one could imagine enterprise bargaining units falling under the control of ultramilitant, unrestrained elements at the job level without the break of responsible elected officials to guide and encourage the rank-and-file workers and one could contemplate a fluctuation between those two extremes. As I have submitted to this House, that instability would be a major feature of these bills if implemented.

It is clear from a study of the bills that enterprise agreements can be reached or are meant to be reached without the involvement of a registered trade union and with minimal scrutiny only by an industrial tribunal. It is easy to contemplate that enterprise agreements may undermine existing award conditions, or alternatively lead to the prospect in some areas of changes which are negative so far as a coherent national wages policy is concerned. In order to ameliorate what are obviously potentially harsh aspects of enterprise agreements, volume 2 of Professor Niland's green paper recommends, under the broad heading of "Equity Considerations", the prescription of minimum standards. It is clear that the proposal contemplates the removal of the protection of current award standards, and consequently contemplates generally lower minimum standards applying to enterprise collective agreements. Professor Niland argues that current minimum standards contained in awards facilitated by the present legislation can be criticised as an inflexible constraint on industrial relations practices of both employers and employees.

It is not the independent commission, but rather a politician, the Minister, who will determine minimum standards for the future. It is not to be done independently or objectively; it is to be done by the Minister setting these minimum standards which are so critical to the scheme of enterprise agreements. The bills contain an incongruous provision whereby the commission is required to assist the Minister in his task. The commission is required to provide facts or information to the Minister, who is set up under this legislation as an arbitrator of these minimum standards. This system is obviously indefensible and it is difficult to see any clear rationale for it except, perhaps, the rationale to be found in the green paper which makes it clear that what the scheme as a whole is concerned with is to downgrade terms and conditions of employment in particular enterprises. That is why it is the Minister who is given the power to determine the minimum conditions every year, so that minimum standards do not creep up closer to the average. It is designed to ensure that some independent-minded judge does not say, "Look, these minimum standards are inadequate for the times".

Professor Niland has argued that a ministerial review ensures that a mechanism exists by which the quanta can be reviewed but not in such a way that over time they would drift closer to the operating average, with the result that there would be considerably reduced scope for the individual parties to tailor their own arrangements. There is thus suggested by the green paper a system of agreements beyond the scope of the commission's real or substantial review, subject only to a safety net of minimum standards determined from time to time by the Minister and not by the commission. This aspect of the scheme, as with many others, shows a markedly diminished role for independent adjudication. Next there is an important component of the Government's scheme which means that the existing Industrial Commission would be divided between a court and an industrial relations commission. This proposal envisages an artificial divide between the judicial and the arbitral. It is cumbersome and unnecessary. The policy basis behind it appears to be the need for a punitive court which would come down hard on those involved in industrial action.

The reformers seek to divide off such a court specialising in retribution from the function of dispute resolution. It is presumably regarded as untoward and unacceptable that a court, faced with an action for a penalty or for deregistration, should actually endeavour to address the real causes of the industrial conflict and to resolve that conflict. This is in fact what happens now, but in a dismembered court-commission it is to be prohibited for the future. Under the current Industrial Arbitration Act, this State has an industrial tribunal structure which is admirable in its flexibility. It is empowered to exercise judicial, conciliatory and arbitral functions in the same proceedings. There is a minimum of legal argument concerning these categories. Proceedings can move swiftly from conciliation to arbitration or concurrently involve both elements. No experienced practitioner advocates the suggested divide; most oppose it. Sceptics suggest that the divide will facilitate dispatching of troublesome judges to a narrow court, which on present estimates will have very little to do. Insofar as currently appointed judges are seen as a fetter on radical reform, the proposed court provides a convenient, if somewhat unproductive, dumping ground.

As the current President of the Industrial Commission, Mr Justice W. K. Fisher, wrote in a recent paper: "Administration, including industrial structures, should not be divided. Divide them only when you don't want them to work". It is important to realise that Professor John Niland's green paper, or at least volume I of it, which, as I have said, provides the philosophical basis for Mr Fahey's proposed transformation, did not support the court-commission distinction; rather, it concluded that the judicial function, particularly that aspect to do with enforcement of awards and orders, is better handled within the industrial tribunal system. It was only if the commission found itself unable to discharge the judicial function that the establishment of some separate court, which, according to Liberal Party policy, would be part of the Supreme Court, would be feasible. Another curious feature of this turnaround from the green paper stance, or from volume I of the green paper, lies in the fact that the Minister is suggesting, so far as the arbitral tribunal is concerned, that the existing tribunals will be replaced by a unified arbitral forum, which will eliminate the existing institutional split. In other words, part of the Minister's proposal says, "Let's have the conciliation commissioners and the deputy presidents in the one single structure".

The Minister, indeed, has positively argued that the industrial relations system has been hampered by the divided tribunal structure under the existing statutory scheme. In fact, the Minister's statement tends to exaggerate the existing divide because, in practice, conciliation commissioners exercise many of the powers of judges and deputy presidents, and the system is integrated by appellate mechanisms, whereby there is extensive facility for review by the judges and deputy presidents of the award-making role

of the commissioners and conciliation committees. Nevertheless, there is a case—which I readily accept—for greater measures of integration, particularly for the geographical location of the commissioners in the same building as the judges and the deputy presidents. Such a step hardly requires legislative change, let alone the Niland-Fahey scheme.

The important point is that Mr Fahey's statement contains an obvious tension between the desirability of integration, on the one hand—that is, integration between the commissioners and deputy presidents into one structure—and proposals for institutional separation, on the other hand—the divide between the court and the commission. The justification for the creation of a new court is to be found in a discussion paper written by Professor Niland, entitled, "An Industrial Court as well as an Industrial Relations Commission for New South Wales". That discussion paper has now been incorporated, in substance, in volume 2 of the green paper. I propose to critically examine the arguments in favour of the divided or separate court in order to show, if I can, that they lack substance and cogency.

The first reason advanced by Professor Niland for the division is that many observers thought that the tribunal would have difficulty in handling the distinction between so-called interest and rights disputes. To suggest that these difficulties require the creation of a separate court obviously assumes the appropriateness of the categories. Many observers have insisted that the categories are vague and unnecessary. Certainly, their utility is not self-evident. In any event, it is far from clear that the Minister's adaptation of the green paper really involves the acceptance of these concepts. The idea of a right to strike during the negotiating phases—the so-called interests dispute—which was favoured by Professor Niland, has been rejected, yet this was, in truth, foundational to the interest-rights dichotomy found in Professor Niland's green paper. Secondly, it is pointed out by the author of the discussion paper that a trade union submission suggested a dual tribunal model was a fall-back position. This overlooks the difficulty that apparently no party suggested it as a positively desirable option.

Again, the Government seems to be the only marcher in step. This is illustrative of many aspects of the scheme. If one were to look at submissions from employer bodies, trade union bodies and other interested observers, many critical elements of the paper are not supported as a first option by any significant participant in the industrial relations scheme. Rather, I think it can be reasonably suggested that this scheme comes from academic theories; it comes from policies based on value judgements rather than from the actual or empirical experience of people who each day are called upon to resolve industrial disputes and to maintain harmonious industrial relations. It is next suggested in favour of this hived-off court in the Niland paper that there must be an outlook and attitude which favours an effective distinction between interest disputes and rights disputes.

It is suggested that the sanctity of agreement will be preserved only if there is such a distinction and that difficulties of attitude point to a more positive light for the idea of a labour court than was apparently the case at the volume I stage of the green paper. This appears to involve a judgment that the mind set of a tribunal dedicated to the resolution of industrial disputes is inappropriate for a forum concerned to apply and enforce penalties. It is true, as I have earlier mentioned, that in penal and deregistration proceedings before the present New South Wales Industrial Commission, the parties stand a reasonable chance of getting into informal discussions presided over by the judges and into conciliatory procedures. They may even resolve the real problems. "What is wrong with that?" I would ask rhetorically.

Many disputes have been and can be resolved by means of such processes, and most observers would regard that as a positive virtue of the system rather than as a detriment. It is only the confrontationist who desires to see pure and unfettered legalism applying to conflicts between employers and employees. Surely it is better to resolve the substantive questions between the parties than to engage in formalistic and punitive litigation. Yet it is just that latter process which this industrial court will entertain. It will not have any role in resolving disputes; it will simply determine whether there is industrial action taking place in accordance with the statute, and, if so, what penalty is appropriate. It will be concerned, as a traditional court is, with the ascertainment of existing legal rights and the implementation of a penalty, without the more important and overriding task of bringing the parties together, of examining compromises, and of seeking common ground between the contenders.

A further argument advanced by Professor Niland concerns the analogy with other State systems of industrial arbitration. However, even the most cursory examination of those other systems shows a

significant degree of integration between an industrial court where it does exist and the arbitral system. Generally speaking, there is overlapping membership between the court and the arbitral body. Here, the scheme does not contemplate overlapping membership between those two institutions. Certainly in the Federal sphere, the 1956 boilermakers case enforces a separation of powers between the judicial and the arbitral. Most participants in that system regard the division as artificial and distracting. Moreover, Professor Niland makes it clear that he wants a separation between the proposed court and the eminent mainstream courts. In the Federal system you do have an eminent court dealing with industrial matters as part of the Federal Court of Australia; you do not have a narrowly based specialised and generally unsatisfactory court which will not in the future attract candidates of calibre to its benches.

Professor Niland says in his green paper that he wants members of the court to maintain a sense of touch and integration with industrial relations. Is this not best achieved by having overlapping membership or complete integration with the arbitral tribunal, where the members deal with practical industrial relations every day? It is said that the attractive simplicity of a unified tribunal would not achieve the key goals of the green paper's industrial system. Because of the degree of difficulty in introducing the interests-rights distinction given Australian traditions. Professor Niland raised doubts about the ability of a proposed industrial relations commission to build the appropriate environment favouring sanctity of agreements. In short, the basis of the separation of a court lies in the persistent desire to introduce this interests-rights dichotomy into Australian industrial relations. This is an abstraction—one that most practitioners had not heard of prior to its emergence in the green paper and one that is generally rejected by interested parties. I have also argued that it has not in substance or in its comprehensive nature been adopted by the Government in these bills. There are critical elements of the scheme which have not been introduced, so that the model of an interests-rights distinction is adopted only in a flawed and unsatisfactory way.

It should not be assumed that a new commission established would not apply the law as it found it in the statute. Rather I should have thought that the assumption was directly to the contrary. The assumption would be that persons who take office in any new commission will apply the law as the Parliament determines it to be. The basis for a division of a separate court proceeds from a wrong assumption that in some way the proposed commission will not be able, or will not genuinely endeavour, to apply the legislation emerging from the Parliament. My contention is that none of the arguments I have gone through is a positive or substantial basis for changing the established structure. The reasoning process is a mixture of the dogmatic and the speculative. It fails to discharge the onus of proof on those who seek structural change of this kind in relation to a longstanding and respected institution. Mark Bray, of the Department of Industrial Relations at the University of Sydney, said correctly, in relation to the proposed court commission division:

This proposal defies all previous advice, including that in the Green Paper. There is also little evidence that the former Industrial Commission in Court Session failed in its judicial role.

I turn now to develop a matter that I adverted to in passing; namely, that the legislation reflecting government policy does not reflect critical elements of the Niland scheme. Obviously one cannot criticise changes of stance as such during the green paper process; there is nothing wrong with alteration that might take place that reflects public debate and the like. However, there are at least a number of alterations that are difficult to justify except upon the ground of political expediency. In other words, the changes do not in truth reflect the development of the Niland proposals; they reflect an alteration based upon non-rational considerations. The matter to which I wished to refer specifically is what has been described as the abiding theme of the green paper; namely, the proposal that industrial tribunals should distinguish interest ? disputes, which relate to the making of the terms of employment or the initial \ bargain or award, from rights disputes, which relate to the interpretation of I the legal rights of parties during the subsistence of that award or bargain. Much of the validity of that distinction depends upon the proposition that it I was unrealistic to regard all industrial action as unlawful.

Professor Niland in volume one of his green paper argued that the relevant legislation needed to contain effective and enforceable provisions I baking unlawful any strike that occurs during the life of that agreement or award, However, he thought it was "equally important that the Act recognised the right of unions to engage in strike activity during negotiations after an award or agreement covering their members has expired". He considered that such industrial action as part of a campaign for a new award or agreement should generally be deemed to be lawful subject to provisions protective of the democratic rights of union

members and the public interest. That notion reflects classical American collective bargaining theory. However, as I understand the present proposal, it seems likely that virtually all strikes, bans and the like, will be deemed unlawful and subject to the heavy penalties that were once envisaged for application to industrial action only during the currency of a bargain or award. The Government has taken the penalty provisions designed by Professor Niland for the limited purpose of industrial action during the subsistence of an award and applied them more generally to unlawful industrial action.

It is not clear in this context where fundamental changes have been made to the green paper what role the interests-rights distinction will play in the operation of the proposed Industrial Relations Commission. Professor Niland envisaged that the commission would not have authority to arbitrate interest disputes unless referred by the Minister in the public interest or jointly by the parties to the award or agreement. But in various statements by the Minister no particular mention is made of any such inhibition in the resolution of disputes and the discussion of the processes of conciliation and arbitration in those ministerial statements seems perfectly general in its character. To understand where it is envisaged that arbitration can occur and where it cannot occur, one must look at the somewhat detailed provisions contained in the bills. As I have endeavoured to argue, the bills, in this critical context, depart from the Niland scheme. Therefore, it will be necessary in due course for the Legislative Council to examine the detail of the dividing line between legitimate and illegitimate industrial action and where the commission can arbitrate and where it is precluded from doing so. These notions are new and quite radical. They have not been part of the tradition of industrial arbitration in this State over the many decades of the operation of that system.

I turn now to develop the argument that this measure is a transformation that the participants do not want. An amazing feature of the proposed transformation lies in the undoubted fact that the major bodies that appear before the Industrial Commission of New South Wales have not sought, and do not in substance want, the radical changes embodied in the bills. Broadly speaking, they are satisfied with the existing system. All, no doubt, would suggest various finetuning reforms, but virtually none suggests the dismemberment that is contemplated by the Government. The legislation flies in the face of the views of those who have daily experience of the present system. This suggests that the Government's motive for change may be essentially ideological. As Mr Justice Fisher said bluntly in a speech given on 23rd March to the Industrial Relations Society of Wollongong:

It is a prescription for major industrial friction. For this reason it has not been received with any enthusiasm by the employers of this State, by unions or by academics.

Radical reform, breaking away from consensus and lacking support from those who actually have practical knowledge of how the system works, is, obviously, fraught with danger. Although I have suggested that an ideological agenda is being pursued involving a desire to reduce the relative strengths of trade unions, nevertheless there is some element of mystery about why the transformation is being pursued by the Government so tenaciously. Part of the answer might lie in the mystique of being seen to have achieved something truly innovative, the love of the new, and the rejection of the staid or established. I wish to refer now to what I would term the Federal threat: the difficulties of taking the New South Wales arbitral system off on a path that is qualitatively different from the scheme that applies under the Industrial Relations Act 1988, the relevant Commonwealth legislation. I contend that one of the most misguided aspects of the whole exercise is the assumption that New South Wales can go its own way in industrial relations. With the re-election of the Labor Government federally, it is clear that there will be a maintenance over the next three years of the traditional legal framework for the resolution of industrial disputes. It is true that enterprise bargains will be reached; trade union rationalisation and restructuring will be undertaken; the number of unions with a presence at particular enterprises, especially so-called greenfield sites, will be reduced and single-union arrangements can be expected. But all these developments will take place in an evolutionary way, with a background of consensus between government and the trade union movement and in the context of an active role for the Australian Industrial Relations Commission.

The suggestion that New South Wales can take a radically different direction given the ascendancy of the Federal system of conciliation and arbitration is misguided. The need for comity between the State and Federal systems was recognised explicitly in volume one of the green paper, in which it was said that in the interests of a more efficient and rational handling of industrial relations, greater consistency

and integration between State and Federal jurisdictions should be sought. Professor Niland argued that the question is not so much whether greater comity and co-ordination is warranted, but rather the ways in which this might be achieved. The reality is that if a system is constructed that is unacceptable to the established trade union movement or to major employers, moves will be undertaken to remove industries wholesale from the New South Wales jurisdiction into the Federal jurisdiction, and, generally speaking, the Australian Industrial Relations Commission will move to resolve interstate industrial disputes notwithstanding that portions of those disputes have been dealt with traditionally by State industrial tribunals.

It is true that the Industrial Relations Commission has a discretion to refrain from hearing or determination such matters under section 111 (1)(g) of the Federal legislation. But why should it do so once it is established that the dispute involves an industry that is not confined to the boundaries of the State of New South Wales and that has a national character? The High Court has overthrown earlier judgments that constrained the role of the Federal conciliation and arbitration system. Nowadays it is a reasonable generalisation that all employees can be engaged in an industrial dispute, and the powers of the Industrial Relations Commission apply broadly to employment in the public and private sectors

In short, if a system is constructed in New South Wales which is seen as antithetical to the interests and objects of one side or the other side of the industrial relations system, the system's establishment will sound its own death knell as a separate scheme for industrial arbitration. The steady drift of industries from the State to the Federal commission will become a landslide. The so-called transformation will amount to a funeral. That the New South Wales Government does not perceive this is surprising to put it mildly and a testimony to its naivety in these matters. The history over recent years has been of a gradual movement from the State system to the Federal system. There is no substantial record of any movement back the other way. What I am really suggesting is that if this Parliament puts the State system out of kilter with the Federal system in a way which tangibly reduces its legitimacy in the eyes of one party or the other, the trickle into the Federal system will become a flood because of the change that the Parliament has effected. That does not mean that this Parliament has to stick to the very letter of everything that is in the Federal legislation. There is reasonable scope for different provisions or fine tuning, but to enact something that is fundamentally different from the Federal scheme would be very dangerous to the continued operation of a New South Wales industrial arbitration system.

I propose now to go to some of the critical elements of the bill and to spell out some of the difficulties that the Labor Opposition has with some of those provisions. The features that strike one as creating a difficulty and as being susceptible to serious debate can be summarised in the following points. I refer first to the denial of ready access to the processes of compulsory conciliation and arbitration as and when the need arises. At present, any party can raise an industrial dispute and ask the Industrial Commission to conciliate and then arbitrate, whether an award is in existence or in operation or not. The commission exercises that function with a due degree of discretion. If a party makes a new award and next week or next month goes back to the Industrial Commission saying that it wants to revise the provisions of that award, it would have to persuade the Industrial Commission that circumstances have changed or that some alteration is called for in the public interest. It is not open slather; it is not a question of revising the bargain as a matter of personal whim or discretion. It is in the hands of the responsible industrial tribunal. But there is the flexibility, in an appropriate case, to achieve a variation of the award when circumstances warrant it.

The Industrial Commission used to use the verbal formula that "good and cogent reasons" need to be made out to justify the variation of an award. Whether that verbal formula is appropriate or not, at least there is the exercise of restraint or discretion by the tribunal before any variation is made. Under the scheme contained in this legislation an award or agreement would be required to specify a term of between one and three years. During this time there would be simply no access to the commission to vary or rescind a current award or agreement without the concurrence of both parties. In other words, one party can exercise a veto right on the application to have the commission exercise its jurisdiction. One party can say to the commission, "We will not give you our consent, therefore you cannot conciliate, you cannot arbitrate and you cannot resolve this industrial dispute". Why is there the need for this inflexibility, these jurisdictional constraints on the industrial commission? The need arises from the interests-rights theory, the idea that once a bargain is reached it should be, as it were, set in concrete for the term specified in the award or the collective bargain. I contend that it does not come from any real or even perceived need on the part of

employers to be protected from applications for the variation of an award. After all, the present wage fixation principles, with their mandatory no extra claims undertakings from unions, already achieve that aim of restraint during periods between national wage or State wage cases. I suggest that this significant fetter on the power and authority of the judges, deputy-presidents and commissioners who constitute the system is unjustified and calculated only to close the door of the commission in resolving industrial disputes.

The second point is the introduction in other aspects of the legislation of the American interests-rights distinctions but without any corresponding right to strike being accorded to trade unions or their members. The Niland report recommended that there should be a limited right to strike during the negotiating phase for a new award or agreement. It comes as no surprise that the Government has adopted many of the Niland report's recommendations, but the fact that there is no accompanying right to strike makes a mockery of the philosophical underpinning of an interest-rights distinction as proposed by Professor Niland. Third, there is the miserable series of minimum conditions of employment to be set by the Minister and to be applicable as a floor to enterprise agreements. The legislation opens the way for removing the protection of existing entitlements under awards and agreements. All existing entitlements such as overtime rates, penalty rates, hours and annual leave loadings would be up for negotiation subject only to a skeletal series of minima—wages at \$294.10 per week scaled down for part-timers and juniors; ordinary hours averaging 40 hours over 52 weeks; a casual loading of 5.8 per cent for part-time work; sick leave of one week per annum with no accumulation; and minimal redundancy payments but only where there are more than 15 employees in any sphere of employment.

It is clear that these new minimal conditions would become the maximum for many workers, especially those who are currently identified as disadvantaged in the work force: for example, women, young workers and workers from non-English speaking backgrounds. Fourth, there is the artificial and unnecessary division of functions to be performed by the new commission and the new Industrial Court. I have already dealt with that in considerable detail. Fifth, there is the battery of new or expanded sanctions against union officials and individual workers. Individuals could be fined up to \$10,000 and unions up to \$100,000. The bill also provides for imprisonment. For example, clause 453 contains an offence of circulating false copies of the rules and provides a maximum period of two years' imprisonment for that offence. It should be noted carefully that this new regime of penalties is in addition to the other actions currently available and which would remain available under the common law and under the trade practices legislation.

Sixth, there is the abolition of recovery proceedings before the specialist Chief Industrial Magistrate's court. For some reason which is very difficult I to fathom, the legislation proposes to abolish the specialist jurisdiction for recovering unpaid wages, annual leave and the like before commissioners under the present section 25AA of the Industrial Arbitration Act and before the Chief Industrial Magistrate. These are low cost, efficient, effective recovery mechanisms and the rationale for their abolition is very far from clear. Seventh, the bill provides for automatic stand-downs, without the need for approval by the commission, in the hands of the employers, coupled with the reversal of the current onus of proof when the matter does come before the commission. Unions would be required to apply to the commission for the revocation of the employers' stand-down orders and the union would be required to prove why stand-downs should not occur or should be revoked. This proposal would open the way for some employers to stand down workers at whim, and the stand-down would be effective until or unless the commission is persuaded to veto it or revoke it.

Eighth, there is provision for fast track registration of pseudo trade unions to be known as enterprise associations. The main bill will establish mechanisms for ousting existing trade union coverage in favour of what may well be management dominated sham unions. There are no real or substantial provisions for a hearing as part of the registration process which would allow existing trade unions to provide good or sound reasons why that enterprise association should not be registered. In particular, existing trade unions are precluded under the provisions of the legislation from raising an objection that those members can conveniently and appropriately already belong to, or be represented by, the existing registered trade union. Obviously if a right of objection of that kind were to be inserted, many enterprise associations would not be registered because existing representative structures are already in a satisfactory state, or so a tribunal would conclude.

Ninth, special penalties against employers who victimise or dismiss employees who choose to belong to a union, who become union delegates, who complain about underpayment or who give evidence in industrial tribunal proceedings will be abolished. At present section 95 of the 1940 Act provides that protection against victimisation. We do not see its equivalent in the bill. That may be an inadvertent omission, as the Minister in another place suggested some other omission may have been inadvertent, and it may be subject to repair. But it seems an ominous sign that these traditional and longstanding anti-victimisation provisions have been removed from the bills before the House, whereas the bills contain a series of other provisions designed to promote freedom of choice concerning union membership and to provide penalties upon those who infringe that freedom of choice. It is an odd and asymmetrical approach to the legislative scheme.

Tenth, preference to union members over non-unionists would be abolished under the main bill and any such existing preference arrangements will have no effect after 12 months. Eleventh, every union will have to apply for re-registration within 12 months of the bill becoming law and satisfy new and expanded registration requirements. In what is certain to be a logistical nightmare, every union in New South Wales, as the Opposition understands the bills, will be required to reapply for registration and if it is not granted within 12 months, registration will automatically lapse. Where the idea for that scheme comes from can be a matter of speculation only, but it seems neither sound nor rational.

The final element of the bills that I want to identify is the prohibition on political donations being made by unions unless a separate fund has been established and contributions to that fund are voluntary. It is reasonable to see that provision as a disguised attack on the Australian Labor Party and on trade union affiliation fees to that party. Though it will no doubt be argued that the same prohibition applies to registered employer organisations, the practical reality is that the conservative parties can expect donations of substance from individual employers rather than the registered employer bodies. Obviously the legislation, as we read it, will have no effect upon such donations. It seems to be a partisan piece of legislation, particularly in the absence of any evidence or indication that there has been anything untoward about the system of political donations or affiliation fees in the past.

One could say much more about this large and complex bill, as well as the cognate bills, which have a particular importance in the scheme. No doubt I will have much more to say about the detail of those bills at the Committee stage. However, the particular aspects of the bills that I have highlighted so far represent the major concerns that I have and, as I understand it, the Opposition has about the legislative scheme that has been put before this House. With all due respect, I suggest there is an element of amateurishness about the scheme that has been constructed. It comes from a variety of sources. It lacks coherence. Professor Niland's scheme has not been embraced in its coherent original version. It has been subjected to all kinds of modification, which has damaged the rational basis of the scheme. As I have argued, the discernible tendency in the legislation is to try to circumscribe the powers and authority of trade unions. I suggest that a political value judgment has been involved in the scheme.

There are technical features of the principal bill which make it incompetent; it is experimental in policy terms and, as I have argued and emphasised, it is unsupported by people of substance who are experienced in industrial relations. I contend that the Industrial Relations Bill will turn New South Wales into an industrial relations laboratory and inflict upon employers and trade unions in this State an experiment calculated to introduce a great measure of instability in place of a well-established system which has been working well. The bill is a curious and woolly mixture of the bland and the dangerous. It is riddled with technicalities which lawyers will love, but unproductive argument of that kind will not assist to resolve industrial disputes.

A tangible indication of some of the thinking which lies behind this legislation, the laissez-faire thinking of the Government, is to be found in the Minister's announcement of 25th May that the Builders Labourers Federation will be welcome back if it applies for reregistration in the New South Wales system. The Minister has been reported as saying that he was not concerned by the track record and imminent return of the BLF and he said, "They can apply for reinstatement next April". Building employers and trade unions in the building and construction industry will be horrified by an invitation of that kind. Yet it is consistent with the open-door approach to registration and the formation of employee bodies that this legislation contemplates. It is consistent with the idea that groups of workers, for example on a particular construction

site, can form their own enterprise association. It does not take much imagination to contemplate pro-BLF groups having hold of enterprise associations of that kind in central business district building disputes. I take that as perhaps the most dramatic illustration of the dangers of the bill but one which seems to be supported by the Minister's statement, at least as reported in the press, and one which should prompt this House to give careful attention to the details of these bills, both in the second reading debate and at the Committee stage in August.