Justice Staples and the Politics of Australian Industrial Arbitration

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A full explanation of the difficulties experienced by Justice Staples during his career on the former Australian Conciliation and Arbitration Commission requires an understanding of the political relationship between the tribunal and its client parties and other branches of the state. It is argued that during times of political and industrial uncertainty there are strong pressures on industrial tribunals to operate in a flexible, opportunistic manner. Staples, however, based a number of his decisions on legal, social and industrial principles that he considered just and proper for the discharge of his office, but which conflicted with the interests of unions, employers, governments and even other members of the commission. His reliance on the principle of judicial autonomy did not deter his opponents from seeking to discipline and finally remove him from the bench. This incident was but the most recent of a number of similar episodes this century, which raises as yet unanswered questions about the extent to which industrial tribunals are and should be free from external intervention.

> This above all: to thine own self be true,
> And it must follow, as the night the day,
> Thou canst not then be false to any man.
> *Hamlet*, 1:3

> 'Ladies and gentlemen, it was an honest decision, I accept no responsibility for subsequent amazing scenes.'
> Justice Staples on his *Wool Stores* decision

In May 1980, Justice Staples, a deputy president of the Australian Conciliation and Arbitration Commission, was relieved of most of his duties by the commission's president, Sir John Moore. From that time, Staples, who became the fourth longest serving presidential member of the tribunal, was provided with little or no work in his official capacity, and he was eventually removed from the tribunal. Despite offers of alternative employment, he steadfastly refused to step down as a matter of principle.

Staples is no stranger to controversy. Before his appointment to the commission, he had acquired a reputation as a champion of unpopular causes

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We wish to thank Braham Dabscheck, Margaret Gardner, David Plowman, Phillipa Weeks and an anonymous referee of the *JIR* for their helpful comments on earlier drafts of this article.

in his career at the bar. He had experienced a previous period of 'exile' not long after joining the commission. In his decisions and comments from the bench, Staples was often highly critical of widely accepted industrial relations practices and powerful institutions. He acquired the reputation of being a 'maverick' judge, and his difficulties were widely viewed as the result of personal idiosyncracies. It came as no surprise to many observers that a concerted attempt was made to relieve him of his duties.

Yet it could be argued that explaining Staples's troubles purely in such personal terms misconstrues the situation that arose. While some of his practices in the commission were unusual, and were the immediate cause of his downfall, the controversy that surrounded his actions must be understood in terms of the institution of industrial arbitration as it has developed in Australia, and the wider context within which arbitration operates. It is suggested that the problems that Staples encountered illustrate important aspects of the politics of industrial arbitration, particularly the constraints on the independence of tribunal members in decision making that can be imposed from both outside and inside the commission.

Arbitration and problems of policy

Despite the limited aspirations for arbitration held by most political leaders involved in its establishment, the industrial tribunals became deeply enmeshed in the general regulation of wages and conditions of employment. An important effect of this was to focus economic class conflict on one of the state apparatuses. This 'canalization' (Therborn 1978) of conflict has been a central feature of industrial arbitration since the early years of this century, and it poses dilemmas of state policy formation in an unusually stark form.

A useful perspective on the policy dilemmas of industrial tribunals[1] can be found in the work of Claus Offe. Offe (1976) argues that the capitalist accumulation process is unlikely to proceed smoothly, and that complex economic difficulties tend to arise, which may threaten to undermine the legitimacy of existing production arrangements. To the extent that problems of accumulation cannot be overcome by purely economic means—and Offe, along with many other writers, argues that this is often the case—solutions are sought outside the 'pure' operations of the market. Over time, the state[2] becomes deeply involved in economic activities, either directly or indirectly through attempts to regulate the private sector. Political intervention, however, is likely to result in economic conflict being refocused upon the state. Although state managers will seek to minimize the negative consequences of such politicization (Block 1977, 1980), the conflicting demands of 'legitimacy versus efficiency' often cannot be accommodated (Offe 1975a).

Many of the economic problems dealt with by the state involve opposing interests, and lasting solutions cannot be found. Nevertheless, the state is unable to opt out of economic intervention,[3] and faces the dilemma of actively

1. The theoretical framework outlined below is developed more fully in Kitay (1984).
2. 'The state' is a convenient shorthand for an ensemble of state apparatuses characterized by complex cleavages and conflicts. It is not conceptualized as a unified whole.
3. The economic 'deregulation' proposed by some commentators on the Right typically involves a significant increase in the level of regulation of trade unions.

preserving the conditions for private accumulation without generating new impediments. As Offe dryly observes (1976, 49), this requires 'an opportunism whose adherence to its own principle is unswerving'. Offe argues that effective long-term planning by the state is difficult, because 'state power subject to such contradictory demands can determine its own strategies neither through general consensus of the citizenry nor through technocratic calculation; for one can neither desire nor calculate opportunistic action.' Where incompatible demands are particularly strong or urgent, flexibility and the ability to shift the basis for decision making will be particularly desirable. Where these conditions cannot be met, the state's ability to develop even short-term solutions will be hindered.

The implications of this argument for Australian industrial tribunals should be clear. Even discounting the bravado that regularly accompanies industrial conflict, tribunals are subject to unusually strong, incompatible claims by trade unions and employers, which at times threaten to create wider political and economic difficulties. Where unions seek large increases in wages or conditions, acquiescence may lead to reduced profitability and investment; resistance may lead to high levels of industrial disputation, or inadequate levels of consumer demand, or both. It is not surprising that the history of such state apparatuses as the Australian Conciliation and Arbitration Commission is characterized by inconsistency and opportunism. This has little to do with the calibre of tribunal members, who are typically highly capable individuals, but instead with the dilemma that any solution is unlikely to remain 'correct' for very long.

In some circumstances the need for flexibility is less pressing. Offe (1975b) points in particular to situations in which key client groups are unable, whether voluntarily or involuntarily, to pursue their interests outside the framework provided by the state. This would explain the ability of the federal tribunal to enforce a very strict and detailed set of wage fixation guidelines under the ALP/ACTU Accord during the Hawke government. More generally, the commission has sought to retain flexibility in its principles and policies, allowing the tribunal to respond to pressures placed upon it. This becomes especially important during times of economic uncertainty or high levels of industrial conflict. The pressures on the commission were particularly strong during the late 1970s, the period with which we are most concerned. A wage indexation 'package' was introduced by the tribunal in 1975 in response to the wages explosion and industrial unrest in 1974, and an economic recession. In the context of continuing economic uncertainty through the late 1970s and little agreement among the commission's main constituents over wages policy, wage indexation required an unusually high level of co-ordination within the tribunal. Internal cohesion has been a continuing problem for industrial tribunals from the early years of this century (Dabscheck 1986; Dabscheck & Niland 1981). The high level of centralization upon which the 1970s model of indexation was based created particular dangers for the commission, as the recession had not uniformly reduced the bargaining power of trade unions, and by 1978 the potential for a wages breakout had become apparent. The commission repeatedly revised its guideliness (i.e. it responded flexibly), while trying to maintain centralized control over wage determination. There was

little room for individual members of the commission to strike out on an independent path under the circumstances, for fear of unleashing pent-up wage pressures in an uncontrolled manner.

Industrial tribunals are also restricted in terms of their range of decision making. They act as 'selection mechanisms', which limit possible outcomes of actual or potential conflict and 'produce . . . a uniformity or consistency of actualized events' (Offe 1974, 38). This does not contradict the previous argument that state policy tends to be inconsistent.[4] To suggest that policy tends to be inconsistent does not mean that all outcomes are equally possible. Rather, some outcomes or sets of outcomes are 'structurally privileged' (Jessop 1983, 101) by the form of the state. Within this limited range, considerable variations in policy may occur. In the case of industrial arbitration, tribunals are hedged in by a complex set of laws and by their location in a hierarchy of state apparatuses[5] in which their autonomy is limited, not only by statute but also by the ability of the parties to pursue their interests elsewhere in the state or 'in the field'.[6] The possibility of conflict within the state thus arises, with the tribunals constrained by other, superior branches of the state such as governments and senior levels of the judiciary. While such conflicts are typically played out within narrow, legal boundaries, they may at times become overtly political. Examples of such conflicts will be discussed below, notably the attempt by the Bruce government to abolish the federal tribunal, and later in efforts by the Fraser government to dictate economic policy to the commission in the late 1970s.

Tribunal members, while enjoying considerable freedom in restricted areas, are constrained by law and political pressures internal and external to the state. While ritualistic dismay at tribunal decisions is commonplace, genuine pressure to provide 'acceptable' decisions may be applied from time to time by unions, employers or other branches of the state.

The federal tribunal: control and autonomy

The extent to which members of industrial tribunals shall operate free from interference has never been resolved in Australia. Direct or indirect attempts to discipline 'wayward' arbitrators, while not a regular occurrence, are certainly not unknown. The case of Justice Staples is but the latest of a small but significant number of such instances.

The Australian Constitution (section 51 xxxv) enables federal Parliament to pass laws 'with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'. The Commonwealth Court of Conciliation and Arbitration was

4. See Fisher's (1983) study of federal arbitration in Australia, in which he argues that the commission's decisions tend to favour the interests of employers. It could be suggested that such a conclusion could only be reached in terms of an overall tendency, with many decisions contrary to this trend.
5. See Poulantzas (1978), especially pp. 137, 143.
6. It has been noted that industrial tribunals tend to act as 'survivors', recognizing the limits of their authority over the parties and tending to make decisions that will, hopefully, retain the allegiance of unions and employers as 'clients' (see, for example, Dabscheck 1980).

established under the Conciliation and Arbitration Act 1904; it became a commission in 1956 after its arbitral and judicial functions were separated following the Boilermakers Case.[7] Although the Arbitration Court had a judicial role until this time and a legalistic tradition had developed in arbitral proceedings, Cupper (1980) documents the gradual decline of legalism in the commission after *Boilermakers*. In particular, Cupper highlights the growing importance of the provision under section 2 of the Conciliation and Arbitration Act that required the commission to operate 'with the maximum of expedition and the minimum of legal form and technicality' in effecting its main task of preventing and settling industrial disputes. This orientation differs markedly from that adopted by law courts, even when dealing with industrial matters. The approach taken by Justice Rogers in *Bennett v. Commonwealth*[8] is characteristic in this respect.

> I think it right and necessary to say that I am in no way concerned with the merits of what appears to be an industrial dispute between the Commonwealth Public Service Board on the one hand, and members of the association on the other. All that this Court has been asked to do is to determine the legal rights of the parties on the basis of the facts adduced in evidence and agreed to between the parties. Nothing I say should be construed as approval or disapproval of the course which has been adopted by the protagonists.

Without wishing to accept the assumption of legal neutrality contained in the above judgment, it is evident that there are differences between courts and tribunals, and that the former are rather blunt instruments in the resolution of industrial disputes.

Over time, the commission has become centrally involved in the determination of terms and conditions of employment, not only within its jurisdiction, but throughout the approximately 85 per cent of the workforce covered by federal and state awards. The powers of the commission are restricted by complex laws and High Court decisions, though these have become less inhibiting in recent years.[9] Members of the commission place considerable emphasis on their conciliation function, but the arbitration power is important and attracts the most attention from politicians, commentators and the public.

Although the commission is set up by Act of federal Parliament, the government is constitutionally precluded from specifying the outcome of tribunal decisions. This has been a source of frustration to Australian governments, but repeated constitutional amendments designed to increase the Commonwealth's industrial relations powers have failed. The commission can have a significant effect on the economy, and federal governments are always concerned that decisions should not unduly contravene their economic policy.

7. Legislation replacing the Australian Conciliation and Arbitration Commission with the Industrial Relations Commission was proclaimed on 1 March 1989. All references are to the earlier body.
8. *Bennett v. Commonwealth and Another* (1980) 1 NSWLR 581.
9. See, in particular, *R. v. Coldham & ors; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297. Also *Re Ranger Uranium Mine Pty Ltd; Ex parte Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 656.

The government has various means of influencing the commission: it can make appearances before the bench (these are generally accorded great weight by arbitrators); it can make changes to the Act;[10] and it is able to affect the wider economic and industrial relations climate (Deery & Plowman 1985). The government's attempts to influence the tribunal's decisions have met with a varied response over the years. At times the commission and the government have been sharply at odds. These have produced some fiery incidents, because the commission has been prepared to treat its constitutionally based independence as equivalent to that of courts of law, in which members may only be removed from office through proved incapacity or misbehaviour.[11] However, as we will now show, measures have occasionally been taken to bypass or remove arbitrators whose actions fall well short of the criteria for dismissal of a judicial officer, but whose decisions are embarrassing or inconvenient for the government of the day or the commission itself.

The incidents to be discussed are of two types, although they overlap in practice. One involves structural conflict between the tribunal and other branches of the state, usually government, in which the tribunal either cannot or will not do what is requested of them on fundamental matters of policy. The second type concerns individual members of tribunals who, for various reasons, are viewed as wayward or inconvenient by superior officials, who then take action to remove the offender.

The clearest case of structural conflict occurred in the late 1920s, when the conservative Bruce–Page government became disenchanted with the court's inability to control the level of industrial disputation. Following an unsuccessful attempt to increase the tribunal's powers by constitutional referendum in 1926, and unable to intervene directly in the tribunal's decision making, the government sought to adopt the opposite approach. They introduced the Maritime Industries Bill 1929, which would have abolished the court and restored full industrial powers to the states, which were not under the same constitutional limitations with regard to industrial relations.[12] The uproar that ensued is legendary, the result being the fall of the government and its defeat at a general election in which the prime minister himself lost his seat. It became accepted wisdom that, regardless of a government's displeasure with the tribunal, the continued existence of arbitration was sacrosanct (Portus 1979; Wildavsky & Carboch 1958).

A more recent, but less clear-cut example of structural conflict occurred when the commission under Sir Richard Kirby, and later under Sir John Moore, came under attack from conservative governments. For example, the

10. For example, the federal government may direct the commission to take certain factors into consideration in reaching decisions, notably the state of the economy. See section 39(2) of the Conciliation and Arbitration Act. Sections 36 and 36A allowed for ministerial intervention in certain tribunal proceedings and application for review of decisions, while section 25(2) allowed the minister to notify the commission of a dispute.
11. Ss 7(4), 11A, 14 and 99(1)(b) of the *Conciliation and Arbitration Act*.
12. Although states are able to legislate directly on industrial relations matters, they have established industrial tribunals and generally allow them full autonomy. However, the states, too, have been willing to bypass or tie the hands of their arbitrators, the most recent example of which occurred during the Queensland power dispute in 1985 (see Guille 1985).

Fraser government placed considerable pressure on the commission in the late 1970s to adhere to its policy of minimal wage increases in order to encourage an investment-led economic recovery. In the 1978 Wage Fixing Principles Case, the Commonwealth submitted that 'while . . . the Commission is free to make its own judgments as to the effect of its decisions on the economy . . . overall government policy must be seen as providing a fixed framework within which the Commission should operate and consider its decisions'. The commission responded sharply, arguing that, if government policy was 'unworkable on industrial considerations', the commission would not 'abandon its industrial responsibilities' in order to accede to the government's wishes (ACAC, Print D8400, 17). The verbal warfare between the Fraser government and the commission continued for several years. The government sought to constrain the independence of commission members by legislation (discussed in more detail below), but these measures were generally ineffective.

Individual members of the tribunal have also come under overt or covert attack. In 1920 the Hughes government passed the Industrial Peace Act, allowing the establishment of ad hoc tribunals for particular disputes, in order to circumvent the formidable and highly independent president of the court, Justice Higgins. Higgins had had a number of disagreements with Prime Minister Hughes, centring on the judge's unwillingness to adopt a 'flexible' approach to major disputes by treating them as special cases (Rickard 1984, 253). Higgins resigned over this legislation, which he viewed as intolerable interference with his independence.[13]

A later 'difficult' president of the court also left his position unwillingly. The biographers of Sir Raymond Kelly (Dabscheck 1983) and Sir Richard Kirby (d'Alpuget 1977) indicate that Kelly's 'promotion' to president of the Industrial Court rather than the Arbitration Commission after the Boilermakers Case was more a matter of being 'pushed upstairs' than a move desired by Kelly. Dabscheck (1983, 152–3) argues that

> Kelly's approach to industrial relations regulation was that of a theorist or social reformer. He concentrated his attention on what ought to happen at the expense of developing an understanding of the problems which were the concern of the parties. Kelly was always one to maintain his distance from the parties—he refused to countenance the notion of backroom deals and declined invitations to the annual dinners of trade unions and employer associations. His views often seemed more appropriate to a scholarly debate of abstract philosophical problems than to finding a practical solution to the intractable problems associated with the real world of industrial relations regulation. Notwithstanding his training in the law Kelly was ill-equipped to assume the responsibilities associated with industrial relations regulation.

Dabscheck (1983, 155) suggests that the parties 'increasingly bypassed' the court, and that the federal government 'was becoming increasingly impatient with the judicial approach of the . . . Court . . . under Kelly's leadership'. The

13. As Dabscheck and Niland (1981, 220) point out, Higgins was in any event nearing the end of his second seven-year term in office and foresaw a likelihood that he would not be reappointed. In 1926 amending legislation was passed giving judges of the tribunal tenure for life, later changed to age 65.

government quickly took the opportunity offered by the *Boilermakers* decision to replace Kelly with the pragmatic Kirby.

There is a distinct difference between an arbitrator's decision being overturned by an appeals bench, which happens frequently, and constraints being placed on 'wayward' tribunal members. The latter appears to occur seldom, and in any event is difficult to document. Certainly, there are numerous examples of highly independent arbitrators who have at times taken controversial approaches to their cases, with the appeals process the only mechanism necessary to exercise control over them. However, d'Alpuget's (1977) discussion of the exclusion of Justices Sweeney and Nimmo from full bench work after the 1965 National Wage Decision, indicates that strong steps can be taken by tribunal presidents. The Sweeney and Nimmo affair was unusual in many respects, including the lack of action taken against the senior judge in the majority decision, Justice Gallagher.[14] It is significant, however, that Sweeney and Nimmo were relatively inexperienced industrially, were considered to be legalistic in their approach to industrial matters, and had aroused the antagonism of both unions and employers. The two judges left the commission in 1969, taking up different federal appointments. Kirby was subjected to criticism for his treatment of his colleagues. The episode indicates, however, that there is precedent for tribunal members to be subjected to sanctions for behaviour that was well within the bounds of their statutory role, but created political difficulties for the commission.

Clearly, attempts have been made to intervene in the workings of supposedly independent arbitration tribunals, with varying success. Overt efforts to confront or undermine the institution as a whole, as took place during the Bruce–Page and Fraser governments, appear to have failed. Attacks on individual arbitrators, however, appear to have been more successful, as seen in the cases of Higgins, Kelly, Sweeney and Nimmo. In no cases were formal disciplinary proceedings begun and it is most doubtful that substantive grounds could be found for such actions, but it is undeniable that the removal of 'inconvenient' arbitrators had occurred. Again, however, the issue of the judicial freedom of arbitrators has not been debated in Australia.

The notion of judicial independence—the freedom of judges to act within the limits of legal procedure and the law—has been central to Staples's defence against criticism and his subsequent removal from duty. Staples has argued that he at all times sought to discharge his office faithfully and responsibly, so the actions taken against him are unwarranted and threaten the integrity of the institution of which he is a member. He cites favourably Lord Hailsham's[15] view that

> An independent judiciary cannot avoid controversy in an age of continuous social change. The flow of controversial work never stops . . . You name it. The judges

14. Justices Gallagher, Sweeney and Nimmo overturned the 1964 National Wage decision against a minority of Chief Justice Kirby and Justice Moore. The decision was one of a series that contradicted earlier principles. According to d'Alpuget (1977), not only Kirby, but also the ACTU and major employer groups were very displeased by the 1965 outcome.
15. Lord Hailsham (1979), 'Democracy and judicial independence', *University of New Brunswick Law Journal*, 28 (Spring), p. 14, cited in Staples (1981a, 9–10).

> have to decide it; and whether they refuse the remedy or grant it, decline jurisdiction or accept it, they will come in for criticism from disappointed litigants, trigger-happy politicians, offended ministers, disgruntled trade unions, or angry bosses, and what is more, they have got to take it in silence because they cannot answer back.

and

> It is I believe increasingly recognised that judicial independence remains one of the few remaining protections of the individual and minority groups against the encroachment of the bureaucracy and the politically motivated jack in office, against the intrusiveness of mass culture and the oppressiveness of unions and great corporations. Individuals and minorities are becoming more and more discontented at what they regard as the increasing remoteness of governments, the facelessness of modern public companies and the insensitivity of officials of private associations.

An examination of Staples's decisions and speeches later in the paper reveals a preoccupation with this notion of judicial independence. It is far from clear, however, as seen in the examples of political interference discussed above, that industrial tribunals in Australia are accorded the same degree of independence as the judiciary, despite frequent lip service given to the autonomy of the arbitral 'umpires'.

Against this background, we now turn to an examination of Justice Staples's decisions and pronouncements.

The court is in session

The judgments of Justice Staples are marked by a penchant for colourful imagery and a tendency towards polemics, a tendency that moved one distinguished advocate to comment during a case:

> I rise to ask your Honour to rule on our application, not to give us the benefit of a polemic on your predilections on what should happen under the Act, but rather to rule—as you are obliged to under the Act, as an arbitrator under the Act—on the application that we make. Your Honour makes remarks about whether there should be one rule for the rich and one for the poor. I ask your Honour to remember your obligation under the Statute and to discharge it, and not to heap upon the parties your views about society generally. (225 CAR 108)

Justice Staples riposted

> I could hardly say that I was grateful for your instruction, but I will give it proper account. I would like to remind you, however, that I am not a clerk in the public service of this community that I can be lightly disposed of, and I am not here to make decisions at the behest of great men. I am here to carry out a function as I see it ought to be carried out in my full appreciation of the law, the nature of my office, the nature of the issue before me, and also my concept of what is the duty in your client. (225 CAR 109)

This response by Justice Staples illustrates his perception of his role, a perception he brings to bear on matters requiring his determination, and is also an illustration of a theme that commonly arises in his decisions.

While the specific outcomes of Staples's decisions were often not at variance

with what one might expect from other members of the commission, the principles that underlay his decisions, and his willingness to draw from these principles conclusions that threatened to unsettle taken-for-granted industrial relationships, differed markedly from his colleagues. Where other arbitrators might be willing to seek the most efficacious solution to a particular dispute, Staples was resolutely unwilling to do so if this would conflict with what he considered to be fundamental principles.

A survey of his decisions reveals a preoccupation with a variety of issues on which he expands, often at considerable length. These can be classified into three broad themes. First, he had strong views on the method of judicial reasoning and the notion of judicial autonomy as applied to industrial arbitration. He expressed a desire to place more emphasis on certain precepts and practices common to law courts than then prevailed in industrial tribunals, raising troubling questions about the relationship between these institutions. Allied to this were matters of form, technicality and substance, for example, notification of disputes, matters of preference to unionists, demarcation and jurisdiction, and the role of corporate personality in industrial proceedings. Second, Staples had strong views on the role of the federal commission, in particular the manner and timing of arbitral intervention in disputes between the parties. His view that unions and employers should seek arbitration only after genuine negotiations had been exhausted placed him squarely in conflict with a federal government policy of restricting direct bargaining. Third, Staples had strong views on a number of social equity matters, including a concern for the plight of the low-paid, the poor, the relative powers of employers and employees, and freedom of the press. In the eyes of his critics, Staples, who had been associated with various left-wing causes before his appointment to the commission, was trying to use the tribunal as a vehicle for bringing about social change.

These themes provide a basis for understanding the controversies in which Staples became embroiled throughout his career at the commission. Some of his views were unusual, and they were definitely inconvenient for various powerful clients of the tribunal and at times for the commission itself. Staples was unwilling to compromise on what he considered to be important points of principle or procedure, and he advocated his views from the bench and outside the commission in a forceful and at times colourful way. It has been suggested that judicial autonomy has not always ranked highly in the priorities of the clients and critics of the commission, and in Staples's case a particularly strong coalition mobilized and moved against him.

Staples himself admitted that 'for all practical purposes I am a cipher in the affairs of the Conciliation and Arbitration Commission and hence in public affairs' (Staples 1981a, 2, 3). He suggests that his decisions antagonized unions, employers and the federal government, to which we would add, crucially, members of the commission itself. This often arose from his persistent pursuit of the themes described above.

Staples and the employers

Staples's troubles with employers began with an early case involving a dispute between the Seamen's Union and BHP over incidents relating to the BHP vessel

Iron Cavalier (171 CAR 711). Unionists had placed bans on the *Iron Cavalier* in pursuit of wage claims. The company then stood down the crew and cancelled their onshore accommodation without notice. Staples criticized the union, but he also strongly rebuked the company for its actions. Seeking to restore industrial peace and reopen negotiations, one of Staples's recommendations was that BHP should compensate the employees for the living expenses they had incurred. The company rejected this proposal and began taking steps that in Staples's view were designed to have the matter heard by another member of the commission. Incensed by BHP's treatment of the employees and himself, Staples declared that to abandon his recommendations

> now that the seamen had been persuaded by them [Staples's recommendations] to move the ship would be distasteful to me. Let them, then, twist slowly, slowly in the wind, dead and despised, as a warning to the Commission of the limits of persuasion by a public authority upon those who zealously uphold the privileges of property and who exercise the prerogatives of the master over those of our citizens whose lot falls to be their employees.

It is significant that, while Staples was critical of both parties to the dispute, his attack on BHP went beyond a simple reproach for intransigence. His remarks went to the core of the relationship of dominance and subordination between employer and employee in language that is not ordinarily found in decisions of the commission. In an extraordinary move, the maritime industry was removed from Staples's panel of industries[16] 'on the ground expressed to me that I had destroyed the confidence of the ship owners that they could get justice under me' (Staples 1981a, 20). This instance provides a graphic example of Staples's concern for social equity, a concern that he was prepared to express, despite the political consequences, inside and outside the federal commission. It also provides an example of his 'apocalyptic' method of expression.

Having antagonized Australia's largest private employer, Staples next displeased one of the country's largest mass media groups. In a dispute between News Limited and the Australian Journalists Association, the employer sought to exempt a new editorial classification from coverage of the award. This would have exempted the occupant of the position from union membership. Staples commented (178 CAR 571) that the 'real' reason for the employer's claim was that management viewed the employee's union membership as 'undesirable in his present appointment'. He remarked that the employer's manoeuvre was 'A great way of de-unionising the industry', and ruled that

> the view that it was any part of the function of the Commission to discourage persons from becoming members and from enjoying the benefits of memberships of organisations, or that it was any part of the function of the Commission to countenance employers' disapproval on that account, is difficult to support. We

16. Since 1972 the commission has been set up in a 'panel system'. Each panel consists of a deputy president and at least one commissioner, and covers a number of industries. Cases are allocated by the deputy president to members of the panel, who then have responsibility for their conduct.

> must recall that one of the chief objects of the Act was to encourage the organisation of representative bodies of employees.

Staples rejected the employer's claim, and later sought to restrict the number of exempted positions under the award. An example of Staples's preoccupation with both social equity and the role of the commission is provided in this case, and echoes of his refusal to 'make decisions at the behest of great men' are evident.

Staples was ever ready to defend the rights of the weaker party in a dispute, often against the interests of powerful institutions—usually, though not always, employers.[17] In a dispute between Australia Post and the Union of Postal Clerks and Telegraphists, the employer invoked a policy of 'no work no pay' against an individual who continued to perform most of his duties. Staples ruled (220 CAR 658) that, under the common law, if a master allowed a servant to continue to work, payment was required. The employer's recourse if the employee refused to perform certain duties was either dismissal or a suit for damages. In this case, the onus had been thrown back onto the employee to seek recompense for his services. Staples was not content to find in favour of the employee; he also proclaimed:

> People should volunteer to obey the law, the Australian Postal Commission should volunteer to obey the law, and the law includes not only the statutes but the rules of common law; in this case, contrary to what one would expect of a great statutory corporation, we find people sitting pat and *asking others not nearly as equally placed as they are* [our emphasis] to call on the courts in their aid if they have a complaint.

Staples was not only concerned to protect the rights of weaker parties; he also expressed a deep sympathy for the less privileged sectors of Australian society. His advocacy of a 'needs' criterion in wage fixation, and his reliance on the spirit, and, in his famous *Wool Stores* decision (Print E1682), the letter, of H. B. Higgins's approach to arbitration were unusual at a time when the legacy of the second president of the federal tribunal was sliding into disrepute.[18] Examples of Staples's concern for social equity and the distribution of wealth and power within society abound in his judgments. It is perhaps the most consistent theme of all, which some considered to be a personal crusade to redress all of society's ills, using the vehicle of the commission. Unfortunately for Staples, the details of his personal vision were not always appreciated by the clients or other members of the federal commission.

Staples and the unions

While Staples's overall approach to arbitration and his dealings with such industry leaders as BHP and News Limited were not likely to endear him to employers, there is no hint of a 'pro-union' bias in his decisions. Indeed, he

17. See also 223 CAR 554 and 236 CAR 32.
18. The 'needs' criterion remains implicit in the commission's decisions in the form of a concern to minimize industrial disputation that might arise due to wage levels that are 'too low'. However, this differs from Higgins's concern to establish an irreducible minimum 'living wage'.

has been at times a scathing critic of union officials, and has persistently attacked the accepted interpretation of the legal restrictions on union jurisdiction in Australia, which restricts competition between unions for membership.

An early salvo critical of union officials was fired by Staples in a full bench decision on a claim by the Ship Painters and Dockers Union for an allowance for handling asbestos (176 CAR 1041). Staples joined his collegues in refusing to grant the allowance, but went on to attack the union for the basis of its claim. Noting that only one group of employees was responsible for handling asbestos, and that a high level of lethal occupational illnesses characterized this group, Staples said

> What struck me . . . was both the hollowness of the reasoning and the ghoulishness of its implications. I was reminded of the cattle industry. The grazier culls out of his herd the cattle due for the meat market and calls them 'killers' and those he would retain for the future he calls his 'breeders'. I have difficulty in understanding how . . . any union or its members working together on a job site as mates and brothers are willing to allow some to be put at a risk that no others are prepared to share or why they do not insist that the risk should be shared equally.

Staples seemed outraged that financial compensation was sought for work that posed a health risk to employees rather than an attempt being made to minimize or eliminate the hazard. Staples (1981a, 20) claims that some unions attacked him 'as a renegade from the labour movement who had become a judge for the "bosses"' as a result of this decision. These cases demonstrate Staples's determination to redress the balance where he believed he had found injustice, no matter what the forum, nor whom he might offend. They exhibit an unwillingness to compromise on basic principles that is manifest in his approach to much of his work, a characteristic that was as distasteful to union officials as it was to many employers.

More important for Staples's relationship with trade unions were his decisions regarding service of claims on employers and restrictions on union rights to recruit members. These seemingly arcane matters were of great concern to union officials. With regard to service of claims, Staples was unwilling to rule in favour of the convenience of unions if this operated against what he perceived to be the basic rights of employers.[19]

In these cases, Staples relied on strict legal principles against what he perceived as the accepted (if legally slovenly and unjust) practices of some union officials. This is indicative of Staples's identification with a *legal* tradition of decision making, which in his view ran counter to accepted practices in industrial tribunals.

> In my decision-making in the Commission I know that I have been greatly influenced by common law doctrines that I had absorbed during my years of practice in ordinary litigation. I have been conscious that my submission to the discipline of common law rules and to the underlying values of the common law has been a source of disruption, if one may use so strong a word, in a jurisdiction

19. See 181 CAR 1020; 221 CAR 135; 240 CAR 283; 243 CAR 475.

> where looseness, expedience, opportunism and eclecticism characterise the behaviour of litigants . . . I would argue that, in some cases at least, it has been my adherence to common law methods of dispute solving, of dispute analysis and so forth that has lead to my earning the common description of being a 'controversial' judge. (Staples 1981a, 3)

It seems that Staples, as a lawyer, placed great store by the judicial process and on occasions favoured a traditional view of judicial method, emphasizing precedent and a strict application of law to the facts of the case, over what may be termed the 'arbitral method', which takes more account of the prevailing consensus on issues.[20] The distinction between courts and tribunals in Australia has been explored briefly by Portus, who notes some similarities in procedure, but also important differences. He traces the major departures from traditional judicial process in the tribunals to 'the importance of conciliation, the legislative nature of awards and the continuing relationship between the parties' in industrial relations (Portus 1979, 94). He notes the lesser role of precedent in tribunals, in which previous decisions are viewed as less binding, as well as the more relaxed rules of procedures and evidence. While there is a strong case to be made out for a distinction to be drawn between arbitral and legal proceedings, it seems that Staples viewed the departure from legal method in tribunals as being too great, such that expediency at times seemed to take precedence over justice.

More unsettling for unions than the requirement of strict adherence to procedure was Staples's attitude to membership coverage. The effect of the provisions in the Conciliation and Arbitration Act concerning union membership has been to restrict the types of employees who might be covered by a given union, to minimize 'poaching' of members, and to make the registration of new unions difficult. While the areas of coverage are not watertight, these arrangements provide security for unions and predictability for employers and state officials.

In a dispute involving Kimberly-Clark Australia Pty Ltd and two trade unions over jurisdiction (Print D1331), Staples went beyond determining the rights of the unions involved to question the whole system of union coverage. He argued that:

> The provisions in the Act which facilitate the enjoyment of membership rights in an organization are in aid of participation by the members in the government of the organization. It does not follow that provisions which locate rights and privileges in an organization in employees in and in connection with a relevant industry involve a derogation from the capacity of that organization to act throughout industry at large. There is no provision in the Act which prohibits recruitment into a union from employees at large.

Reflecting on this decision some years later, Staples (1981a, 26) stated:

> the burden of my ruling was that the law of this country did not, despite appearances and common understanding, compel an employee to belong to that

20. Staples's views on such matters are complex, as seen in an address to the Queensland Society of Labor Lawyers in which he discounted the distinction between judicial and arbitral functions as being scholarly rather than realistic, and often not observed in practice (Staples 1981a).

> union only which was allocated to his industry by the Industrial Registrar or by the draftsman of the eligibility rule of a registered organisation of employees. The effect of my reasoning was to break up the monopolies enjoyed by registered organisations over the recruits available in industries which they cover. The reasoning tended to legitimise a little competition amongst those whose right to a membership subscription has hitherto been believed to be pre-ordained in a particular workplace. Since everyone, that is to say, bureaucrats in the public service, in the ranks of private employers and in the trade union movement have an interest in maintaining the present captive circumstances of the average employee, my position could only be profoundly disturbing. I was appearing to let loose the body snatchers.

The implications of this position apparently aroused considerable concern amongst industrial relations practitioners. Early in 1977, Staples was relieved of his duties and invited to undertake an extended overseas trip examining human rights legislation on behalf of the federal government. Staples attributes this to disquiet over his *Kimberly-Clark* judgment (*National Times*, 27 October 1979; Staples 1981b, 9).

Staples and the Commonwealth

Having lost the goodwill of unions and employers, Staples then came into sharp conflict with the federal government. Upon his return from overseas, Staples was appointed to a new panel of industries which included, among other things, major statutory authorities and wool storage.

His troubles with the conservative Fraser government arose in a series of decisions involving Australia Post and Telecom, particularly his attitude towards the practice of statutory authorities under the direction of the government refusing to enter into serious negotiations with trade unions on wages and conditions. These matters, it seems, were referred by the statutory authorities to the federal Department of Industrial Relations, which scrutinized the claims for possible 'repercussive effects' within the public sector before returning them to the relevant employer—to be taken to arbitration, not negotiation.

Staples objected strongly to these practices. He disputed the government's right to intervene in the everyday operations of statutory authorities to the extent of dictating their industrial relations policies, and he rejected the use of arbitration as a first resort in industrial disputes. He asked:

> What is this practice of the Postal Commission . . . if it is not a formula for bureaucratic inertia and for the stultification of responsiveness and flexibility in the relationship at hand? What possible goodwill can be generated by such procrastination? The system is a very engine of frustration. (Print D9960)

He then declared:

> what possible justification exists for the baleful eye of circumspection falling upon industrial claims without immediate response, for the Postal Commission standing like the geese before the gates of Rome, as it were, to warn all within that danger is at hand?

Similar episodes occurred with Telecom. Staples said:

> This commission is not and ought not to allow itself to be manoeuvred into becoming the financial manager and paymaster of industries under federal awards and those under state law that tend to adopt our determinations. We ought not to be a court of first resort. Our task is not to step into the shoes of those who would abdicate their responsibility to manage the resources in their charge, and to face in their place a claimant workforce. (223 CAR 561).

Staples refused to find a dispute in these matters, a necessary step before arbitration could commence. He claimed that, as no meaningful negotiations had taken place, he could not declare, as required under section 30(1) of the Conciliation and Arbitration Act, that conciliation proceedings had been completed without agreement. He resolved to refer the question of whether arbitration could proceed before negotiations to a full bench (225 CAR 102), but the full bench overturned Staples's ruling, finding that a dispute existed (Creighton, Ford & Mitchell 1983, 366). This concern with the failure to negotiate, and restrictions on the ability to negotiate, which, in effect demand a more robust attitude to the award-making process, reflect Staples's concern that much of industrial relations in Australia becomes the province of the commission, that parties fail to negotiate in anything other than a cursory fashion, being content with leaving the arbitral body to make the decision, which in turn places the parties to the award or decision in the position of expressing either fulsome praise or righteous indignation at the actions of the commission, depending on their view of the outcome.

Staples also attacked the operational performance of Australia Post and Telecom. He announced 'Let us be perfectly blunt about it. The postal industry is not serving the community well' (Print D9960). Telecom fared worse. Unconvinced by Telecom's argument that union claims would be inflationary, Staples engaged in an unprecedented personal study of the authority's investment and pricing policies (230 CAR 229). He concluded that there were serious problems with Telecom's management practices, such that he saw no reason to refuse to grant wage increases.

The Fraser government's strategy contested by Staples was part of a wider policy to restrict wage increases throughout industry. The government sought to channel all industrial disputation into the commission, and there to exploit the restrictive provisions of the wage indexation guidelines in operation at the time. Staples's position threatened to undermine this centralizing approach. As well, the government perceived him as intruding on their authority within the public sector.

The government soon introduced a series of amendments to the Conciliation and Arbitration Act, some of which were designed to reduce the autonomy of members of the commission. In particular, a provision empowering the president to remove matters from individual members, including the finding of a dispute (the main issue in the Telecom and Australia Post episodes), became known as the 'Staples amendment'. The legislation was strongly criticized within the commission and by the commission's former president, Sir Richard Kirby (Kirby 1982). Staples circulated an internal letter outlining his disagreements with the amendments, which struck against his view of the

appropriate role of judicial agencies, particularly the concept of judicial autonomy. This letter created a furore after it was obtained by the media and tabled in Parliament.[21]

On the proposal to allow the president to remove matters from sitting members he said, 'Nothing is more calculated to strike at the independence and authority of any member of the Commission than that he be under threat of becoming disentitled to act if he does not please' (Staples 1979, 56). Staples likened another section of the Bill, which proposed greatly expanded powers to deregister trade unions, to 'key practices of totalitarian and authoritarian regimes'. He claimed that arbitrators would become like 'judges in pre-war Germany who simply acted out their office in a train of events that culminated in legal conclusions that "Jews" and "Communists" were no longer full citizens' (Staples 1979, 58). Media commentators promptly asserted that the judge had equated the legislation with 'Hitlerite' or 'Nazi' Germany, and the government did not disagree with this accusation.[22]

Staples and the commission

Only two months later, Staples became embroiled in an even more heated controversy. This involved his decision in a wool storemen's work value case on 21 December 1979 (Print E1682). In four matters at issue, Staples found for the employers in three, but ruled that wages should rise. The case took place in the context of a general work value round, in which the work value provision of the wage indexation guidelines was being used as a thinly disguised mechanism for general wage increases of approximately $8 per week.[23]

Staples (1980) asserts that he was asked for a 'genuine' arbitration in the matter. Mindful of the current work value round, he warned the parties that he was not an 'eight dollar automaton'. In other words, he would not go through the motions of a work value study and grant an increase of eight dollars irrespective of the merits.

His decision created an uproar. A passage outlining the difficulties of assessing work value was widely but erroneously interpreted to mean that Staples had reached his decision in a flippant manner. After listing numerous criteria he was precluding from using in his deliberations, he lamented:

> For the quantification, then what shall I do? I am already reeling under the advice of many prophets. There is no Polonius at hand to give me memorable precepts as he did Laertes when he fled the confusion. I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life.

21. Staples's letter has been reprinted in the *Australian Quarterly*, vol. 51, no. 4, pp. 51–8 (December 1979). Relevant Parliamentary debates can be found in *Debates*, Representatives, 16–18 October 1979. See especially pp. 2153–4, 2158–9, 2182–3. See also *National Times*, 27 October 1979.
22. *Debates*, Representatives, 17 October 1979, 2158; 18 October 1979, 2183.
23. 'Work value' is a notoriously difficult wage fixation concept to specify. In theory, only significant changes to specific classifications should result in wage increases. In practice work value cases have often served as a vehicle for general wage flow-ons. See Hutson (1971, ch. 37); Plowman (1981, ch. 5); Kitay (1984, pp. 112–28, 359–65).

What 'turned up' were increases of $12.50 to $15.90, well above the 'going rate' in the work value round. The literary allusions in the decision were apparently lost on his audience, who ignored later remarks in the judgment to the effect that 'I have never approached this matter upon any basis other than that it must show a result that would stand scrutiny in the public arena at the hands not only of those most directly interested but of others.' In other words, Staples considered his decision to be responsible and appropriate, based on the particular merits of the case, in full awareness that it might be subject to appeal. To have ruled otherwise would, in his view, abandon equity in exchange for the expediency in decision making of which he was so critical.

While editorialists leapt upon Staples's language, the industrial relations community were more concerned with the new wage rates, which they feared would spark another wage round. The wool brokers and the Storemen and Packers Union had agreed that an appeal would only be lodged if the decision was 'extravagant or unfair'. The wool brokers lodged an appeal, according to Staples at the insistence of the Commonwealth and the peak employer councils. The union promptly went on strike, claiming that the new rates were not unreasonable and that the employers had reneged on the agreement. A full bench overturned Staples's decision, substituting $8 in line with other industries (1980 AILR 156). Staples asserts that his original rates were quietly restored by agreement between the parties after the fuss subsided (*Bulletin*, 25 June 1985).

Staples's troubles with Telecom then resurfaced. He declined to find a dispute in what he viewed as another bogus work value case (*Bulletin*, 25 June 1985; Staples 1981a). The federal government approached Sir John Moore to see if Staples would be interested in moving to the Law Reform Commission.[24] Staples refused, and sought an unqualified expression of support from the president, which he did not receive.[25]

Staples made a public response to his critics in a speech to the South Australian Industrial Relations Society on 17 March 1980.[26] He said:

> We lurch and shuffle from one headline to another, jerking our arms with each screaming slogan and if someone makes a literary allusion, uses our language with a little colour, writes with a certain bemusement, seeks to demonstrate in a pithy way what a pass we have come to in our thinking, we cry out that we are in anarchy wrought by a blundering judge. We substitute the form for the substance. Like Hamlet's ghost, the insubstantial bends our thinking, governs our lives and becomes the source of our incomprehension.

He argued that the source of the problems in the wool dispute was not his decision, in which he said he was faithfully acting according to the wishes of the parties and in which, if anything, the wage increases he offered were not generous,[27] but due to a conflict between graziers and wool brokers,

24. See Staples (1981a), also *Debates*, Senate, 19 March 1980, 773, 778; Representatives, 18 March 1980, 835–6, 908.
25. *Australian Financial Review*, 8 May 1980; *Bulletin*, 25 June 1985; Staples (1981a).
26. Staples (1980). Reprinted in *Journal of Industrial Relations*, vol. 22, no. 3.
27. Note the high level of productivity changes listed at the back of his decision. Print E1682, pp. 11–12.

accentuated by the federal government's hard line approach to wage policy. He claimed that 'The employers of this country have been reduced to cowardice by the [wage indexation] guidelines and the government, a state of ignobility which fortifies, however, their material interests' (Staples 1980, 11).

Staples then turned his attention to the commission. He had already expressed his unease with attempts to use the wage indexation guidelines as a vehicle for introducing a wages freeze, and had referred to the work value clause as a 'nonsense principle' (*Communication Worker*, December 1979, 5). The restrictions imposed on individual arbitrators by the wage indexation guidelines,[28] as well as the opportunism required to make the guidelines work, were evidently difficult for Staples to accept. He now asserted that, after the recent metal industry work value decision, followed by the National Wage decision,[29] and the appeal from his wool industry decision, the commission had simply reintroduced comparative wage justice 'in all its bland and fulsome force', contrary to the guidelines. 'The inconvenience of doing otherwise, the [metal industry] Full Bench emphasised, was plain and troublesome. They may have been right, but was it guideline goodness. If such a trespass is virtue, what is my sin?' (Staples 1980, 13, 14).

This speech added Staples's colleagues on the commission to the list of those whom he had antagonized. Eight deputy presidents wrote to Sir John Moore criticizing the 17 March address (*Age*, 6 May 1980). This letter was used as a major justification by the president when he removed Staples from his panel of industries on 1 May 1980. One of the signatories to the letter, Justice Gaudron,[30] then resigned from the commission, claiming that it was not her intention that the letter be used for such purposes and that she had been misled by certain of her colleagues who had foreseen the likely consequences (*Australian Financial Review*, 2 May 1980; 6 May 1980).

Staples had been relieved of his panel, but he could not legally be removed from office.[31] While his actions were undoubtedly inconvenient to the government and the commission, he could not be accused of wilful misbehaviour or incompetence.

Under Sir John Moore, Staples continued to sit on occasional full bench matters, where his more controversial judgments could be overruled by a majority. However, this work was far from enough to keep him fully occupied in his official duties.

Staples refused to resign or accept an alternative position. He also refused to be muzzled in his decisions. One example that attracted considerable

28. The extent to which full bench decisions have a legal or moral binding force on arbitrators has been explored, without clear resolution, by the High Court in *R. v. Clarkson and Ors; Ex parte Australian Telephone and Phonogram Officers Association* (1982) 39 ALR 1.
29. Wage increases were simply averaged through the Metal Industry Award (Print E1277). The decisions in the June/September 1979 National Wage Case accepted that this was likely to flow through the workforce (Prints E1681, E2370).
30. Later appointed to the High Court.
31. Under sections 7(4) and 99(1)(b) of the *Conciliation and Arbitration Act*, presidential members could only be removed on grounds of 'proved misbehaviour or incapacity' found by both Houses of Parliament.

attention involved rail fettlers working for the Australian National Railways in Tasmania. At issue was the familiar problem of disputed union membership. The workers in question, labourers in rail gangs, wished to change their union membership. In a brief decision, two of the three members of the tribunal simply ruled that they could be covered by another union (Print G0156). Staples agreed, but went much further. He reiterated the argument that had aroused such excitement in the *Kimberly-Clark* decision, declining to restrict 'a citizen's entitlement to freedom of association in the promotion of his material interests'. He declared that the Act 'does not . . . create or even encourage monopolies', but 'looks to representative bodies, and the best judges of that are the rank and file'.

The election of a federal Labor government in 1983 did not bring Staples remission from exile. Nor did the appointment of a new president of the commission, Justice Maddern, in late 1985.[32] Indeed, under Maddern, Staples was given no work at all. In a letter to Maddern on 8 August 1986, Staples sought reinstatement to full duties, arguing that as he had been appointed by the governor-general and had not been removed from office, he was entitled to a panel and full bench work. The president did not respond. Staples's cause was taken up by the National Conference of the Australian Society of Labor Lawyers, who in October 1986 petitioned the federal government to effect his return to duties, citing concerns over the independence of the judiciary. The attorney-general, Mr Bowen, replied to the lawyers that the matter was internal to the commission, and that it would be inappropriate for the government to intervene on the very grounds of judicial independence that had been raised.

This letter triggered a lengthy reply by Staples to the attorney-general on 6 February 1987, in view of reports that changes to the legislation governing industrial tribunals would effectively remove him from office.[33] He based his argument on the need for an independent judiciary, rejecting any clear distinction between courts of law and industrial tribunals.

He defended his own record, saying, 'I have no apology to offer because, in acting out my fealty to my oath, my work attracted a certain amount of attention from the public at large and from energetic interest groups in particular. I regard it as a necessary concomitant of doing one's job.' Staples suggested that his continued exclusion was at the behest of 'our industrial leaders, our complaisant corporatists' whom he had affronted over the years. He concluded his letter by warning that future appointments to federal industrial tribunals

> will be absolutely compromised, if I am banned, by the mere fact of being nominated and, in any event, by the threat to them of an abuse of power by the head of the tribunal for which a precedent has been set in my case and which

32. At no point did Staples publicly place personal blame on Sir John Moore for his predicament. See, for example, *Bulletin*, 25 June 1985.
33. The government proposed to introduce an Industrial Relations Commission to replace the Conciliation and Arbitration Commission. Members not appointed to the new tribunal would be deemed to be 60 years of age and eligible for retirement. That this provision was aimed at Staples, who was then 57, was not lost on anyone.

now stands authorised by the one person surely charged to uphold the law, the constitution and the conventions in the face of abuse of power.

Ironically, when this correspondence was released, Staples's cause was taken up by the conservative federal Opposition, at whose hands he had suffered when in government.

In March 1989, when the Industrial Relations Commission was established, Staples was the only member of the old tribunal who was not appointed to the new body.[34] Support for Staples came from an array of sources, ranging from conservative media commentators[35] and politicians to five judges of the New South Wales Supreme Court. The government, however, remained unmoved in its determination to effect his dismissal. Staples vowed to take his case to the governor-general and High Court (*Australian*, 1 March 1989; *Australian Financial Review*, 1 March 1989).

Staples had acquired some unusual champions. He had pulled no punches in defending himself and his record. And he remained without work.

Conclusion

The removal of Mr Justice Staples from his panel of industries is frequently explained in terms of the idiosyncratic exercise of his office. There is little doubt that important features of Staples's practice on the commission were unusual and in some ways potentially disruptive to the everyday activities of the federal tribunal. However, to understand why Staples's rulings were widely viewed as controversial, and why they were unable to be accommodated within the political and industrial relations 'mainstream', it is necessary to examine not the personal characteristics of the judge, but also the nature of the tribunal within which he worked.

The main themes that have been associated with Staples's difficulties have been discussed above. More than his contemporaries on the commission, Staples was motivated by, *and consistently acted upon*, a concern for a particular vision of social and economic reform. In this he was in the tradition of activist arbitrators,[36] like Higgins and Kelly, and like them his views were inconvenient to powerful client groups of the commission and other branches of the state. It could be argued that the industrial tribunals have never been at the forefront of reform, nor do they have the institutional capacity[37] to carry out reform, relying as they do on the continuing goodwill of the parties and the institutional space allowed by other, more powerful state apparatuses. Indeed, the tribunals have only a limited capability to manage major industrial

34. One cannot but note the great irony in the words of Waterside Workers Union secretary, Mr Charlie Fitzgibbon, at Staples's official welcome to the commission in 1975. In referring to a well-known incident early in Staples's adult life, he assured the new judge that 'it might be more difficult to get expelled from the bench than it was to get expelled from the Communist Party!' (Australian Conciliation and Arbitration Commission, Transcript of Proceedings, *Welcome to His Honour, Mr Justice Staples*, 24 February 1975, p. 10).
35. See articles by Gerard Henderson (*Australian*, 30 January 1989) and Padraic McGuinness (*Australian Financial Review*, 26 January 1989).
36. See Dabscheck (1983).
37. For a discussion of state capacities, see Skocpol (1985).

disputes, no less significant social change. Those who have espoused views of social reform while on the bench, notably Kelly and Staples, have been deposed through government intervention.

A further source of controversy was Staples's attachment to a number of legal and procedural niceties. Although Staples accepted that the commission was a tribunal of 'common sense', in which strict courtroom procedure was frequently inappropriate, he nevertheless argued that the balance had shifted too far in the direction of expediency and opportunism (Staples 1981a). Interestingly, Staples's view that a greater element of judicial practice should prevail in the interests of justice was especially provocative to the tribunal's trade union constituency. Staples was uncompromising in the pursuit of his view of social justice and adherence to procedural requirements, basing his approach on a strict view of judicial autonomy, citing impeccable and enduring legal precedents.

These points are linked with the third major theme in Staples's decisions, as nowhere are they more evident than when Staples was charged with the task of resolving disputes by arbitration. He adopted the approach of deciding each case on its individual merits, with frequent reference to legal precepts he considered to be applicable to the matter. This was consistent with the emphasis he placed on judicial technique in his public criticisms of the commission. However, at times this came into conflict with 'industrial relations realities'. Industrial disputes that come before the commission frequently contain 'hidden agendas', understood and generally accepted by the participants. Staples refused to countenance such practices when they conflicted with his perception of his judicial role, even when he was aware that he was likely to create powerful enemies. The concept of judicial autonomy on which Staples relied to sustain his practices proved to be ephemeral.

It has been shown that there is a history of constraints being placed on arbitrators whose 'independence' was viewed as disruptive by governments and key figures in the industrial relations community. The preservation of the autonomy of industrial tribunals and their members is widely viewed as desirable, but at times the tribunal is constrained by the urgency and potential impact of the economic and industrial matters with which it deals. While attempts to restrict judicial independence are unlikely to be made lightly, the concept is not absolute in practice. This appears to be particularly true for industrial tribunals when compared with courts of law. The industrial tribunals are concerned with problems for which solutions are likely to take the form of a compromise between parties in an ongoing relationship. This issue is less central for courts of law. Furthermore, and more significantly, the relationships with which the industrial tribunals are concerned typically have an immediacy and potential for widespread political and economic disruption. It is this difference, the involvement of the industrial tribunals in continuing potentially volatile economic relationships that attracts the intense scrutiny of governments, and increases the likelihood of intervention. Whether such intervention should occur has never been resolved, but it is raised in a particularly clear way by the fate of Staples, and points to basic contradictions in the industrial tribunals,

This leads back to the theoretical points made at the outset. Industrial

tribunals are subjected to unusually strong and immediate conflicting pressures, which encourage the flexibility and opportunism characteristic of the form and content of their policy making. If flexibility and opportunism are essential for 'successful' policy, then an attachment to social ideals or strict rules of procedure by personnel within such state apparatuses are likely to become disruptive. A likely response will be conflict within the state apparatus in question, or between that agency and its clients and other branches of the state.

It was argued that there exists a hierarchy of state apparatuses, such that the independence of action of some agencies is constrained. In the case of the commission, its actions are limited formally by the legal framework imposed by Parliament and the High Court, and informally by direct and indirect pressures that can be brought to bear by governments. If the tribunals must be seen to be independent in order to maintain their legitimacy, they must also be pragmatic in order to maintain their effectiveness. These requirements can become contradictory. The exclusion of Staples from his panel of industries and his ultimate exclusion from the bench clearly demonstrates this contradiction, as do the other instances of discipline imposed on tribunals and their members.

The decision to take action against a tribunal member will depend upon the issues involved and the context. In Staples's case, his decisions and pronouncements were seen by others, most importantly by other members of the tribunal, to disturb important aspects of the commission's operations at a time of considerable economic and industrial uncertainty. The validity of his views (which has never been adequately debated) was seemingly of less importance than their political consequences. Explaining the circumstances surrounding the removal of a highly independent senior state official such as Staples must be based not only on the personal characteristics of the individual, but must also include an analysis of the institutional parameters and constraints within which he operates.

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