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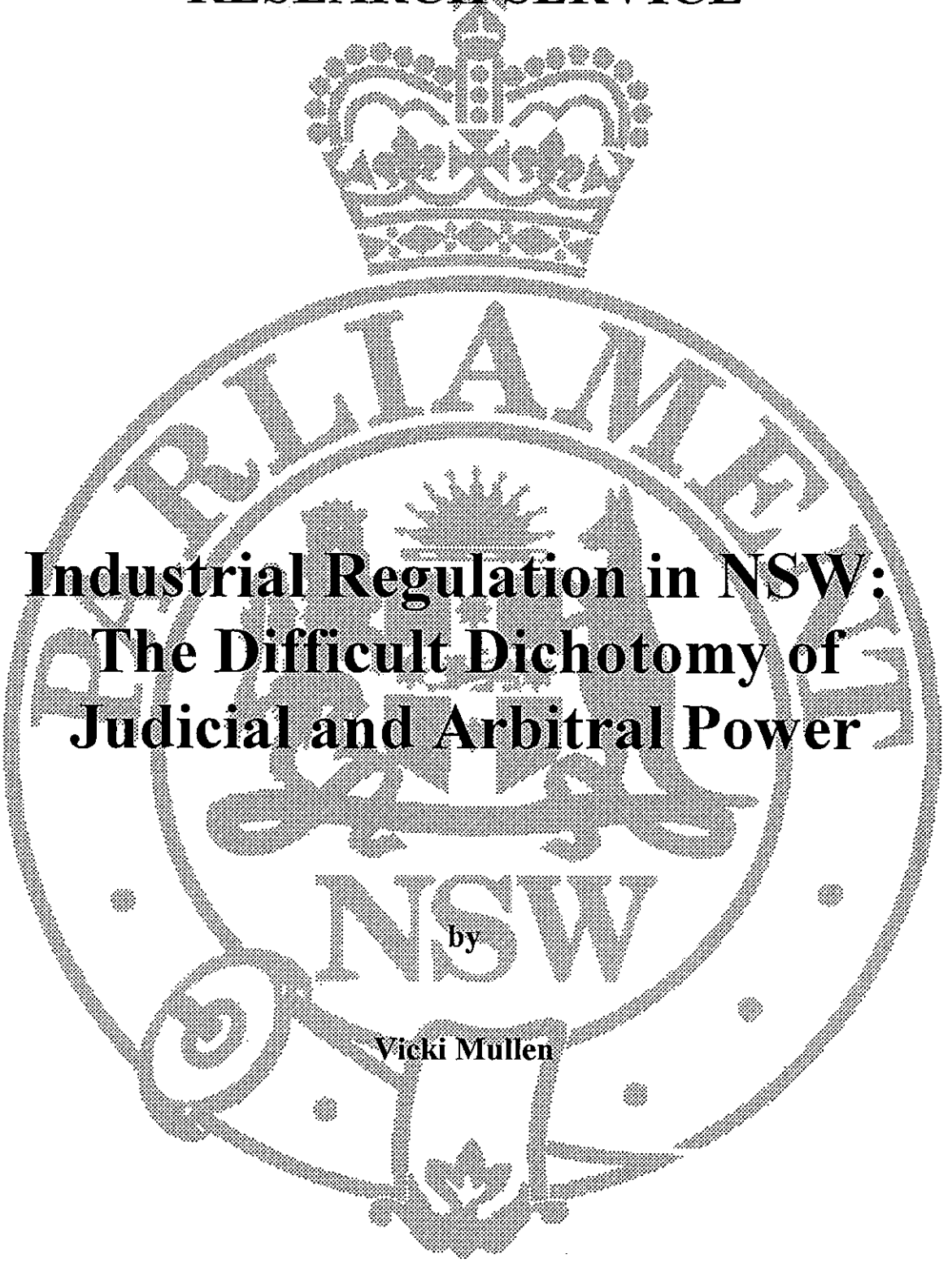

Industrial Regulation in NSW: The Difficult Dichotomy of Judicial and Arbitral Power

by

Vicki Mullen

Briefing Paper No 25/95

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CONTENTS

EXECUTIVE SUMMARY

This *Briefing Paper* considers the difficult distinction between judicial and arbitral power in light of proposals to integrate the Industrial Court and the Industrial Relations Commission into one body in NSW. The case for and against the exercise by one body of both judicial and arbitral power in an industrial relations context is considered. The main findings include:

- the Industrial Commission under the (repealed) *Industrial Arbitration Act 1940* (NSW) carried out both judicial and arbitral functions (pages 4-5);

- in 1992 a distinct dual tribunal structure came into operation in NSW with the establishment of the Industrial Court and the Industrial Relations Commission upon commencement of the *Industrial Relations Act 1991* (NSW): the philosophy of this structure was based on the idea that a separation of judicial and arbitral power would better serve the concept of sanctity of awards and agreements, by distinguishing between the negotiation of an agreement and its enforcement (pages 6-8);

- if the Court and the Commission are to be amalgamated, the issue as to the reappointment of Industrial Court Judges, according to Part 9 of the *Constitution Act 1902* (NSW) which protects judicial independence, arises for consideration (pages 14-16);

- with the entrenchment of Part 9 of the *Constitution* in NSW it could be argued that there is now in operation in NSW a limited constitutional separation of powers, although the exact nature and interpretation of Part 9 is yet to be fully revealed (pages 16-18);

- irrespective of a constitutional doctrine requiring the separate exercise of judicial and arbitral power in NSW, the central argument in favour of the creation of a single regulatory body is based on the character of industrial relations practice as an area particularly requiring efficient and administratively streamlined procedures to resolve all types of disputes (page 19); and

- the case against integration of the Court and the Commission relates to the idea that judicial and arbitral power should be exercised separately: where the one body acts as both court and regulator, a danger exists of there being a perceived mix of politics and justice, which can damage the public's confidence in the independent exercise of judicial power (pages 19-21).

1 INTRODUCTION

It has been said that '[t]he most distinctive feature of the Australian industrial relations system is the existence of industrial tribunals to regulate the behaviour of industrial parties.'[1] Such tribunals (or commissions) have traditionally exercised a very wide range of powers and functions including the conciliation and arbitration of industrial disputes and claims as well as the determination of strictly legal issues through the exercise of judicial power.

Although it will be discussed further below, judicial power has been defined as being 'concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the moment the proceedings are instituted'. The function of arbitral power in relation to industrial disputes has been described as being to 'ascertain and declare, but not enforce, what *in the opinion of the arbitrator* (emphasis added) ought to be the respective rights and liabilities of the parties in relation to each other'.[2]

In light of possible reforms to industrial regulation in NSW, the aim of this *Briefing Paper* is to discuss the former scheme of industrial regulation in NSW and the developments of 1991 with the creation of the Industrial Court ('the Court') and the Industrial Relations Commission ('the Commission') and the separation of the judicial and arbitral powers between the two bodies. The scheme established under the *Industrial Relations Act 1991* (NSW) for industrial relations in NSW marked a strong break with the past in order to create favourable regulatory conditions for an increased enterprise focus in employment agreements and a genuine recognition of the sanctity of such agreements. However, the clear separation of the conciliation and arbitration practice from the exercise of judicial power in NSW between two tribunals has been questioned as to whether it is the most appropriate regulatory scheme in an industrial relations context. As a result, the Labor Government has signalled that, as part of a package of industrial relations reforms, it will seek to integrate the Court and Commission into one body in order to 'provide for a single, cost-effective and independent tribunal to deal with all questions of law, enforcement, conciliation and arbitration in the one proceeding.'[3]

Constitutional issues relevant to the amalgamation in NSW are discussed, as well as the case for and against the integration of judicial and arbitral power in the one body or tribunal as the most effective regulatory structure for industrial relations practice.

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1 Dabscheck, B, *Arbitrator at Work, Sir William Raymond Kelly and the Regulation of Australian Industrial Relations,* Allen & Unwin 1983, p xi.

2 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463.

3 See the *Media Release* of the (then) Shadow Minister for Industrial Relations, Jeff Shaw MLC, 'NSW Labor's Industrial Relations Policy', 21/2/95, Policy Summary, p 1.

2 AN HISTORICAL PERSPECTIVE - INDUSTRIAL REGULATION UNDER THE (REPEALED) INDUSTRIAL ARBITRATION ACT 1940 (NSW)

The regulatory scheme under the (repealed) *Industrial Arbitration Act 1940* (NSW) ('the 1940 Act') has been described as a 'two-tiered, disjunctive structure.'[4]

> At the first tier [were] the conciliation commissioners, conciliation committees, industrial magistrates and the Industrial Registrar. The Industrial Commission of New South Wales constitute[d] the second tier, which itself operate[d] at two levels: the single member level and the full bench level. The main linkages between the first and second tiers [were] the appeal provisions, the provision for reference from the conciliation commissioners to the Industrial Commission and vice versa, the allocation by the President of Commissioners to full benches, and the statutory requirement for members of the Industrial Commission to meet with conciliation commissioners three times a year.[5]

(i) The Industrial Commission

The former Industrial Commission was established under section 14 of the 1940 Act as a superior court of record.[6] Members of the Commission were required (under former section 14):

- to be legally qualified (and could be appointed if they were a judge of the Supreme Court or the Land and Environment Court; a barrister of not less than 5 years' standing or a solicitor of not less than 7 years' standing); or
- to have had 'experience at a high level in industry, commerce, industrial relations or the service of a government or an authority of a government'; or
- to have acquired (not less than 5 years previously) relevant academic qualifications.

These requirements reflected the fact that the Industrial Commission was to be made up of judicial and non-judicial members with relevant practical or academic experience or knowledge. The constitution of the Industrial Commission in this way enabled it to carry

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[4] Niland, J, 'Transforming Industrial Relations in New South Wales', *A Green Paper*, 1989, Volume 1, p 48.

[5] Ibid.

[6] A court of record has been defined as '[a] court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has authority to fine and imprison for contempt of its authority.' Bird, R (Ed), *Osborn's Concise Law Dictionary*, 7th edition, Sweet & Maxwell, London, 1983, p 100.

out judicial and arbitral functions within the one tribunal.

Section 30A of the 1940 Act set out the general powers and functions of the Industrial Commission which included powers of conciliation in relation to *industrial matters* and regulated contracts under Part 8A of the 1940 Act. In addition, the Industrial Commission was able to make 'binding declarations of right whether or not any consequential relief [was], or could be, sought'. 'Industrial matters' were widely defined according to section 5 of the 1940 Act to mean 'matters or things affecting or relating to work done or to be done, or the privileges, rights, or duties of employers or employees in any industry...'. Specific examples of industrial matters given in the definition included wages and remuneration, hours of employment, the interpretation of an industrial agreement or award and equal pay issues.

The Industrial Commission had wide judicial and arbitral powers with respect to industrial matters. Particular powers and functions of the Industrial Commission were to be found throughout the Act. For example, section 30B outlined the particular jurisdiction of the Industrial Commission in court session (ie a sitting of 3 members) which included the power to hear and determine certain appeals. An important example of judicial power was section 88F, which enabled the Commission to declare certain work contracts, arrangements or conditions void or to vary such contracts, agreements or conditions. The grounds for such a declaration or variation were that such contracts or agreements were unfair, harsh or unconscionable, against the public interest or that they provided for total remuneration less than a person would have received as an employee, or if they were designed to avoid the provisions of an award, industrial agreement, Part 8A agreement or contract determination.[7] A similar power is now exercised by the Industrial Court in relation to the declaration of void enterprise agreements, according to section 133 of the *Industrial Relations Act 1991* (NSW).

(ii) Conciliation Commissioners and Committees

Section 15 of the 1940 Act provided for the appointment of conciliation commissioners to be chairmen of each conciliation committee and each tribunal (for example, contract regulation tribunals). A conciliation commissioner also had further powers to summon any person to a compulsory conference for the purpose of settling an industrial question, dispute or difficulty (see section 25 of the 1940 Act). It has been commented that '[i]n practice, the great majority of industrial disputes and difficulties [were] dealt with and settled in compulsory conferences before conciliation commissioners.'[8]

The establishment and constitution of conciliation committees 'for any industry or calling or for any combination, arrangement or grouping of industries or callings' was provided

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[7] For further details concerning the former Industrial Commission of NSW, see CCH Industrial Law Editors in consultation with Peter Punch, *Law of Employment in Australia,* CCH Australia Limited, 1989, pp 419-422.

[8] Ibid, pp 418-419.

for by section 18 of the 1940 Act. Each committee was to consist of an equal number of representatives of employers and employees and a chairman. The original jurisdiction of conciliation committees was provided for by section 20 so that 'a committee shall have cognisance of and power to inquire into any industrial matter in the industry or calling for which it is established, and in respect of such industry or calling may on any reference or application to it make any order or award' in relation to a number of matters including wage rates, hours of work and the determination of industrial matters (see the reference to the definition of 'industrial matters' above). A committee proceeded first by way of conciliation, and then it proceeded to arbitration on a matter.[9] The making of awards was the major role of conciliation committees.

> Proceedings before conciliation committees [were] more concerned with the formal processes of award making and award variation. This [was] distinct from the function of compulsory conferences which [were] intended to be more concerned with day-to-day problems, and, immediately, with industrial disputes.[10]

(iii) Industrial Magistrates

Section 126 of the 1940 Act provided for the appointment of industrial magistrates, 'who shall have the qualifications of a Magistrate, and who shall throughout the State have the jurisdiction and powers conferred by this Act on an industrial magistrate, and in the exercise of such jurisdiction may do alone whatever might be done by two or more justices constituting a local court.' Industrial magistrates were described as 'the key enforcement agency within the tribunal structure'.[11] A key example of the powers of an industrial magistrate was section 92, which provided that a person could apply to an industrial magistrate for an order for the recovery of wages and other amounts due from an employer.[12]

3 1991 TO THE PRESENT - THE INDUSTRIAL COURT AND THE INDUSTRIAL RELATIONS COMMISSION UNDER THE INDUSTRIAL RELATIONS ACT 1991 (NSW)

(i) The philosophy behind the dual tribunal structure

In the Second Reading Speech to the Industrial Relations Bill 1990 and the Industrial Court Bill 1990 (which were reintroduced, in an amended form, as the Industrial Relations Bill 1991), the (then) Minister for Industrial Relations and Employment, the

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[9] Mills, CP, *Industrial Laws, New South Wales*, (4th edition), Butterworths, 1977, p 2.

[10] CCH Industrial Law Editors, op cit note 7, p 418.

[11] Ibid, p 427.

[12] For further details, see ibid at pp 427-428.

Hon J Fahey MP referred to the main reason for the creation of a dual structure with a Court and a Commission:

> sanctity of awards and agreements is a concept which underpins much of the new legislative thrust which is required for effective industrial relations change. Sanctity of bargained terms is possible only if the tribunal system is suitably arranged to distinguish between the negotiation of employment conditions and their enforcement. That distinction necessitates the deployment of arbitral and judicial functions to separate bodies. ... The new commission will be charged with exclusively exercising the conciliation and arbitration functions of the new system; the Industrial Court will exercise judicial functions, particularly in regard to interpretation and enforcement matters.[13]

These regulatory reforms were based on the final recommendations of Professor John Niland who had been commissioned by the (then) Government to prepare a Green Paper on Industrial Relations in NSW. The first volume of the Green Paper was released in February 1989 where the interest/rights distinction in relation to industrial disputes (which was considered crucial to the principle of the sanctity of agreements) was thus described:

> An important guiding principle for the transformation of industrial relations in New South Wales is the development of a commitment to a clear operating distinction between phase one disputes, which generally are known as interest disputes, and disputes that occur in phase two of the industrial calendar, generally known as rights disputes. This distinction will not necessarily arrive easily in Australia, given the long tradition of tribunal predisposition to process industrial claims no matter when they arise in the course of the industrial cycle.[14]

Chapter 4 of Volume 1 of the Green Paper was concerned solely with the industrial tribunal system and possible alternative models. Essentially two models were discussed:

(i) an integrated or unified tribunal structure (including a simple co-location model) with greater co-operation between the Conciliation Commissioners and the Industrial Commission[15], or 'full integration between the presidential members of the current [in 1989] Commission (judges, and deputy presidents alike) and the conciliation commissioners, together with the Chief Industrial Magistrate, with all

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[13] *NSWPD*, 16/5/90, p 3499.

[14] Niland, J, op cit note 4, p 26. Phase one refers to the process of setting the agreement or contract; phase two refers to the operation of that agreement or contract (p 25).

[15] Ibid, p 51.

of them to become members of the new Industrial Relations Commission'[16] of NSW; and

(ii) the separation of the judicial power and conciliation and arbitration functions of the [former] Industrial Commission either through the establishment of two tribunals, the Industrial Court and the Conciliation Commission of NSW or through the establishment of an Industrial Division of the Supreme Court as well as an Industrial Relations Commission.[17]

In October 1989, Professor Niland released Discussion Paper 3 where he commented that '[s]anctity of agreement is possible only if the tribunal system is both willing to distinguish between the negotiation of the agreement and its enforcement, and has an effective means of making that distinction. In this context, the deployment of arbitral and judicial functions becomes important.'[18] Recommendation 5 of Volume 1 of the Green Paper was in favour of a single tribunal with four divisions.[19] However, in the subsequent Discussion Paper it was considered that a single body may not have had the ability 'alone to build an overall environment in which sanctity of agreement is paramount.'[20] As a result, it was finally recommended that there should be a completely separate Industrial Relations Commission and Industrial Court.[21]

(ii) The Industrial Court

Section 288 of the *Industrial Relations Act 1991* (NSW) ('the Act') establishes the Industrial Court of NSW ('the Court') as a superior court of record, which has a constitutionally recognised equivalent status to the Supreme Court of NSW (see section 52(2) of the *Constitution Act 1902* (NSW)). Part 1 of Chapter 4 (sections 287-314) of the Act deals with the administrative and operational arrangements of the Court. The functions and powers of the Court are to be found throughout the Act and include functions and powers in relation to:

- the declaration of an enterprise agreement to be void if such agreement is found to be unfair, harsh or unconscionable, or entered into under duress (section 133);
- the variation of an enterprise agreement in certain circumstances (section 134);

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16 Ibid, p 53.

17 Ibid, pp 51-52.

18 Niland, J, 'An Industrial Court as well as an Industrial Relations Commission for New South Wales', *Discussion Paper 3*, 1989, p 3.

19 Niland, J, op cit note 4, p 144.

20 Niland, J, op cit note 18, p 11.

21 Niland, J, op cit note 4, Volume 2, pp 151-152.

- orders dealing with the recovery of wages and other amounts (sections 151-153, 156, 157);
- orders and injunctions relating to a breach of an award or agreement (sections 166, 167);
- injunctions in respect of industrial action over settled rights (sections 193-197);
- interpretation of awards or agreements (sections 198-199);
- the certification of an industrial matter as a 'new matter' for the purposes of Part 2 of Chapter 3 of the Act (section 202);
- the contravention of a dispute order (sections 211-214);
- unlawful industrial action (sections 215-217);
- the granting of injunctions in relation to boycotts and related penalties and damages (sections 262-269);
- the declaration of certain contracts to be void (sections 275-278);
- the declaration (in relation to the determination of remuneration) of contracts for certain work to be unfair, harsh or unconscionable or against the public interest (section 281);
- appeals against or a reference by the Commission on a question of law (sections 383, 384);
- a reference by the Industrial Registrar for the opinion of the Industrial Court on a question of law arising in a matter before the Industrial Registrar (section 388);
- the determination of superannuation appeals (sections 390, 391);
- the registration of organisations of employers and employees (for example, see sections 417-418, 440-441); and
- breaches of contract determinations and agreements (for example, see sections 693-695, 697).

It should be noted that section 290 enables a Judge of the Industrial Court to also hold office as a Presidential Member of the Industrial Relations Commission. The possibility of dual appointment for judges was enacted as a result of the adverse response of judges of the former Industrial Commission to proposals to restrict their work under the new

regulatory scheme to that of the Court only.[22] All Industrial Court Judges are in fact Presidential Members of the IRC.[23]

(iii) The Industrial Relations Commission

Section 315 of the Act establishes the Industrial Relations Commission of NSW ('the Commission') which consists of a President, Vice-President, Deputy Presidents and Conciliation Commissioners. Members of the Commission are to be appointed only if, 'in the opinion of the Minister, the person has the skills and experience in the field of industrial relations that are appropriate for the office...' (section 316).

Part 2 of Chapter 4 (sections 315-379) of the Act deals with the administrative and operational arrangements of the Commission including Conciliation Committees and Contract Regulation Committees. Sections 345-352 outline the general functions of the Commission and the Committees. In particular, section 345 lists the general functions of the Commission so that it:

(a) may, on its own initiative, inquire into any industrial matter;

(b) in the exercise of its functions, must take into account the public interest (and for that purpose is to have regard to the objects of the Act as outlined in section 3);

(c) must consider, and report on, any matter referred to it by the Minister.

Other particular functions and powers of the Commission are to be found throughout the Act and include the following:

- the power to make awards on conditions of employment (section 8);
- obligations to fix wage rates and prices for work done (section 12);
- the consideration of national wage decisions (section 14);
- the insertion of various provisions in awards, relating to such conditions as employment protection, sick leave and equal pay (for example, see sections 84, 91, 96, 100 and 101);
- the power to grant an exemption from an award (section 105);
- the variation and rescission of awards (sections 111-114);
- the settlement of disputes in respect of awards and agreements (sections 188-192);

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[22] Moore, M, 'Industrial Judges win - for now', *The Sydney Morning Herald,* 3/8/91.

[23] *New South Wales Law Almanac for 1995,* pp LVI-LVII.

- conciliation and arbitration on disputes not concerning settled rights (sections 201-210);
- the determination of demarcation questions (sections 220-223);
- the making of stand-down orders (section 231);
- the making of reinstatement orders for injured employees (section 237); and
- the determination of claims for unfair dismissal and the making of reinstatement orders (sections 245-255).

The summary of the powers and functions of the Court and the Commission under the 1991 Act illustrates the 'deployment' of judicial and arbitral power between the two bodies.

4 DUAL TRIBUNAL INDUSTRIAL RELATIONS REGULATION IN AUSTRALIA: JURISDICTIONAL COMPARISONS

(i) The Commonwealth

A dual tribunal structure with a separation of judicial and arbitral power has operated at a federal level since 1956 with the creation of the Commonwealth Industrial Court[24] as a legacy of the High Court's decision (as affirmed on appeal to the Privy Council) in the *Boilermakers case*[25] where it was held that:

> ...chapter III of the Constitution did not permit powers that are foreign to the judicial power to be conferred on courts established pursuant to that chapter. From this decision it followed that the Commonwealth Court of Conciliation and Arbitration, established as an arbitral tribunal, could not '...constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of the Commonwealth.'[26]

The doctrine of separation of powers and the nature of arbitral and judicial power will be discussed in more detail below.

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[24] Shaw QC MLC (NSW Attorney General and Minister for Industrial Relations), 'The Industrial Relations Court of Australia', *Current Affairs Bulletin,* August/September 1994, p 17.

[26] *The Queen v Kirby and Others; Ex parte Boilermakers' Society Of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529.

[26] Ludeke, Justice JT, 'Arbitrator and Law Maker', 1990 32(2) *The Journal of Industrial Relations,* 269 at 270.

The current federal structure under the *Industrial Relations Act 1988* (Cth) includes the Australian Industrial Relations Commission ('the AIRC') established according to Part II of the federal Act, and the Industrial Relations Court of Australia ('the IRCA') established under Part XIV of the same Act.

The Australian Industrial Relations Commission

The AIRC is constituted according to section 30 of the federal Act, by either one or two members or as a Full Bench which consists of at least 3 members (including at least 2 Presidential members). Section 10 outlines the qualifications for appointment to the AIRC. Briefly, a presidential member (ie the President, Vice Presidents, and Deputy Presidents) must have judicial or legal experience and a high level of relevant experience in the field of industrial relations or industry or commerce, or (except in the case of the President) relevant academic training and practical industrial relations experience. Commissioners are appointed solely on the basis that they have 'appropriate skills and experience in the field of industrial relations.'

The general functions of the AIRC, as listed in section 89 of the federal Act, are the prevention and settlement of industrial disputes 'so far as is possible, by conciliation; and where necessary, by arbitration'. Further, the AIRC has a broad duty, under section 90, in the performance of its functions to take into account the public interest, and for this purpose must have regard to the objects of the federal Act as well as 'the state of the national economy and the likely effects on the national economy of any award or order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.'

Even though some members of the AIRC have judicial experience, the role of the AIRC is restricted to conciliation functions and the exercise of arbitral power.

The Industrial Relations Court of Australia

The IRCA is created under section 361 of the federal Act as a superior court of record and as a court of law and equity. Importantly, the tenure of the Industrial Court judges is protected under section 362, so that a Judge is appointed for a term ending when the Judge attains the age of 70 years. A Judge may only be removed by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for removal on the ground of proved misbehaviour or incapacity.

As a practical indication of the range of the nature of judicial power, the express jurisdiction of the IRCA includes the interpretation of awards (section 413); the making of binding declarations of right, whether or not any consequential relief is or could be claimed (section 417); the determination of matters completely and finally (through the granting of remedies) (section 418) and the making of orders (including interlocutory orders) and the issuing of writs (section 419). According to section 455, the IRCA may, in determining a matter in a representative proceeding (where 7 or more persons have similar claims against the same person): determine issues of fact and law; make a

declaration of liability; grant any equitable relief; make an award of damages, and make such other order as the Court thinks just.

The IRCA was established in 1994 with the effective commencement of the *Industrial Relations Reform Act 1993* (Cth) which, inter alia, provided for the new specialist federal court in place of the industrial relations jurisdiction of the Federal Court.[27]

(ii) Queensland and South Australia[28]

The following is a very brief outline of industrial regulation in Queensland and South Australia where a dual tribunal structure operates, which is similar (in varying degrees) to that of the federal system.

Queensland

The *Industrial Relations Act 1990* (Qld) provides for the operation of the Industrial Court operating as a superior court of record (section 7) and the Queensland Industrial Relations Commission which operates as a court of record (section 18). A decision of the Industrial Court is final and conclusive (section 13, except see section 117) and binding on the Industrial Commission, all Industrial Magistrates and 'all industrial organisations and persons who are subject to this Act, or bound by the award, agreement or permit' (section 14).

The general jurisdiction of the Commission includes the hearing and determining of all questions of law and fact brought before it and 'all questions arising out of an industrial matter or involving the determination of the rights and duties of any person in respect of an industrial matter' (section 32). The specific powers of the Commission include the power to vary or to declare void certain contracts (section 40) and the power to grant injunctions and make orders to compel compliance with an award or agreement or the Act (section 42).

In Queensland, the judicial functions and powers relevant to industrial relations issues in the State are exercisable by both the Commission and the Court. The Commission therefore exercises both judicial and arbitral powers.

South Australia

The *Industrial and Employee Relations Act 1994* (SA) provides for the operation of the Industrial Relations Court of South Australia as a court of record (section 9). The

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[27] *Commonwealth Parliamentary Debates,* 28/10/93, p 2783.

[28] For further detail as to the regulation of industrial relations in Victoria, Queensland, South Australia, Western Australia or Tasmania, see CCH Industrial Law Editors, in consultation with PJ Punch, *Australian Labour Law Reporter,* (Looseleaf Service), CCH Australia Limited, 1992, Volume 2.

jurisdiction of the Court includes the interpretation of awards and enterprise agreements, the determination of questions of law and jurisdiction, the making of declaratory judgments, the determination of certain monetary claims and the making of particular orders (injunctive remedies) to take or refrain from certain actions (sections 11-15).

Section 23 provides for the operation of the Industrial Relations Commission of South Australia which is divided into the Industrial Relations Division and the Enterprise Agreement Division (section 25). The jurisdiction of the Commission includes powers and functions in relation to the approval of enterprise agreements, the making of awards, the resolution of industrial disputes and the determination of industrial matters (section 26).

In South Australia the exercise of judicial and arbitral power is generally separated between the Court and the Commission. However, the Commission does exercise '"judicial" functions in relation to...unfair dismissal applications'[29] (see sections 107-108).

5 ARBITRAL AND JUDICIAL POWER - ISSUES RELEVANT TO THE PROPOSED AMALGAMATION OF THE COURT AND COMMISSION IN NSW

(i) Constitutional issues - Judicial independence and Industrial Court Judges

Part 9 of the *Constitution Act 1902* (NSW) operates to protect the tenure of judicial officers in NSW so that '[n]o holder of a judicial office can be removed from the office' unless the Governor is addressed by both Houses of Parliament in the same session seeking removal 'on the ground of proved misbehaviour or incapacity' (section 53).

Part 9 is now an *entrenched* set of provisions, with the legislation effecting the entrenchment receiving a 'Yes' vote at the referendum of 25 March 1995. This means that Part 9 itself (except section 52 for a particular purpose) can only be amended in the future if the amending legislation is passed by both Houses of Parliament as well as receiving approval at a referendum of the people. This entrenchment of Part 9 came about due to a perceived need to give not only constitutional recognition, but also constitutional protection to the independence of the judiciary in NSW. Judicial independence is widely considered to be a fundamental and essential feature of an operative democracy on the basis that judges, in order to administer true justice free from bias, must be able to exercise judicial power with no political or other external influences. A means of protecting judicial independence is to guarantee judicial tenure and judicial remuneration for the length of that tenure. Part 9 operates to protect the tenure of judicial officers in NSW.

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[29] Creighton, B & Stewart, A, *Labour Law, An Introduction,* (2nd edition), The Federation Press, 1994, p 91.

However, section 7B of the *Constitution* was amended by the *Constitution (Entrenchment) Amendment Act 1992* (from the date of assent, 2 May 1995) so that future legislation amending section 52 'for the purpose of extending the application of Part 9 to additional judicial offices or classes of judicial offices' is not required to be passed according to the manner and form provisions of section 7B (ie the referendum requirement). This exception is significant with respect to the proposed amalgamation of the IRC and the Industrial Court in NSW.

'[J]udicial office' is defined by section 52 to expressly include the Chief Judge, Deputy Chief Judge or Judge of the Industrial Court. For the purposes of Part 9, the Supreme Court, the Industrial Court and the Land and Environment Court 'are taken to be courts of *equivalent status* (emphasis added)...'.

Of further significance with respect to proposals to amalgamate the IRC and the Industrial Court in NSW is section 56 of the *Constitution*, which states that Part 9 does not prevent the abolition by legislation of a judicial office. However, a judicial officer who loses his or her position because of the abolition of a particular court, is entitled '(without loss of remuneration) to be appointed to and to hold another judicial office...in a court of *equivalent* (emphasis added) or higher status, unless already the holder of such an office.'

Under section 289 of the *Industrial Relations Act 1991*, judges appointed to the Industrial Court may be a Judge of another court of record or a person who is under 72 years of age and is a legal practitioner of at least 7 years' standing. There are currently 11 Judges of the Industrial Court of NSW. All Judges are also Presidential Members of the NSW IRC. The 8 original Judges, who were appointed upon the commencement of the *Industrial Relations Act 1991* on 31 March 1992, were all formerly Members of the Industrial Commission under the (repealed) *Industrial Arbitration Act 1940.*[30] The former Industrial Commission was established as a superior court of record.

If the Government proposes to amalgamate the Industrial Court and the IRC, the issue arises as to the future reappointment of the Industrial Court Judges under section 56 of the *Constitution*. It would seem unlikely that Judges with particular experience in the industrial relations sphere would accept an appointment to the Supreme Court of the NSW or the Land and Environment Court in lieu of their places on the Industrial Court (although this is possible). However, section 56 of the *Constitution* states that the right of the judicial officer to be appointed to another court of equivalent status 'remains operative for the period during which the person was entitled to hold the abolished office, subject to the removal or suspension in accordance with the law.' Further, '[t]he right lapses if the person declines appointment to the other office or resigns from it.' It is interesting to consider how this issue could be approached. From a practical point of view, the Industrial Court Judges could be offered positions on existing courts of equivalent status (ie the Supreme Court or the Land and Environment Court) on the basis that if they did not accept these positions, their right to reappointment would be lost. If such

[30] *New South Wales Law Almanac for 1995*, pp LVI-LVII.

reappointment was declined, the Industrial Court Judges could still be appointed as Presidential or Judicial Members of a new Industrial Relations Commission. However, this approach would open the way for what could be seen as an abuse of judicial independence and the principle behind Part 9, as certain Industrial Court Judges may not be offered future positions on a new IRC if they lose their constitutional right of reappointment. This approach would also leave the Presidential or Judicial Members of a new IRC outside the constitutional protection of Part 9. This could be criticised as an erosion of judicial independence in NSW.

A more likely approach would involve legislation (to be passed in the ordinary manner) to amend section 52(1) of the *Constitution,* to extend the definition of 'judicial office' to include Presidential or Judicial Members of a new Industrial Relations Commission. As outlined above, this approach is possible under section 7B(8) of the *Constitution.* In relation to the status of a new IRC for the purposes of section 56 (as discussed above), paragraph (d) of section 52(2) states that 'the relative status of any other court is to be as determined by legislation.' For this purpose, a new IRC could be expressly accorded the equivalent status of the Supreme Court of NSW under new Industrial Relations legislation. In this way, there could be an effective reappointment of the current Industrial Court judges to a new IRC under section 56 of the *Constitution.*

There is a further issue with respect to the exact definition of 'judicial office' for the purposes of section 7B(8) of the *Constitution.* If such interpretation arose for judicial determination, it is possible that Judicial or Presidential Members of a new Industrial Relations Commission, whose primary function may be that of arbitration, may be excluded as not being within the concept of 'judicial office'. However, in this regard, it is interesting to note that Members of the former Industrial Commission (under the 1940 Act) were included in the definition of 'judicial officer' in section 3 (as originally enacted) of the *Judicial Officers Act 1986* (NSW).

(ii) The case for and against the integration of arbitral and judicial power

Whilst the definitions of judicial and arbitral power given in the introduction to this *Briefing Paper* appear to draw a fairly distinct line between the two concepts, it is widely acknowledged that the distinction is a very grey area. A good example of this problem in an industrial relations context has been thus stated:

> The distinction between arbitral and judicial power may become blurred in practice, and much will depend upon how a claim is framed. Thus in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* [(1987) 72 ALR 173], the Court held that where a tribunal decided a claim for payment of wages 'as a matter of legal right' this involved an attempted exercise of judicial power. However, had the tribunal approached the matter in terms of what was 'right and fair' then this might well have been the exercise of

an arbitral power.[31]

A further useful formulation of the difference between judicial and arbitral power, and one which accords with the philosophy behind the creation of the Industrial Court of NSW in 1992, is the idea that:

> the difference between the functions has been narrowed to a question of time; the function is probably judicial if the adjudication is to ascertain existing legal rights and obligations, but it is arbitral if the inquiry is to determine what rights and obligations should be established for the future, notwithstanding that that may require determination of a dispute relating to past events.[32]

The need to distinguish between judicial and arbitral power has never existed in relation to State courts, tribunals and commissions. State Constitutions have never supported the doctrine of the separation of powers between the legislature or executive and the judiciary. In fact, until 1992 (when Part 9 was first inserted), the NSW *Constitution* was completely silent on the position and status of the judiciary as an independent and separate arm of government. However, with the entrenchment of Part 9 of the NSW *Constitution* (see discussion above), it could be argued that there is now in operation in NSW a limited constitutional separation of powers for the purposes of protecting the independence of the judiciary. The entrenchment of Part 9 has been supported by a majority vote of the people in recognition of the fundamental importance of an independent judiciary.

It may be extending the comparison of Part 9 of the NSW *Constitution* with Chapter 3 of the federal *Constitution* too far to suggest that the separation of powers doctrine (as 'strongly affirmed'[33] in the *Boilermakers'* decision and requiring, at a federal level, that 'judicial powers be kept separate from non judicial powers'[34]) could be applicable in a State context.[35] Nonetheless, the principle of judicial independence, which underscores the doctrine of separation of powers at a federal level, has been constitutionally entrenched in NSW through the protection of judicial tenure. In a federal context, it has been commented that:

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31 Gunningham, N, *Industrial Law and the Constitution,* The Federation Press, 1988, p 134.

32 Ludeke, Justice JT, op cit note 26, p 274.

33 Lane, PH, *A Manual of Australian Constitutional Law* (4th edition), The Law Book Company Limited, 1987, p 258.

34 Lane, PH, *An Introduction to the Australian Constitutions* (6th edition), The Law Book Company Limited, 1994, p 163.

35 See the discussion of the federal judicature and Chapter III of the federal *Constitution* in the *Boilermakers' case,* op cit note 25, pp 267-269.

> for the purposes of understanding the constitutional relationship between the executive and the judiciary, the notion of judicial independence is the crucial defining characteristic of judicial power, and is thus central to the separation of powers issue. This principle makes clear the current trend toward a more 'modern' version of the separation of powers test, one which focusses on the extent to which the exercise of administrative [or executive] power by judges has an inconsistent or incompatible impact on the ability of judges to exercise their judicial power.[36]

The Boilermakers' doctrine[37] at a federal level may be in decline[38]:

> [i]ndustrial arbitrators *are* exercising judicial power and/or performing functions that fall within the various definitions of 'judicial power' and 'judicial functions'. These incursions are increasingly being treated as 'quasi-judicial', or 'incidental', or are just being characterised as being 'within power'. [39]

However, the doctrine of separation of powers is not about to disappear altogether, as witnessed in the recent decision of the High Court in *Brandy v The Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1, where certain sections of the *Racial Discrimination Act 1975* (Cth) were held to be invalid on the basis that they enabled a

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[36] Brown, AJ, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge', (1992) 21 *Federal Law Review* 48 at 50.

[37] The significance of the *Boilermakers'* decision has been described as follows:

> 'If you find that the Arbitration Commission, the Administrative Appeals Tribunal, the Trade Practices Commission or some other federal non judicial body or officer exercises a power which can be called a judicial power on the tests given in 's.71 - Judicial Power of the Commonwealth', then that exercised power will be invalid, and any decision flowing from that exercise can be disregarded. Correlatively, if you find that the High Court, the Family Court of Australia, the Federal Court of Australia or any State court invested with federal jurisdiction exercises a power which can be called a non judicial power - such as the giving of an advisory opinion, the taking of a reference that results in a mere opinion, the making of an industrial award, the conduct of an inquiry, the launching of a prosecution - then that exercised power will be invalid, and any decision flowing from that exercise can be disregarded.' Lane, PH, *A Manual of Australian Constitutional Law* (4th edition), The Law Book Company Limited, 1987, p 257.

[38] Ludeke, Justice JT, op cit note 26, p 271.

[39] de Meyrick, J, 'Whatever happened to Boilermakers? Part 1', (1995) 69(2) *The Australian Law Journal,* 106 at 111.

determination of the Commission, in certain circumstances, to take effect as if it were an order of the Federal Court.[40] This decision has been described as a:

> reaffirmation of the principle that judicial powers may only be exercised by persons who are protected by a Constitutional guarantee of their independence and freedom from executive interference, and not in a manner which is inconsistent with our traditional judicial process.[41]

As the exact nature and interpretation of Part 9 (in an entrenched form) of the NSW *Constitution* is yet to be fully revealed, it is impossible to decisively conclude as to the nature of its effect on the separation of judicial and arbitral power in NSW. Notwithstanding the existence or non-existence of a constitutional doctrine in NSW requiring judicial and arbitral power to be exercised by separate bodies, it is interesting to consider other issues relevant to the case for and against the exercise of both powers by a single body in an industrial relations context.

The case in favour of integration

The central argument in favour of the creation of a single regulatory body with the capacity to exercise both arbitral and judicial power is based on the character of industrial relations practice as an area particularly requiring efficient and administratively streamlined procedures to resolve all types of disputes. It is in the public interest (for obvious economic and social reasons) for a flexible and speedy system to be in place. The following remarks in support of a single tribunal (which performs conciliation, arbitration and judicial determination) are taken from submissions received for the purposes of the Niland Report in 1989.

> 'In order to "streamline" the industrial system it is recommended that there should...be a sole tribunal, the Industrial Commission of [NSW]...with overall control of the system. ... The continuation of the present [in 1989] judicial role of the Commission, with the current status, would include dealings with judicial matters that have industrial relations implications. The Arbitration role would include the present appellate jurisdiction, a criminal hearing function for the more serious breaches of industrial legislation, and general oversight of the "fairness" of the market by way of a s 88F [under the 1940 Act] type procedure.' (Submission from the Department of Industrial Relations and Employment)[42]

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[40] Morris QC, SC, AJH, 'Bursting the Brandy Balloon', A Paper delivered at a seminar conducted by the Law Society of NSW, Young Lawyers Section, 26 April 1995, as published by NSW Young Lawyers, 1995, p 4.

[41] Ibid, p 12.

[42] Niland, op cit note 4, p 196.

> '[T]he situation which led to the separation in the Federal sphere of judicial and non-judicial powers, the 1956 Boilermakers case, does not exist in the [NSW] jurisdiction. Why not take advantage of the greater power available under the [NSW] machinery to make a more streamlined system than exists at the moment [ie, in 1989 with the separation of the Industrial Commission and the Conciliation Commissioners]?' (Submission from Westgarth Baldick)[43]

A further reason in support of a single tribunal is that such a structure would 'eliminate the tendency in the current system towards excessive court cases and will help save parties time and money.'[44] In addition, excessive legalism of a dual tribunal structure has been identified as a problem.[45]

The case against integration

If a new IRC was accorded the status of the Supreme Court of NSW and Presidential or Judicial Members of a new IRC were included as judicial officers within section 52 of the *Constitution,* the curious situation would arise where the protection of Part 9 would be extended to individuals in their roles as *both judge and arbitrator.* Currently, the protection of Part 9 only extends to protect Industrial Court Judges in their roles as judges. It does not provide constitutional protection of their positions as Presidential Members of the IRC. However, if the IRC and the Industrial Court are combined, the principle of judicial independence could be extended to protect the independent exercise of arbitral as well as judicial power. Many may support this development as a positive move, particularly in light of the fact that arbitrators are ultimately decision makers who may frequently exercise their powers in a judicial manner and resolve disputes 'by recourse to principles and procedures that have much in common with those followed in the courts'.[46] Further, there have been cases in the past where the unprotected independence of industrial arbitrators has been threatened or breached for political reasons.[47] However, it could be questioned as to whether such extension of Part 9 to protect arbitral as well as judicial power is contrary to the spirit of the constitutional

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[43] Ibid, p 198.

[44] Shaw MLC, J, op cit note 3.

[45] *NSWPD*, 10/9/91, p 903.

[46] Ludeke, Justice JT, op cit note 26, p 271. This comment was made in respect of the federal Industrial Relations Commission, however it is relevant to the exercise of arbitral power generally.

[47] The refusal by the Federal Government to appoint Justice Staples to the new Industrial Relations Commission and the threat by the NSW Government to not reappoint Justice Fisher to 'a new tribunal or court' in 1991, were discussed in an article by Alicia Larriera, 'Cabinet drops plans for industrial court', *The Sydney Morning Herald,* 17/7/91.

protection of judicial independence.

On a more practical basis, it has been stated that:

> Two important differences between regulatory agencies and courts need to be noted. First, regulatory agencies are involved in a continuing or ongoing relationship with special interest groups. Courts, on the other hand, are usually involved in an intermittent or one-off relationship. It is easier for courts to hand down unpalatable decisions than it is for regulatory agencies. Unlike regulatory agencies, courts are more immune from the results of their decisions. Second, courts are more insulated from political influence than are regulatory agencies. Life tenure and the relative infrequency of judicial appointment enables, indeed encourages, courts to be independent.[48]

The above comment encapsulates the practical difference between the role of a 'regulatory agency' (which would include a conciliation and arbitration tribunal or commission) and courts of law.

It has been repeatedly said that the public confidence in those individuals who exercise judicial power can only be maintained while justice is done and *seen* to be done. State industrial relations regulatory bodies have traditionally exercised a mixture of judicial and arbitral power. Even with the separation of the Industrial Court and the IRC in 1992, the Industrial Court Judges all serve as Presidential Members of the IRC.[49] However, under the current scheme, the exercise of judicial power has at least a structural, legal and distinct separation from the exercise of arbitral power.

Where the one body acts as both court and regulator, it could be argued that there is always a danger of there being a perceived mix of politics and justice in all decisions made, which can damage the perception that judicial power has been exercised in a truly independent manner. Further, it has been stated that:

> if there is to be a true democracy then there must be a truly independent judiciary; and for that to be so it is essential that judicial authority should abide only in the judiciary and in no other instrument of authority within the system. Further, it is essential that the judiciary should not be corrupted by either the vestment of other kinds of authority or the temptation to assume any other kinds of authority.[50]

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[48] Dabscheck, B, op cit note 1, p 12.

[49] *New South Wales Law Almanac for 1995,* pp LVI-LVII.

[50] de Meryck, J, 'Whatever Happened to Boilermakers? Part II', (1995) 69(3) *The Australian Law Journal,* 189 at 192.

6 CONCLUSION

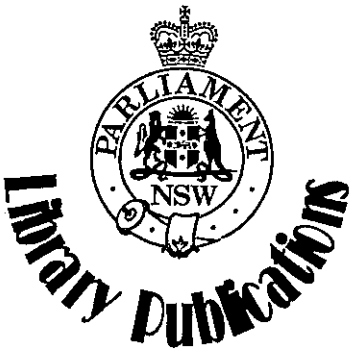
If the Industrial Court and the IRC are combined to form a new IRC, and if Presidential or Judicial Members of a new IRC are protected under Part 9 of the NSW *Constitution*, their tenure and therefore their technical independence will be protected. Notwithstanding this, it may be argued that their operation within the context of a regulatory body primarily concerned with conciliation and arbitration of industrial matters could submit the exercise of judicial power to political, social and economic expedients in a way that is contrary to the spirit of Part 9.

It is also recognised that the practical realities of industrial relations dictate that most disputes will normally be determined and resolved through conciliatory or arbitral processes. The various systems of conciliation and arbitration in Australia developed as a way of taking the employment relationship outside the strictly legal sphere of contract, and according it a special status. This approach redressed an obvious imbalance in bargaining power between employer and employee and recognised that employment relations were often best regulated through a formal (however, essentially non-legal) process with a third and neutral party as a decision-maker.

Even so, it is inevitable that strictly legal issues will arise that need to be determined by legally qualified individuals according to established legal principle. Although it could be argued that the exercise of judicial power in an industrial relations context should comply with the need for a cost-efficient and speedy resolution of disputes.

The balance to be struck between the *effective* independence of those that exercise judicial power in the industrial relations sphere in NSW and the practical needs of industrial relations dispute resolution will depend largely on the regulatory structure that is set in place.

Index to NSW Parliamentary



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Air Pollution in Sydney by Stewart Smith	024/95
Industrial Regulation in NSW: The Difficult Dichotomy of Judicial and Arbitral Power by Vicki Mullen	025/95

(D) STATISTICS

TITLE	NUMBER
Quarterly Statistical Bulletin by Jan Newby	Vol 2 No 2 February 1995 Vol 2 No 3 May 1995

TITLE

Electorate Profile - ***Murwillumbah*** No 001/95 . . . . . by Jan Newby
Electorate Profile - ***Kogarah*** No 002/95 . . . . . by Jan Newby
Electorate Profile - ***Drummoyne*** No 003/95 . . . . . by Jan Newby
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