H R Nicholls Society

2005 Annual General Meeting

Monday, 5 December, 2005

President's Report.

N R Evans.

Ladies and Gentlemen

It is my pleasure to present this report and to comment on the activities of the past year.

The Board has met via tele-conference on eight occasions since our last AGM and, as usual, much of our business is conducted by fax, phone and email. Despite the lack of face-to-face contact the Board has functioned effectively, and I wish to thank my colleagues for their contributions over the past twelve months, and again to thank Michael Moore, particularly, for the administrative support which he has provided.

The main activity for the year was our XXVIth conference, held at the Jika International Hotel in Heidelberg Road, Fairfield on 18-19 March, 2005 The conference theme was "Carpe Diem", ie Seize the Day, and the ambition which we had for this conference was that of setting down some benchmarks which could guide the Howard government in its declared ambition for swingeing labour market reform.

We were very fortunate in that Charles Baird, arguably the most distinguished labour market economist in the US, was able to come to Australia for two weeks to participate in the conference and to speak to other audiences around Australia about the US labour market in particular, but also, more generally, about the great benefits which freedom for participants in the labour market bring to social and national life.

An extra benefit from Professor Baird's visit was his experience of engaging with Roman Catholic luminaries in the US and the Vatican over labour market issues. In Australia, the Roman Catholic Church has long been associated with doctrines supporting labour market regulation and trade union privilege. The trade union movement has been dominated since the early C20 by Irish Catholics. The battles between the communists and the groupers in the trade unions in the post WWII period were led in the main by ex-Catholics on the one side, and committed Catholics on the other. The influence of BA Santamaria on these issues can still be found within the present federal cabinet, as well as within the Roman Catholic hierarchy.

Charles Baird was able to break this mould and the papers which he has written on this very important matter, which we were able to place on our website, will be of lasting significance.
He gave two papers at our conference and the minister for Workplace Relations, the Hon Kevin Andrews moved the vote of thanks to him. On behalf of the Board I wish to record my special thanks to Des Moore, who organised the Baird visit, and accompanied Charles and his wife Jo-Anne on their visits to Canberra and Sydney.

The Copeman Medal for 2005 was awarded to Roger Kerr, Exec. Director of the New Zealand Business Roundtable, whose influence on our debates in Australia has been very important. The Hon Ian McLachlan, former Defence Minister, and former President of the NFF, presented the Medal.

Regrettably, because of fog in Wellington, Roger Kerr was unable to fly out of to accept the award in person. He was able to present the paper he had prepared using a telephone link and a microphone connected to the lectern. It was an excellent presentation and the audience heard every word.

At least from an intellectual point of view the conference was an outstanding success. From a political point of view it would have to be seen as a complete failure.

The Society also ran a very successful dinner in Sydney, on 12 October, at which David Murray, former CEO of the Commonwealth Bank gave the address. Board member Rob Thompson, and his wife Ann,

provided administrative support for that occasion and we are most grateful for that.

I now turn to our website and again I wish to record our gratitude to our website manager, Chris Ulyatt, who has again provided us with a degree of service which goes far beyond the normal bounds of a commercial relationship. The hit rate for the last 12 months is set out below

12/04 - 16706 hits	01/05 - 15685 hits	02/05 - 17343 hits	03/05 - 23141 hits
04/05 - 25144 hits	05/05 - 26153 hits	06/05 - 22236 hits	07/05 - 18800 hits
08/05 - 20430 hits	09/05 - 17699 hits	10/05 - 19641 hits	11/05 - 16380 hits

It is clear that the hit rate has increased significantly during the last 12 months, the maximum was for May 2005 of more than 26,000 hits. The total data transferred for this month was nearly 784 Mbytes. This is pretty serious data transfer, and one explanation for this increase in traffic has been the continuing attention in the mainstream media, and the hostility from the trade unions and the ALP, to the Howard Government's declared intentions of carrying through serious labour market reform.

This AGM, as in the past, provides the opportunity to reflect on what has recently happened in the on-going debate over labour market reform, and this year we have to put on the record our deep disappointment at the failure of the Howard Government to legislate for reforms which would put Australia on the road to serious prosperity; reforms which would put this country at the top of the world's per capita income ladder.

Within months of the Fraser Government's defeat in March 1983, John Howard, as Shadow Minister for Industrial Relations, spoke to the National Press Club on 31 August 1983. In that speech he called for Henry Bournes Higgins to be turned "on his head".

More recently John Howard won the election of October 2004 with a decisive majority in the House of Reps, and with an unexpected majority in the Senate. This Senate win changed the face of Australian politics, and after many months of work by literally hundreds of lawyers (almost all them brought up in the Higgins traditions and mindset), the labour market reform Bill, the Workplace Relations Amendment (Work Choice) Act (2005), of more than 700 pages, has just been passed by both Houses of Parliament. And it is a sad thing to observe that in this extraordinary structure of new regulation we can see the ghost of H B Higgins, rising out of his grave, and turning J W Howard on his head.

To understand what has happened it is necessary to put the situation in its historical context. This Bill has been described by the Prime Minister as the most far reaching measure of labour market legislation since the 1904 Conciliation and Arbitration Act was passed. It is no such thing. And the Government's failure to turn Higgins on his head is the consequence of its continuing acceptance of the Marxist dogmas which inspired the trade union movement of the 1880s and 1890s, and their contemporary supporters from the intellectual classes. The Marxist class-struggle view of the world also provided the platform from which those politicians of the 1890s and 1900s, Higgins, Hughes and Kingston particularly, got the 1904 Act through the Parliament. Alfred Deakin acted as the Godfather in this enterprise and the C&A Act, with its tribunal and its privileged trade unions, became the twin sister to the protectionism that was established as the central core, along with White Australia, of the Deakin settlement. The C&A Act was 34 pages long, and although not as wide as a church door, nor as deep as a well, it sufficed to do immeasurable harm to economic life in Australia for the next century. The 2005 descendant of the 1904 Act is some 700 pages long with 500 pages of explanatory memoranda.

As Higgins and his supporters saw it, the common law of property, contract and tort; which had provided the framework under which Great Britain had, during the C19, become the world's greatest economic, technological and naval power, and under which Australians had become, in per capita terms, the most prosperous people in the world, was no longer adequate to govern the relationship between employer and employee. In particular, they believed that the common law, and the courts which administered it, had failed to recognise that class warfare was the reality which governed economic life, and that the power of the State had to be brought to bear to quell this civil strife which threatened

the very fabric of civilisation. This was the thinking which lay behind the title of H B Higgins' 1922 apologia *A New Province for Law and Order*. As Steven Cranshaw SC, put it "The deregulated industrial relations environment of the 19th century, which Higgins described as "rude and barbarous", was replaced by a "new province for law and order", the system of conciliation and arbitration." (SMH 28 Nov 05).

The arguments which drove the new "law and order" protagonists were simple, if completely erroneous. For them the class struggle was the main social fact of economic life. The common law was irrelevant to the new social reality. The state therefore had to supersede the common law by appointing tribunals which would rewrite the common law contracts which had, up till then, provided the legal framework which allowed the labour market to match workers to jobs with unprecedented efficiency.

The last remnant of this Marxist class-war mindset is found today in the imbalance of power doctrine. It is this doctrine which is used to justify union claims to legal privilege, and the unions and their lawyers cling to it passionately. It was seen in all its naked splendour in the TV advertising run by the ACTU during September last; a campaign which panicked the Government into spending serious money on the most tedious and arguably counterproductive advertising campaign in Australian political history.

The Government could, easily and effectively, have responded to the ACTU with advertisements showing that employees have very considerable bargaining power vis a vis their employers, and that the trade unions, and the arbitral tribunals, and the Federal Court, are living off a mythical doctrine. Its failure to do so is deeply revealing, showing that the Government mindset is still that of H B Higgins. The Howard Government does not believe that the common law can protect the rights of citizens when they participate in the labour market as employees. The Howard Government still believes that regulation must supersede the common law in the labour market, and they have produced 700 pages of such regulation.

Once this position is adopted it is logically impossible to win an argument with those who demand more regulation. Human affairs are always accompanied at best by complaints about something or other, or by unintended consequences, or by accidents, or by malicious behaviour of some kind. Once regulation is perceived to be the answer to these things then the role of the regulator is limitless. Barnaby Joyce's grandstanding on behalf of the so-called "icons" of Xmas Day and Easter is an example. There is no end to what has to be prescribed as lawful. Will Ramadan be next? And so the business of prescription continues endlessly, and the cost of supervising what is prescribed keeps on growing. This cost is born by all Australians but particularly by employees.

It is true that prior to federation, colonial governments had legislated to override the common law as it applied to the employer-employee relationship, particularly in Victoria. But it was Higgins who, as President of the Arbitration Commission, handed down the Harvester Judgment, and became the public advocate for the merits of regulation, and the stern critic of the "higgling of the market place". And while competition between the States would limit the their power to do serious damage to their economies, the Federal Government is not so limited, except in the very long term.

This may seem to some as ancient and irrelevant history. But the truth is that the dispute over the superiority of regulation as opposed to the freedom which is entrenched in the common law, is still the central issue in this debate. And the tragedy is that the Howard Workchoice Act. with minor exceptions, supports regulation and disparages freedom, together with the common law, which make freedom, real entrepreneurship, and sustained economic growth, not just possible but an ongoing, normal part of life.

What is so special about the common law? The common law provided the legal framework which facilitated the Industrial Revolution and which enabled Great Britain to become the world's great power during the C19. One of major factors leading to Britain's economic decline during the C20 was the passage of the Trade Unions Disputes Act of 1906 which bestowed upon trade unions immunity from tort. This meant that in the course of so-called industrial action the unions could inflict huge damages

upon companies they were targeting, knowing that their victims had no legal redress. The trade unions were placed above the law. As a consequence British capital moved overseas, to the US in particular, and Britain, the workshop of the world during the C19, became an economy which is today reliant upon the financial services sector for its prosperity.

In the US, also a common law country, attempts to bestow legal privileges upon trade unions and to supersede the common law met with much greater resistance, although, with the New Deal, the unions did achieve some success. The US is, today, the world's great power, and the labour market regime which operates there is in many ways much more free than in Australia. In particular, the various states are able to compete in labour market regimes and the transfer of many industries from the highly regulated "rust-bucket" states of the North to the "right-to-work" states of the South, has been one of the most spectacular economic changes in America of the last 30 years.

The common law is to be distinguished from the Civil Code of Europe in this major quality. Under the common law, citizens are free to pursue their ambitions in whatever manner seems best to them, provided of course, they do not do things which are contrary to the principles of the common law that have been developed over centuries by the courts. Under the Civil Code the opposite is true. Citizens are permitted to do those things which are specifically set down as lawful. What is not specified is not lawful. The difference is profound and explains much of the economic and cultural decline that we see in Europe today.

So a useful measuring stick for evaluating a Bill such as this is to consider whether or no the Bill returns us to common law principles, or takes us further down the Higgins path of limiting the freedom which people have in drawing up an employment contract which is to the mutual advantage of both parties. Tragically, although the PM and Minister Andrews talk about "flexibility" and productivity, there is not much in this Bill which takes us back to the Common Law. The most serious flaw is that the Bill will maintain the lock-out provisions of the current regulatory regime. Those who are now unemployed, and cannot get a foothold on the employment ladder because the wages which would make them welcome in the labour force are illegal under the present Act, will continue to be locked out under the new legislation.

The new body established to enforce the lockout is to be called the Australian Fair Pay Commission. The word "fair" in Australian political life has now taken on the Orwellian qualities described in ***1984***. This new tribunal has no power under the Bill to reduce wage minima to let the unemployed into the labour market. No, it must follow the awards initially set down by the AIRC and even though these awards will diminish in impact over time, the quality of fairness will be severely strained for the current generation of unemployed, a significant proportion of whom now come from families who have been wholly dependent on welfare for a generation. The FPC will become the most important regulator for those workers and companies which will come under the Act by virtue of their corporate status.

If the High Court accepts that the use of the corporations power which underlies virtually all of the new regulatory scheme is in fact constitutional, then the States will still be able to regulate, or to deregulate, for unincorporated business such as trusts, most farmers, and of course unincorporated small businesses. They will also be able to regulate the regime governing state employees, which in NSW number more than a quarter of a million.

John Howard has come out of the closet and shown himself to be the most centralist Prime Minister we have had, at least since Gough Whitlam. It is now forgotten that the Kennett Government's September 1992 Victorian legislation remains by far and away the best labour market regime ever to pass into law in Australia. Tragically, that legislation became a dead letter once John Hewson had lost the unlosable election.

Similarly, the IR legislation which was introduce by Graham Keirath in the early days of the Richard Court Government, provided the instrument by which the mining industry in WA, along with other industries, could make huge productivity gains. Once again that legislation was repealed after electoral

defeat. The use of AWAs mushroomed in WA as the mining industry was forced to abandon the State jurisdiction and use the AWA processes of the Reith 1996 Act.

At some stage John Howard will leave the Lodge, and his place may well be taken by a Labor Prime Minister who will satisfy his trade union constituents by passing major amendments to the 2005 Act. In that situation, there will be no place to which industries can retreat to secure their competitiveness. The Commonwealth Act will trump any State legislation, (assuming, again, that the High Court finds the Workchoice Act to be constitutional).

There are some redeeming features of the current Bill. Although the right to strike still remains as lawful, that right is so hedged about with procedures and restrictions that to all extent it is, from a trade union point of view, a dead letter. That is an unqualified good. The Bill seeks to restrict and to regulate the rights of entry which trade union officials have under the current legislation. This right of entry is one of the most important legal privileges which the unions enjoy. They will now turn to State OH&S legislation to seek to reclaim those privileges. They will also be able to appeal the the Federal Court in support of these endeavours. That is an unqualified bad.

The unfair dismissal provisions of the Brereton Act have been repealed at least for businesses employing less than 100 people. Dividing companies into two classes is highly objectionable. The rule of law should be the same for all people and all companies . A company which is growing and wants to expand beyond the 100 employee size will now be forced to find mechanisms to avoid breaching this barrier. Such stratagems will increase costs and may well encourage companies to go off shore rather than expand here. It should be recalled that the unfair dismissals legislation relies on the External Affairs power for constitutional legitimacy. The instrument in this case is an ILO convention which Australia has ratified.

At the same time the door has been opened wide for litigation based on anti-discrimination laws. The Virgin Blue case is being appealed. If the appeal is lost then companies hiring new staff will be forced to try to work out how to avoid similar litigation. Since the act of choosing a new employee means discriminating against all but one of the applicants for the job, the new field of anti-discrimination law will provide new employment opportunities, in a no-cost jurisdiction, for hundreds of lawyers.

One of the good things about the Bill is the diminution of regulation in AWAs and the improvement in procedures for making them legally effective. Nonetheless the degree of regulation concerning AWAs is still something that would warm H B Higgins' heart. It shows that his spirit still animates the Government and the lawyers who drafted the Bill. Further, the Federal Court can get involved in reviewing the terms of particular AWAs and decide, ex post, whether those terms are reasonable or otherwise. Once again the spirit of H B Higgins is alive and well. At first sight the new AWA legislation is an improvement on the existing arrangements. Time will tell if that is an accurate judgment.

Another serious flaw in the Bill is the degree to which the Federal Court is to supersede the State Supreme Courts in interpreting this Act. The record of the Federal Court in industrial relations law is a seriously tainted record. The names of Justice Murray Wilcox and Justice Tony North immediately come to mind. But more importantly, the Federal Court, unlike the State Supreme Courts, is not a common law court. And so the spirit of H B Higgins finds a congenial home in the Federal Court.

This Act, then, is an unhappy story of disappointment and lost opportunity. The H R Nicholls Society and people associated with us did all we could to persuade the Government to go down the Common Law path. Instead the Government chose the Higgins road. There will be all sorts of unintended consequences. Lawyers will earn lots of fees. The unions will continue on the path of slow but inexorable decline, and at some point this decline will generate a crisis within the ALP. We tend to forget that the unions still own the ALP, and the conflicts which will arise between the national interest and the trade union interest, will become more acute with every election.

The duty of this Society is to keep up its work and its enthusiasm. No one can predict the political future of the country. We can be certain that the freedom we advocate in the labour market is a great ambition for Australia. If it can be achieved Australia will have the opportunity to become a great nation in the world, and particularly in our region, and Australian citizens will enjoy opportunities and prosperity which will be the envy of the world.

Our next conference will be held in Sydney on March 3rd-5th 2006. This conference will celebrate the 20th anniversary of the Society. The conference theme is "Let's Start All Over Again" a theme which I'm told was the title to a popular song of the 1960s. More details will be circulated to our members next week.

Ray Evans

5 December 2005