ANALYSEN UND BERICHTE

The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia [1]

By *Michael Kirby*

The English Constitutional Settlement & Judicial Tenure

In their recent book *Retreat from Injustice*[2], Nick O'Neill and Robyn Handley remind Australian lawyers who may have forgotten of the origins of judicial tenure in the English legal tradition to which we, in Australia, are heirs. It has a long history. But it came to a head when King James II succeeded to the throne of England in 1685. The King attempted to "suspend" laws enacted by Parliament by the use of his Royal Prerogative. His specific objective was one which, in today's world, would perhaps be seen as a defence of religious freedom. But in the circumstances of England at the time, it was seen by his critics as an attempt by the King to override laws duly made by Parliament and to reintroduce the disputes about religion which had bitterly divided the Kingdom and which were still the occasion of warfare on the continent of Europe.

James II, in 1688, summoned the Archbishop of Canterbury and six other bishops of the Kingdom because they refused to comply with his command that a Declaration of Indulgence, suspending the operation of laws against Roman Catholics, should be read in all churches and chapels throughout England on two successive Sundays. The Bishops had petitioned the King claiming that this use of his royal power was illegal and contrary to the laws of England. For their audacity, the King had the bishops committed to the Tower of London on charges of seditious libel.

The bishops first petitioned the King's Bench to release them. But their plea was denied by a supine court whose judges held office, in effect, during the King's pleasure. When,

1 The Ronald Wilson Lecture, Perth, Western Australia, 21 September 1994. Adapted from an adress to the Judicial Conference of the Compensation Court of New South Wales, Jamberoo, New South Wales, 18 June 1994.

2 *M. O'Neill / R. Handley*, Retreat from Injustice: Human Rights in Australian Law, Federation, 1994, Sydney, 5.

however, the charges were heard, the bishops were acquitted by a jury. Such was the civic outcry in London and throughout England that James was forced to leave the Kingdom. A conditional invitation was then sent to Princess Mary of Orange to take the throne. This invitation was later extended jointly to William, Prince of Orange. From 13 February 1689, the Sovereign held the throne of England upon conditions set by the Commons of England in the Declaration of Right. That Declaration was ultimately embodied in statutory form in the Bill of Rights.[3] In the same spirit, the Act of Settlement of 1700[4] promised tenure to the judges of England *quamdiu se bene gesserint.* During good behaviour, they could not be removed by the Crown, nor their salaries reduced, except by an address of both Houses of Parliament.

The promise and actuality of tenure removed the supine subservience of the judges of England to the Executive Government and the Crown. The judiciary, which had begun within the King's council, as part of the government established by the Crown, secured an independent legitimacy and the courage and neutrality of mind that came with such independence. This was truly, in its origin and in its practice, a revolutionary doctrine. The notion of neutral judges can be traced to Biblical times. But the constitutional assurance of tenure, which underlies the tradition which has obtained in Australia and other common law countries, is one of the most important explanations of the freedoms we enjoy.

The principle of judicial independence was not always followed in colonial days, as I shall show. It was not always observed in respect of judicial officers in courts which were not superior courts. It was certainly not always observed in non-judicial commissions and tribunals. But it is important to remember the historical origins and fundamental reasons for the principle of judicial independence. A decision-maker who must evaluate evidence and submission fairly and reach conclusions affecting powerful and opinionated interests, must be put beyond the risk of retaliation and retribution. Otherwise human nature, with its mixed elements of cowardice and ambition, may tempt the decision-maker to ignore the merits of the cause under consideration and to favour the interests of the powerful. That is what the tenure of judges and other independent office-holders is about. It concerns giving substance to the promise that important decisions will be made neutrally: without fear or favour, affection or ill will.

My thesis is that, until recent time in post-colonial Australia, we have observed with a high degree of strictness, the convention of respecting the tenure of judicial officers and their equivalents. But over the last twenty years, and in virtually every jurisdiction of Australia, we have begun to see departures from this beneficial tradition. The departures

3 1 Will and Mary c2 (1688).

4 12 and 13 Will III c2. See also *J. Quick / R. Garran*, Annotated Constitution of the Australian Commonwealth, 1901, 728 f.

are always explained by the Executive which attempts to justify them. But they have begun to have a grievous effect upon the notion of the independence of judges and other like office-holders. The departures can only be attributed to the ignorance of history of those who have undone the conventions and a defiance or indifference to the internationally accepted principles for the defence of judicial independence.

So many are the examples of departure from principle and so widespread the illustrations throughout Australia, that doubt may now be cast as to whether the principle itself endures, at least in its earlier form. The immediate problems of which I speak have arisen in the context of the abolition of courts and independent tribunals and the creation of new courts or tribunals to which some only of the former office-holders are appointed. This practice, once unthinkable, has now become relatively common in Australia. The practice represents a shocking erosion of the principle of independence of judicial and like decision-makers. It should be exposed and appreciated in the hope that the trend may be arrested and reversed. For if it is not, we will return much of the judiciary and other independent office-holders of Australia to the compliant status of the judges of king James II. A precious independence of mind and of action will be lost. The people of Australia and their good government will suffer as a consequence.

Judicial Tenure in Colonial Australia

The principle of judicial tenure which was accepted in England was not generally applied in the British colonies. Perhaps this was because of the variable quality of the judges recruited to the colonial judicial service in earlier times. Perhaps it was because of the conception that colonists did not merit precisely the same form of government as the commons of England had won at home. Perhaps it was because those commons were not as tender to the rights of the colonists as they were to their own rights. However that may be, judges in British colonies typically held their appointment in the absolute discretion of the Crown. Their tenure was governed by the Crown's needs and wishes. Their removal later became dependent upon, or subject to appeal to, the Judicial Committee of the Privy Council which gave advice to the Crown.[5]

Resentment concerning this disparity in judicial tenure was one of the sources of complaint of the American colonists and settlers. Their Declaration of Independence recited, amongst the wrongs of King George III, that he had:

5 See Terrell v Secretary of State for the Colonies & Anor [1953] 2 QB 482 (DC) concerning the application of Burke's Act. See also Supreme Court Advocates-on-Record Association and Ors v Union of India (1993) 4 SCC 441 (SCI), 620.

"... made Judges dependent on his Will alone, for the tenure of their offices and the amount of payment of their salaries."[6]

It was unsurprising, therefore, that the American Constitution should contain a specific guarantee of judicial tenure similar to that containes in the English Act of Settlement.[7]

In the Australian colonies, a number of the judges were removed (or "amoved") by the Crown. The very first judge who arrived in New South Wales, Geoffrey Hart Bent maintained a long vendetty with the civil authorities and was ultimately recalled. The first judge of the Supreme Court of South Australia, John Jeffcott had been Chief Justice of Sierra Leone. He was removed from office after he killed a fellow Irishman in a duel. The first judge sent to Melbourne was John Walpole Willis. He had the distinction of being "amoved" from judicial office twice. The first amoval took place in Canada; but he was subsequently reinstated by the Privy Council. His second petition for redress after his amoval from Melbourne was unsuccessful.

Algernon Montague, appointed to the Supreme Court of Van Diemen's Land in 1833 was removed from office after he claimed immunity in his own Court from creditors who were pursuing him. In 1867, Mr Justice Boothby was removed from office in the Supreme Court of South Australia following addresses passed by both Houses of the Colonial Legislature. Although some colonial judges saw it differently, there was no real doubt that they could be removed from their offices by Executive action in Whitehall.

In early 1878, a political crisis in Victoria illustrated the vulnerability at least of the lower judiciary in the Australian colonies. In the previous year, a bitter struggle had broken out between the Legislative Assembly and the Legislative Council of the colony. The latter refused to pass a Bill providing for the continuance of payments to members of the former. The Appropriation Bill containing the disputed item was adjourned by the Council in December 1877. During the legislature's recess, the Premier, Mr Berry, with the support of the Governor, conceived a scheme to embarrass the Council. An extraordinary Gazette was issued announcing the dismissal by the Governor in Council of all persons then

6 *B. Bailyn*, The Ideological Origins of the American Revolution, discussed in Federal Judicial Center (US, Judicial Discipline and Removal in the United States, 1979, 5.

7 United States Constitution, Article III, Section 1 ("The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office"). The only judge of the United States Supreme Court who has been impeached was Samual Chase in 1805. He was acquitted. A proposal was made in the early 1960s, by Mr Gerald Ford (later President), that Justice William O. Douglas be impeached. However, no formal action was ever taken on a resolution to that effect. Justice Abe Fortas resigned in 1969 under the threat of impeachment. In 1980, the United States Congress passed the Judicial Council Reform and Judicial Conduct and Disability Act (28 USC #372 (c)) to provide for judicial discipline of Federal judges short of impeachment. See *R.L. Marcus*, Who Should Discipline Federal Judges, and How?, 149 FRD 375 (1993).

holding office as judges of County Courts, Courts of Mines and Insolvency and all Chairman of General Sessions, all Police Magistrates, Coroners and Wardens of the Goldfields as well as a large number of public servants. The day of their removal became known in Victoria as "Black Wednesday".[8]

A number of conferences took place before Parliament resumed. Three County Court Judges and three Police Magistrates and Coroners were reappointed. By April 1878, most of the Judges, Police Magistrates and Crown Prosecutors, who had been dismissed, were reappointed. However, a number never were. The Government paid a considerable amount to them in pensions and compensation. Dommenting on these events, Sir Arthur Dean declared in words which now seem ironic:

> "It is difficult to believe that any Government would go so far as to close Courts and to dismiss Judges and Magistrates. One can easily imagine the alarm and protestations of the Bar and the Discussion which must have ensued."[9]

There were a number of interesting sequels to these judicial dismissals. The *Argus* newspaper described the action of the Government as "shameful":

> "If County Court Judges, Chairmen of General Sessions, Stipendiary Magistrates, Coroners and Wardens are able to be dismissed without good reason given, at the arbitrary will of the Government of the day, what chance has the subject of redress of justice in any cases in which the Crown is concerned? The gentlemen may do their utmost to be impartial and strictly fair, but it is not in human nature - especially in hard up human nature, with a family dependent on it - to hold the scales with unwavering exactness when a slight inclination may make the difference between competence and instant dismissal. The Government, by its tyrannical proceedings, has inaugurated a reign of terror in every Department of the State. Every officer, judicial and executive, ... feels that strangulation would immediately follow any word or action displeasing to the powers that be ... Judges and Magistrates dare not call their souls their own ..."[10]

In the courts, challenges were brought to the purported reappointment of the County Court judges after their earlier "cancellation".[11] The Supreme Court held that County Court judges' tenure was during pleasure and that they could be removed for no cause assigned.

8 *A. Dean*, A Multitude of Counsellors, F.W. Cheshire, Melbourne, 1968, 53.

9 *Ibid*., 53-4.

10 The Argus, 16 February 1878, 1.

11 Regina v Cope; Ex parte Fraser (1878(2 VLR 261 (VFC). For an account of a serious dispute between the Victorian Government and the judiciary in 1954 see *Z. Cowen / D.P. Derham*, The Constitutional Position of Judges (1956) 29 ALJ 705 at p. 706.

It was a sorry episode. But as I shall show, no more sorry that one which was to occur a little more than a century later.

Perhaps the events of Black Wednesday helped to reinforce the desire of the Founding Fathers of the Australian Commonwealth to enshrine the principles of the Act of Settlement in the Australian Constitution for the protection of the tenure of Federal judges. By s 72 of that Constitution it is provided:

"72. The Justices of the High Court and of other Courts created by the Parliament

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same Session, praying for such removal on the ground of proved misbehavior or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office."

This provision is one of very few amended by referendum approved by the Australian people. In 1977 provision was made whereby the maximum age for justices of any court created by the Federal Parliament would be seventy years. Parliament may fix a lesser age. But no such amendment affects the term of office of a justice appointed before the amendment. Nor did the amendment of the Constitution affect the life tenure which it had been held was enjoyed by Federal judges prior to the constitutional referendum.

The State Constitution Acts of Australia included provisions similar to those in s 72 of the Australian Constitution to protect the tenure of judges in the States.[12] But, save for any entrenched provision, those constitutions could readily be amended. Their amendment does not, generally, require approval of the people at referendum. It was this differentiation which exposed appointees to Federal offices (who were not justices of the High Court or of courts created by the Federal Parliament) and all State appointees to courts and tribunals to vulnerability as to their legal tenure. Eventually, the point had been driven home, by numerous illustrations, that all that protects such tenure is a convention that Parliaments and Executive Governments of Australia will respect the tenure out of deference to the high constitutional principle which it upholds. The lesson of more recent times in Australia is that such respect has been eroded. It is not too much to say that it now lies in ruins.

12 See Constitution Act 1902 (NSW), Part 9 inserted by Constitution (Amendment) Act 1992 (NSW), Schedule I, cl (4) (ss 52ff); see esp. s 53 and s 56 [Abolition of Judicial Office].

The Original Convention: Respecting Tenure

For the better part of this century, and indeed earlier, the convention in Australia alike with England was uniformly followed that where a court, or court like tribunal, was superseded, all members of the former body were, by new appointment or statutory provision, transferred to the newly created institution and to an office equivalent to that previously held by them.

Thus, when the superior courts of England were united in 1873 and consolidated as "one Supreme Court of Judicature in England", that court was constituted by the judges of the courts which were "united" into the one new court.[13] None was left out.[14]

Similar provisions were enacted by Parliament throughout Australia when they reconstituted courts. The former judicial officers of such courts were automatically appointed, or deemed to have been appointed, to the new court.[15] In the nature of things, these courts, whether superior courts of record or inferior courts, were creatures of the legislature. Theoretically, the legislature might have dispensed with the services of the judicial officers concerned in the same peremptory way as the colonial office and colonial governors might have done. But they did not do so. Doubtless, some of the appointees were persons who might not, on a fresh appointment, have been given a commission in an entirely new court. But the convention was followed out of respect for the principle of tenure which is the foundation of judicial independence. This same rule was followed when the lower judiciary was reorganised in several States of Australia. All magistrates holding office immediately before the commencement of the new legislation were deemed, in ways variously expressed, to be reappointed to the new court under the new legislation.[16]

In this regard, the convention observed in Australia was harmonious with that followed in other parts of the Commonwealth of Nations. Thus in the Province of Alberta in Canada, the first provincial legislation regulating magistrates was enacted in 1906. It provided for the appointment by the Lieutenant Governor in Council of Police Magistrates having the powers and authorities to two Justices of the Peace. In 1922 the statutes were revised. The

13 Superior Court of Judicature Act 1873 (UK), s 5.

14 Macrae v. Attorney-General (1987) 9 NSWLR 268 (CA), 287.

15 See eg. District Courts Act 1912 (NSW), 2; Industrial Arbitration Act 1912 (NSW), s 13; Industrial Arbitration (Amendment) Act 1926 (NSW), s 3; Supreme Court Act 1970 (NSW), s 13 and 23; District Court Act (1973), ss 13, 185(4) and 185(5); Compensation Court Act 1984 (NSW) and Miscellaneous Acts (Workers` Compensation) Amendment Act 1984 (NSW), Schedule 2 cll 7(1) and 7(3).

16 See Stipendiary Magistrates Act 1969 (Tas); Stipendiary Magistrates Act Amendment Act 1979 (WA); Magistrates' Courts (Appointment of Magistrates) Act 1984 (Vic), s 5.

new Act eliminated the requirement of legal qualifications for police magistrates. In 1955 the designation "Police Magistrate" was changed to "Magistrate". In 1970 the designation "Magistrate" was changed to "Provincial Judge". In each one of these changes, all of the holders of the former judicial office were, either by appointment or by force of the statute, to hold judicial office under the new legislation.

The same course was followed in New Zealand when the Magistrates Courts were abolished in 1980. By the District Courts Amendment Act 1979 (NZ), s 19(2) all existing magistrates in New Zealand were appointed Judges of the District Court. This was done by Parliament out of respect for the office of the judicial officers concerned and the vital part which tenure played in the independent performance of the duties of office.

The same convention was also observed in Australia, until recently, in repect of decision-making bodies which, although not formally courts, were set up with procedures akin to courts, obliged to act in a judicial manner and required by their very funtions to enjoy independence and neutrality on the part of the decision-makers.

An important test in the Federal sphere came in 1956 with the decisions in the Boilermaker's Case.[17] The decisions in that case held that the Commonwealth Court of Conciliation and Arbitration was not validly constituted as a court under Chapter III of the Australian Constitution. This was because it performed non-court functions. Immediate steps had to be taken both to create new institutions which would divide the work previously performed by the former court and deploy the personnel of that court. In *Macrae v Attorney-General for New South Wales*[18] I described the punctiliousness with which the Federal authorities dealt with the problem, conformably with the established convention:

> "... Particular care was paid by Federal Parliament to provide for appointments to the new Commonwealth Conciliation and Arbitration Commission of judges of the former court. Seniority as a member of the Commission was to be that of the seniority formerly enjoyed as a Judge of the old Court. Member sof the former Court held office as Presidential Members of the new Commission until resignation or death. The provisions were enacted out of deference to the expectation raised by their original appointment to a Federal Court, even though it had been held that such Court did not comply with the requirements of Chapter III of the Constitution and even though future appointees to the new Commission would not enjoy such tenure. All member sof the old Commonwealth Court were to be appointed either to the new Commonwealth Industrial Court or to the Commission. Indeed, the Commonwealth Court of Concilia-

17 See *R v Kirby*; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 (HC); Attorney General of the Commonwealth of Australia v The Queen & Ors; Kirby & Ors v The Queen & Ors (1956) 95 CLR 529 (PC).

18 (1987) 9 NSWLR 268 (CA), 278 f.

tion and Arbitration was not finally abolished until act number 138 of 1973 [Conciliation and Arbitration Act 1973 (Cth) (s 39).] That Act took effect after the last member of the Arbitration Court (Sir Richard Kirby) retired: see (1973) 149 CARv."[19]

The same convention was observed when the Federal Court of Australia was established in 1976. That Court assumed the jurisdiction formerly exercised by the Australian Industrial Court and by the Federal Court of Bankruptcy. It was provided that the Australian Industrial Court would be abolished upon a day to be fixed by proclamation, "being a day on which no person holds office as a Judge of" that court.[20] There was a like provision made in respect of the Federal Bankruptcy Court.[21] Only some of the judges of the Australian Industrial Court were appointed to the Federal Court of Australia. But all of the Judges retained Federal judicial office with the title, rank, salary and pension rights of that office.

In *quasi* judicial tribunals a similar convention was faithfully followed, until recently, by the Commonwealth. When the Taxation Boards of Review had their jurisdiction transferred to the Administrative Appeals Tribunal, all persons who, immediately before the amending legislation came into force, were members of the Board were thereafter to hold office as full-time Senior Members of the Administrative Appeals Tribunal as if they had been appointed to such Tribunal[22]. However, it was at about this time that the convention, protective of judicial officers, and also of *quasi* judicial officers in independent tribunals, began to erode.

The Federal Erosion of Tenure

The departure from convention was first signalled in what happened to Dr. V G Venturini, a Commissioner of the Trade Practices Commission. Dr. Venturini was a Visiting Professor of Anti-Trust Law at the University of Chicago when Attorney-General Murphy invited him to accept appointment to the newly created Trade Practice Commission of Australia. Dr. Venturini was appointed in February 1975 for seven years. He had a legitimate expectation to believe that he would hold and exercise that office independently during that time.

19 See also Conciliation and Arbitration Act 1956 (Cth), ss 6, 7, 26, 27, 28.

20 Conciliation and Arbitration Amendment Act [No. 3] 1976 (Cth), s 4.

21 See Bankruptcy Amendment Act 1975 (Cth), s 8.

22 Taxation Boards of Review (Transfer of Jurisdiction) Act 1986 (Cth), s 254(1).

In December 1975, following the dismissal of the Whitlam Government, the Fraser Government was elected. The Commission, however, continued with its work, including an inquiry into an alleged cartel, comprising some of Australia's largest mining companies, which was said to control the zinc market in this country. The Commission was also conducting a national investigation into pachaging and labelling. Both of these investigations were controversial. They required independence from external pressure to the report on packaging, Dr. Venturini attached a dissent. It was expressed in strong language and was critical of the other Commissioners. With the consequence that it would rid the government (and the Commission) of this troublesome member, the old Trade Practices Commission was abolished.[23] It ceased to exist from 1 July 1977. The appointments to the Commission "will terminate on 30 June 1977". A new Commission was established by a new Federal Act. All of the Commissioners of the former Commission were appointed to the new one, save for Dr. Venturini. However, by letter to the Governor-General, Dr. Venturini purported to resign immediately before the coming into effect of the 1977 amendment.[24] The tale of this rather unhappy saga is told by Dr. Venturini in a book.[25] Yet the significance of what occurred went far beyond the Trade Practices Commission. It laid the ground for a precedent which has been repeatedly followed in Australia since 1977.

A much more serious case was shortly to arise involving Justice James Staples. He had been appointed a Deputy President of the Australian Conciliation and Arbitration Commission in February 1975. He proved to be somewhat idiosyncratic in the performance of his duties of office. A first attempt was made to take Justice Staples out of those duties when he was sent on an expensive "study tour" concerning matters of human rights and civil liberties between 1977 and 1978. The then Federal Attorney-General (Mr. R. J. Ellicott) was unwilling, or felt unable, to do anything inconsistent with Justice Staples' commission as a Deputy President of the Commission.

Between 1979 and 1980, Justice Staples returned to normal duties in the Commission. However, "crises" arose because of one of his decisions, his manner of expressing it and a speech which he made to an industrial relations conference in Adelaide. Justice Staples was isolated within the Commission. He was thereafter not assigned duties either by Sir John Moore, as President, or by his successor, Justice Maddern. Justice Staples appealed to the legal profession for support. However, the New South Wales Bar Association declined to intervene. Some members were apparently affected by the suggestion that Justice Staples was not a "real" Federal judge. Within the Australian Commission, his

23 Trade Practices Amendment Act (Cth), s 6A.

24 *V.G. Venturini*, Malpractice - the Administration of the Murphy Trade Practices Act, Bell Air, 1980, Melbourne, 441.

25 See *ibid.*

entreaties to exercise his powers of office were ignored. He continued to receive his salary. But he was treated as if he was no longer a commissioned member of the Australian Conciliation and Arbitration Commission. I have told this story elsewhere.[26]

In 1988, following an inquiry, new Federal legislation was introduced to abolish the Arbitration Commission and to replace it by the Australian Industrial Relations Commission. Questions were raised in Parliament as to whether Justice Staples would be appointed to the new Commission. He was not. Instead, he was deemed by legislation to have reached the age at which he could retire with a judicial pension. It is a discreditable tale. Few of those involved emerge with credit. But its importance is that it demonstrated that protest against such conduct within the community would be comparatively muted; that the media would tend not to see the significance of the principles involved; that the legal profession would be rather weak and excessively technical in discerning the values at stake; and that the statutory procedure afforded those with political power a simple means of ridding themselves of a member of a judicial or *quasi* judicial body whose continued presence, for whatever reason, was not desired.

Recent Instances of Non-Re-Appointment

New South Wales: The Venturini and Staples precedents were soon followed in New South Wales. Upon the reorganisation of the magistracy of that State by the Local Courts Act 1982 (NSW), all but six magistrates who served in the former Courts of Petty Sessions were appointed magistrates of the new Local Courts of New South Wales. Unknown to the six, the Chairman of the Bench of Magistrates had written to the Attorney-General urging "strong reasons" for their "non-reappointment". His letter listed their alleged disqualifying disabilities. The magistrates in question were never confronted with the accusations. An appointments committee procedure was established by which each of the magistrates appointed to the old court could apply for appointment to the new.

The Court of Appeal of New South Wales held that, in considering applications for appointment as magistrates under the Local Courts Act made by the former magistrates, the appointments committee was not entitled to take into account, or act upon, material adverse to the applicants without notifying them of the existence and content of the material so as to give those affected a full and fair opportunity of being heard in relation to the accusations made. The Court held that, based upon the strong convention protective of judicial independence, the magistrates' functions as judicial officers and a letter which they had received informing them that they would accede to the office of magistrate under

[26] *M.D. Kirby*, The Removal of Justice Staples and the Silent Forces of Industrial Relations, (1989) 31 J Ind Rels 334; (1990) 6 Aust Bar Rev 1.

the new legislation, each of the retiring magistrates had a legitimate expectation that any adverse material would be put to them for comment and response.[27] The Court of Appeal was unanimous. The High Court of Australia refused special leave to appeal from its decision. The decision was that the purported determination of the Attorney-General not to recommend the former magistrates to appointment was void. Accordingly, the matter was sent back to the Attorney-General and his advisory committee to reconsider the applications, freed from the defective procedures which the Court felt to be unfair.

It is worth noting that, as a result of the vigorous debate in Parliament which ensued, the Local Courts Act 1982 (NSW) was amended by the Local Courts (Amendment) Act 1984 (NSW) which inserted the following provision:

> "3. A former Magistrate who does not accede to the office of a Magistrate on the appointed day is, if the former Magistrate has not attained the age of sixty years, entitled to be appointed to some position in the Public Service and is, until —
> (a) attaining that age; or
> (b) ceasing to be a Public Servant,
> whichever first occurs, entitled to be paid salary at a rate not lower than the rate of salary for the time being payable to a Magistrate of the rank or grading that is equivalent (or nearest equivalent) to the rank or grading held by the former Magistrate immediately before the appointed day."

As if fearful that this provision might come back to haunt it, the Government proposed and Parliament accepted the following unusual rider:

> "4. Neither the enactment of nor the provisions of subclause (3) shall be treated by any Court or Tribunal, or in any other way, as a precedent for the manner in which other persons may be dealt with."

When the matter of the magistrates was sent back to the Attorney-General, the Government had changed. But the new Attorney-General indicated that the plaintiffs in *Macrae's* case would "not be treated differently" from any other applicant for appointment, save that the allegations, the subject of the earlier decision, would not be taken into account unless they were given an opportunity to meet them. The magistrates were, upon this basis, reconsidered but not appointed.

One only remained to stay the course, Mr. Eris Quin. He contended that his entitlement was to be considered on his own merits as a judicial officer and not in competition with the merits of applicants hwo were not themselves former magistrates. In the court of

27 See Macrae (above).

Appeal, this submission was upheld by Hope JA and myself.[28] It was rejected by Mahoney JA. In the High Court of Australia, by majority,[29] this view did not find favour. The majority of the High Court accepted that the former magistrates had a "legitimate expectation" because of the "circumstances of this case including the position of the plaintiffs as magistrates of the old courts".[30] But translating this expectation into action defensive of judicial office was thought too difficult:

> "[T]he case fails because it would require the Court to compel the Attorney-General to depart from the method of appointing judicial officers which conforms to the relevant statutory provision, is within the discretionary power of the Executive and is calculated to advance the administration of justice."

With respect, this is a disappointing view both of the scope of legitimate expectation and of what really advances the administration of justice in this country. Amongst the considerations which most advances the administration of justice in Australia is surely the independence of judicial officers, including magistrates who perform more than 90 percent of the court work of Australia. If they are susceptible to removal by the reconstitution of their courts and an obligation to apply and be considered *de novo*, their independence is negatived. The signal sent by the High Court's decision in *Quin* is that the procedure adopted in the New South Wales reconstitution of the Local Court is permissible and ultimately beyond curial interventionl

This was a particularly bad signal to have sent at this time. Sadly, it has been picked up with energy. Unless reversed, it will continue to assist Executive Governments throughout Australia to erode judicial independence and tenure upon the asserted basis that this is being done to uphold "quality" in courts, tribunals and other public offices. If regular resubmission of judicial appointees to a suggested test of "quality" is permissible - whether directly or indirectly - we have shifted the basis of tenure in judicial and like appointment. It rests no longer upon the absence of proved incapacity or misconduct. It rests, instead, upon some person's opinion as to "quality". Inevitably, that will be a contentious criterion. With respect, *Quin* is a most unfortunate decision. As the judges in the minority in the High Court observed pointedly, it is difficult to reconcile it with the earlier refusal of special leave to appeal in *Macrae*.[31] It is also an unduly narrow decision when compared with recent decisions in England concerning judicial review of the

28 See Quin v Attorney-General (New South Wales) (1988) 28 IR 244. See also comment *K. Marks* (1994) 68 ALJ 180.

29 Mason CJ, Brennan and Dawson JJ; Deane and Toohey JJ dissenting.

30 Mason CJ at 20, *ibid.*

31 See *ibid.*, Deane J, 45; Toohey J, 68.

Crown's exercise of its prerogative powers.[32] One may hope that, in time, *Quin* will be revisited. Whilst it stands, it encourages the application of the Venturini / Staples expedient. The instances where that has been applied have, as I shall now show, increased apace, encouraged by *Quin.*

Following the deep concern which was voiced in response to the Victorian instances which will be detailed hereunder, the New South Wales Parliament enacted amendments to the Constitution Act of the State. These were designed to enhance judicial tenure as enjoyed by all "judicial officers" of the State. It has been indicated that the Government intends to seek the approval of the people at referendum to entrench these amendments in the Constitution so that they could be removed or amended only by consent of the people of the State.[33] If this procedure is effective, it will equate the judiciary in New South Wales to the protected tenure of judges of the High Court of Australia and of courts created by the Federal Parliament. Calls for the early implementation of this protection have been made by many New South Wales judges, fearful of what they have observed to be happening in other Australian States.[34]

Queensland: Queensland is the only State in which, during this century, the formal procedure of removal of a judge from office has been carried into effect. The former Justice Angelo Vasta was removed from office as a Judge of the Supreme Court of Queensland after the Parliament of that State received and considered a report of a commission of inquiry chaired by the former Chief Justice of the High Court of Australia, Sir Harry Gibbs.

Contrary to the recommendation of the Gibbs Commission, the Government of Queensland declined to pay the costs of Mr Vasta of defending his entitlement to office before the inquiry. This is a another departure from principle. Effectively, it signals to judicial officers throughout Australia that, if they are the subject of an inquiry concerning alleged misconduct or cuase of removal, they run the rist that they will be denied legal assistance to defend themselves and their office as Mr Vasta was. Few judicial officers could face the costs of a lengthy inquiry. Some, knowing of the Vasta precedent, would be persuaded that the publicity and the rist as to costs are just too high. A resignation may seem a comparatively easy way out. This is why the refusal to pay Mr Vasta's costs was so wrong. In defending himself or herself, a judge may also be defending judicial tenure

32 See In re M [1994] 1 AC 377; [1993] 3 WLR 433 (HL); Regina v Secretary of State for the Home Department; Ex parte Bentley [1994] 2 WLR 101 (QBD); Regina v Parliamentary Commission for Administration; Ex parte Dyer [1994] 1 WLR 621 (QBD).

33 See above n 11.

34 See eg *F.R. McGrath*, Retirement Speech of Chief Judge of the Compensation Court of New South Wales, 6.

as the cornerstone of judicial independence. It would be a bad thing if the mere accusation of wrongdoing against a judge were enough, in effect, to drive the judge from office.

No court has been abolished in Queensland in recent years. However, the Queensland Parliament established a new Court of Appeal in 1992. This replaced both the Full Court of the Supreme Court of Queensland and the Court of Criminal Appeal of that State. A letter, obtained by the Courier Mail newspaper under the Freedom of Information Act of Queensland, indicates that the Chief Justice of Queensland, Chief Justice Macrossan, opposed the establishment of the new Court upon the footing that serving judges' expectations would thereby be disappointed. They would effectively see their opportunities of appellate judicial work curtailed or limited. In his letter, the Chief Justice pointed out that the appointees had made:

> "... their decisions [about accepting appointment] having in mind the structure of the Supreme Court as it has stood for a very long time."

He warned against the change of the structure and the real danger of "disaffection" and "destabilising dissension" which it would bring in the ranks of the court.

There is no doubt that the creation of a separate appellate court, affecting both the precedence and work of existing judged, may create animosities and resentment, as it did in New South Wales.[35] However, at least in Queensland, no judicial officer lost the judicial commission. The introduction of the new Court has included the continued substantial use of existing Supreme Court judges sitting in appellate duties.

Victoria: The largest challenge to the conventions protecting judicial officers and other independent decision-makers has occurred in Victoria. The instances are many. They have followed the election of the Kennett coalition government:

(i) *Law Reform Commission:* The Victorian Law Reform Commission was abolished soon after the new government came to power. The Attorney-General, Mrs Jan Wade in effect terminated the appointments of the Commissioners by securing the Parliamentary abolition of the Commission. She announced that in future law reform would be handled by a part-time Law Reform Advisory Council as well as two Parliamentary Committees and the Victorian Law Foundation.[36]

(ii) *Equal Opportunity Commissioner:* In October 1993, the government had indicated that the post of Equal Opportunity Commissioner would be taken over by a five member Commission headed by a Chief Conciliator responsible for day to day

35 *M.D. Kirby*, Permanent Appellate Courts - the New South Wales Court of Appeal Twenty Years On (1987) 61 ALJ 391, 396.

36 See The Age, 10 November 1993, 13.

administration. Many of the critics of this move suggested that its real purpose was to remove from office Commissioner Moira Rayner, an articulate defender of equal opportunity and anti-discrimination.[37] Mrs Wade was able to point out that a review of the Equal Opportunity Commissioner's office had been promised before the 1992 State election. She contended that the purpose of the abolition was to make the anti-discrimination body more accountable to the government. But critics pointed to the very great increase in complaints during Commissioner Rayner's term and to the fact that over a third of them were made against government agencies. This suggested that independence of government was an important necessity for manifest justice in the discharge of equal opportunity functions if they were to have any credibility. Predicably enough, Opposition Parliamentarians described the "sacking" of Ms Rayner as "a disgrace".[38] But the Parliamentary Committee, in which the Government members were in a majority, was also critical. It stated that the abolition of Ms Rayner's statutory position, three years before her appointment was due to expire, "may trespass against the rights of the currend office-holder". The Victorian Bar Council acknowledged the right of the Government to restructure the Commission. But it said "this should not be done in a way which effectively ends prematurely the term of a statutory office-holder".[39] At a dinner in Melbourne in February 1994 a large audience heard criticism of the effective "dismissal" of the Commissioner.[40] But the Government was unbending. Ms Rayner was removed from office in the same way as Dr. Venturini had been nearly twenty years earlier. Her statutory position was abolished.

(iii) *Victorian AAT:* Members to the Administrative Appeals Tribunal of Victoria (AAT) were typically appointed for three year terms. These office-holders were, usually, automatically renewed in office. However, in March 1994, three appointees who had an association with the Opposition party were not reappointed by the Victorian Government. Of course, appointments are within the prerogative of the Executive Government. But the former convention of reappointment was defensive of the independence of the office-holders of the AAT, which performs duties in many ways similar to those of courts. The Government was accused of undermining the independence of the Tribunal, especially important because of its function in adjudicating disputes between the public and the government and its agencies.[41] The Attorney-General denied that there was any political motive whatsoever for the move. She claimed, rather unpersuasively, that she was simply seeking to find "fresh

37 See .*D. Murphy*, No Mercy for Fair Go Monitor, The Bulletin, 1 March 1994, 30.

38 See eg Melbourne Star Observer, 29 October 1993, 1.

39 The Age, 27 November 1993, 2.

40 *M.D. Kirby*, A Disgraceful Blow to Judicial Independence (1993) 5 Judl Officers Bull 41.

41 See *M. Bruer*, Wade 'No' to three Tribunal Members", The Age, 25 March 1994, 1.

faces". The President of the Law Institute of Victoria, Mr David Denby, said that the legal community was concerned about the non-reappointments. Professor Cheryl Saunders of the Melbourne Law School stated that the insecurity arising from short-term appointments to the AAT "provides obvious potential for inroads to be made into the Tribunal's independence".[42] No convincing reason was given for the non-reappointments of the three retirees. But the only common feature of the three members was their link (or that of their spouses) to the Opposition party. Mr. Michael Wright QC, and other members of the Planning and Local Government Bar in Victoria, wrote to the Melbourne Age drawing to public attention the effect of the Government's action in "undermining the independence of the Tribunal":[43]

> "Independence can exist, and can be seen to exist, only if members of the tribunal have sufficient security of tenure of office to act without concern for reappointment. The legislation does not prescribe a particular term of office for members of the Tribunal. However, it has been the invariable practice to reappoint permanent members of the Tribunal who are of good behaviour and who are willing to continue of office. A number of members of the Tribunal have accepted short-term appointments, in many cases of only three years, in the expectatino that this practice will provide the necessary security of tenure."

Mr Wright and his colleagues called upon the Government to reinstate the previous practice. They warned of the destruction of "fragile community confidence" in the Tribunal dealing with complaints against the Government. The government was unbending.

(iv) *Director of Public Prosecutions:* In December 1993, the Victorian Government revealed draft legislation which, if it had been enacted, would have significantly reduced the independence and authority of the State Director of Public Prosecutions (DPP).[44] In effect, the legislation would have permitted a Deputy Director to control the DPP's decision to present a person for contempt of court; to overrule a Crown Prosecutor who had declined to make a presentment or to enter a *nolle prosequi*; to issue guidelines on prosecutions; or to delegate functions. The Bill followed a controversy in Victoria after the DPP had criticised the Government and the courts and threatened action for contempt of court against senior politicians for comments about cases which were before the courts. The DPP was also revealed as having been involved in an investigation of the former Federal President of the Government Party. Various people leapt to the defence of the independence of the DPP. A letter was published, initiated by a former Federal Judge (Hon Xavier Connor) and the

42 *Ibid.*, 2.

43 See The Age, 31 March 1994, 14.

44 Public Prosecutor's Bill 1993 (Vic). See note (1994) 68 ALJ 488.

Chief Judge of the Family Court of Australia (Nicholson CJ). The letter was signed by other judges (including myself) and by senior lawyers. It expressed concern about the "blight on the independence" of the DPP if the foreshadowed legislation were enacted.[45] The Victorian Premier attacked his critics. But, for once, they were defended by the media.[46] An editorial in the Australian Financial Review stated:

> "Unless the Government is prepared to show grounds why both Houses of Parliament should vote to remove Mr Bongiorno, it is improper to act against him in this manner. It is for Parliament to remove the man if it chooses; until then his office deserves respect and real independence."

At least, it seemed, commentators were reminding the community of the important safeguards secured by the local equivalent to the Act of Settlement which Parliament had extended to protect the independence of the Victorian DPP. In the result, the Government abandoned the plans to curb the powers of the DPP.[47] It dropped the proposal for a Deputy Director and it modified other proposals. A minor victory for the independence of an office-holder whose duties required independence, was secured.

(v) *Industrial Relations Tribunal:* Not so in the case of the Industrial Relations Commission of Victoria. The Employee Relations Act 1992 (Vic) replaced the Industrial Relations Commission of Victoria with the Employee Relations Commission as from 1 March 1993.[48] The former Commission enjoyed both arbitral functions and judicial functions. The judicial functions were both original and appellate. There were fifteen members of the Commission. Any three of them who were legally qualified could constitute the Commission in Court Session. In this respect, the structure of the Commission was not dissimilar to that of the former New South Wales Industrial Commission. By s 175(1) of the Employee Relations Act, 1992 (Vic) it was provided that "on the appointed day the former Commission is abolished and the members of the former Commission go out of office". The Act did not make provisions for the appointment of members of the old Commission to the new. True it is, the President of the old Commission (Justice Alan Bolton) was offered appointment as President of the new. However, he declined to accept the appointment. He reverted to his full-time position as a Deputy President of the [Australien] Industrial Relations Commission.[49] The Deputy Presidents and other members of the old Commission were advised that they were to be regarded as having applied for

45 See The Age, 21 December 1993, 10.

46 See eg The Age, 21 December 1993, 20 ("Judges and Politics").

47 The Age, 17 March 1994, 12.

48 *J. Catanzariti / C. Sullivan*, Industrial Relations Legislation - 1992, (1993) 35 J Ind Rels 110, 122.

49 See Herald Sun, 4 February 1993, 1.

appointment to the new Commission unless they indicated otherwise, notwithstanding that their applications would "not be trated more favourably that those of other applicants". It is clear that the letter to the former office-holders of the Commission was drafted with the majority opinion of the High Court in *Quin* in mind. Of the fifteen members of the old commission, five declined to apply for a position in the new Commission. They were offered a non-negotiable *ex gratia* termination package as determined by the State Department of Industry and Employment. The remaining members (including two Deputy Presidents and eight Commissioners) sought appointment to the new body. As the appointments were not finalised by 1 March 1993, the Government made temporary appointments for a period of three months. In the result, within that time, the two Deputy Presidents were successful in their application. But only two of the eight Commissioners succeeded. The unsuccessful Commissioners were offered "*ex gratia* termination packages". When informed of the operation of the Act, members of the old Commission, through the President, expressed their concern to the Minister at the failure of Parliament to provide for automatic appointment of the members of the existing Commission to its replacement body. Attention was drawn to the report of the Joint Select Committee of the Federal Parliament on the tenure of appointees to Commonwealth Tribunals.[50] In the final Annual Report of the President of the old Commission, the retiring President of the Victorian Commission observed:

> "The policy of the Employee Relations Bill is not for consideration in this Annual Report. However, it is appropriate that all members of the Commission have been duly appointed by successive Governments until the age of sixty five years under the Industrial Relations Act 1979 and have performed their duties on the Commission with distinction. In these circumstances, all members of the existing Commission should be offered equivalent position on the Employee Relations Commission in accordance with the recommendations in the report of the Joint Select Committee. Statutory protections are provided to the holders of office on quasi judicial tribunals so as to allow them to bring independence of judgment to the resolution of the issues which come before them. The resolution of industrial problems and disputes often involves consideration of complex and controversial issues and a balancing of various interests. To perform their role effectively, Industrial Tribunals must retain the confidence of the parties and the community and must be independent of governments, employers and unions. The members of the Tribunal must exercise their functions in a fair and impartial way."[51]

50 November 1989.

51 See President, Industrial Relations Commission of Victoria, 11th Annual Report, year ending 31 October 1992, 8.

The serious injustice done to the members of the old Commission who were, in effect compulsorily retired by the legislative abolition of their offices gaines little attention in the media. It was the substantive provisions of the legislation affecting pay and conditions of workers which dominated the media coverage of its passage. When the Bill was in Parliament, the Law Institute of Victoria urged the Voctorian government to give an assurance of reappointment. The Government failed to do so and, eventually, refused appointment to many. The Law Council of Australia urged the Minister for Industry and Employment to conform to the principles necessary for the independence of office-holders in statutory tribunals. The President of the Law Council (Mr Robert Meadows) expressed the opinion that to require the members of the Victorian IRC to compete for positions on the new body, was not consistent with established principle. The Minister and the government rebuffed all of these representations. As the headline in the Melbourne Herald Sun[52] put it bluntly, the government administered the "Axe for 16 IRC bosses". The "bosses" involved were the commissioned office-holders whose duty had been to act fairly and independently and against whom no wrong or misbehaviour was ever alleged, still less proved.

(vi) *Accident Compensation Tribunal:* I now reach the most serious of the departures from the conventon which I have described. It affects an undoubted court and undoubted judges. By the Accident Compensation Act 1985 the Parliament of Victoria established an Accident Compensation Tribunal. Its members enjoyed the rank, status and precedence of a judge of the County Court of Victoria. They performed judicial duties. They were each to hold office as a judge of the Tribunal during good behaviour until attaining the age of 70 years. They could be removed from office only by the Governor of Victoria on an address of both Houses of Parliament.

In November 1992 the Parliament of Victoria enacted the Accident Compensation (WorkCover) Act 1992 (V9c). Section 10 of that Act abolished the Tribunal. It made no provision for the continued existence for the office of the judges or for their tenure. The result was that all of the judges who were not reappointed to some equivalent office in the County Court or the State AAT were effectively removed from office. But they were removed without the proof of misbehaviour, or by the exercise of the Parliamentary procedure promised to them by Parliament and accepted by them on their appointment. The result was an unprecedented protest from judges in virtually every jurisdiction of Australia. The Victorian Attorney-General has since said that she heard from 82 Australian judges.[53] The International Commission of jurists, the Centre for the Independence of Judges and Lawyers (in

52 17 October 1992, 1.

53 The Age, 16 March 1994, 18.

Geneva), the Law Council of Australia, Law Societies and Bar Associations throughout the nation, individual judges and others protested. But to no avail. The Government was given support by ill-considered editorial opinions, as for example in The Age.[54] It acknowledged that tribunals "are here to stay" with an "essential job". But it asserted:

> "The mistake is to think of them as courts. Their job is administrative: quasi judicial at best. It is the fault of successive governments that they have become robed in the judicial mantle. The reasons are understandable. It is necessary to give them real authority to demonstrate that they are not merely creatures of the Execurive, and to attract decent talent. Understandable but wrong. Judicial status and the independence which goes with it must be jealously reserved to the occupants of truly judicial office - the judges of our courts ..."

These were words of cold comfort to the judges, known as such, promised such tenure, performing independent decision-making, thrown suddenly out of office. Of the nine who were not appointed elsewhere, each was provided with monetary compensation falling far short of the promise of office to the age of seventy, to say nothing of pension and other rights. They were afforded "compensation" of money. But not for the dispossession of office, status, loss of reputation, etc. They have now commenced proceedings in the Supreme Court of Victoria.[55] Those proceedings are under the scrutiny of a number of international bodies including the Law Association for Asia and the Pacific (Lawasia), the International Commission of Jurists and the International Bar Association. The newly appointed United Nations Special Rapporteur on the Independence of the Judiciary (Dato' Param Cumaraswamy), when visiting Melbourne in December 1993, expressed Lawasia's concern. He promised to observe the former judges' proceedings closely. They will also be closely watched by many others. Presumably to defeat similar claims in other contexts, legislation has been enacted by the Victorian Parliament to alter or vary s 85 of the Constitution Act 1975 (vic) to prevent the Supreme Court from entertaining actions for compensation or other amounts because a member of an abolished body has lost office.[56]

South Australia: By the Industrial and Employees Relations Bill 1994 (SA) provision was made, in effect, for the abolition of the Industrial Court of South Australia and of the Industrial Commission of South Australia established under the Industrial Relations Act

54 2 December 1992, 18.

55 Bingman v Attorney-General for the State of Victoria (no 4493/93).

56 See Local Government (General Amendment) Bill (1993) cl 28.

1972 (SA). In a schedule to the 1994 Bill reference is made to the transfer of office-holders, but not automatically:

"Officers of Court and Commission

9(1) On the commencement of this Act, a person who held judicial office in the former Court immediately before commencement of this Act is transferred, *unless the Governor otherwise determines*, to the corresponding judicial office in the Court under this Act.

(2) On the commencement of this Act, a member of the former Commission is transferred, *unless the Governor otherwise determines*, to the corresponding office or position in the Commission under this Act.

(3) The Registrar and other staff of the former Court and the former Commission (other than those specifically mentioned above) are, ont he commencement of this Act, transferred to corresponding positions on the staff of the Court or Commission (or both) under this Act.

(4) If the Governor determines that a judicial officer of the former Court or the former Commission is not to be transferred to a corresponding office in the Court or Commission under this Act, the Governor *must transfer the judicial officer to a judicial office of no less a status*." (emphasis added)

The pattern which has been emerging will be readily discerned. Staff and administrative functionaries are automatically transferred - just as once for the defence of high principles, judges and their equivalents were. In the case of judicial officers their transfer is contingent upon a decision of the Governor otherwise to determine. That means, of course, a decision of the Government, ie the political Executive Government of the State. That means, in turn, that politicians in the Executive Government may veto the continuance in office of a judicial officer in office without submitting that determination to the traditional principle of scrutiny in Parliament against the test of proved incapacity or misconduct. The basis of the appointment of the judicial officer is changed in a stroke.

The same is true of non-judicial members of the former Commission. But in their case they are not entitled to transfer to "a judicial office of no lesser status". They may simply be "otherwise determined", ie determined that their appointment is, in the opinion of the Executive Government, undesirable. This veto by the Executive Government over persons who have, of necessity, had to make controversial decisions affecting government and other powerful economic and political interests is contrary to the former convention. It is wholly undesirable.

The Bill produced a letter of protest to the Minister for Industrial Affairs of South Australia from the President of the Law Council of Australia (Mr. J. R. Mansfield QC):

> "If specialist courts are to be established, the principle of judicial independence requires that those who are called upon to exercise the specialist jurisdiction should be free of any threat that they may be deprived of that jurisdiction by Executive action ... The abolition of one tribunal and its replacement with another should not be the occasion - either actually or potentially - for the removal of persons whose work may not have been acceptable to the Government of the day."[57]

As is now known, the judges of the Supreme Court of South Australia met and requested the Chief Justice (the Hon L J King) to write to the Attorney-General protesting about provisions of the Bill. This exchange has now been made public. The Chief Justice made it clear that the Bill offended basic principles securing judicial independence.

In the result, the Bill was emended to delete the worst of the offending provisions. But then the Government indicated a new strategy. This was an inducement to pay judges of the old Court and Commission a "retirement package" to resign early. This report led to another meeting of the Supreme Court judges. They adopted a resolution which made it plain that early retirement benefits should be offered to the judges only in descending order of seniority - to avoid the suggestion that the Executive was targeting particular judges whom it wished, in effect, to remove from the Bench. The Government eventually agreed to this proposal. In fact the President of the former Court, Justice Stanley, took the "retirement package" and suddenly retired. But other defects in the legislation remained. The industrial judges and magistrates who formerly enjoyed tenure to ages 70 and 65 years respectively were henceforth to enjoy only six year terms on the new Industrial Court. Reappointment would be at the decision, in effect, of the Government. Following an outcry this provision was also softened by a statutory requirement of consultation with employer, trade union and parliamentary nominees.

Perhaps the most depressing aspect of the affair in South Australia has been the general silence, or even antipathy, of the media. So vigilant to defend their own perceived basic rights, the media in Australia are generally blind to the importance to the tenure of independent office-holders. An editorial in The Australian newspaper described the labour law reforms in South Australia as "moderate". It suggested that the "familiar non-debate about industrial reform and judicial independence" was a "diversionary non-issue". The local newspaper, the Adelaide Advertiser, declined, when asked, to publish media releases by the Law Society of the State supporting the judiciary. Further legislation was pending at the time this paper was written.

Western Australia: The same developments have occurred in Western Australia. The Government determined to abolish the Workers' Compensation Board. That Board was a

[57] Letter by the President of the Law Council to the Minister, 20 April 1994.

court with, by legislation, the status of an inferior court of record.[58] Of the three members of the Board one was "a Judge, and Chairman of the Board".[59] The qualifications for appointment to that office were substantially the same as for a judge of the Supreme Court of Western Australia or of the District Court of Western Australia. Subject to the Act, the Chairman of the Board was entitled to hold office during good behaviour. He or she was only liable to be removed from office by the Governor of Western Australia upon an adress of both Houses of Parliament.[60] By the Act, the Chairman was entitled, in relation to his office as a Judge of the Board, to the style and title of "His Honour" and like salary, allowances and reimbursements, leave of absence, pension rights and other rights as a judge of the District Court, other than the Chief Judge.[61]

Upon the decision of the Government of Western Australia to abolish the office of the Chairman of the Board and to establish a Workers' Compensation Conciliation Tribunal, strong representations were made to the Government concerning its imperative duty either to offer the judge a position on the District Court or the opportunity to retire on a full judicial pension. Repeatedly, it was acknowledged that the design of tribunals and substantive legislation was a matter for the Government and Parliament. But the protection of the office of the current holder of a judicial position was a matter, in a true sense, of constitutional concern.

Despite the strong representations put to the Government of Western Australia, including by myself, the Chairman of the Board (Judge Gotjamanos) was not appointed to an office of equivalent rank in the District Court of Western Australia. He was offered instead, and accepted, a temporary position as a "Commissioner" of the District Court. Faced with such a predicament as statutory abolition of his or her office, a judge or former judge is in a desperately poor bargaining position. He or she is scarcely able, in most cases, simply to resume legal practice. The former convention, and the assumption that Parliament will abide by its promise of tenure, lull the judge into a sense of independence from conduct such as has been occurring. Sadly that sense of security has proved false. When the Executive acts in defiance of long observed conventions and international principles the result has been one of shock. The judge is often forced to accept whatever crumbs the Executive Government may cast in his or her direction. These are truly shocking developments in Australia. Their aggregation is a matter for special concern.

58 Workers' Compensation and Rehabilitation Act 1991 (WA), s 112(1).

59 *Ibid*, s 112(2) and (3).

60 *Id.*, 112(5).

61 *Id.*, 12(18).

International Principles of Judicial Independence

The foregoing list discloses that the earlier established convention, which protected judicial and *quasi* judicial office-holders in Australia from effective removal from office by the statutory abolition of their court or tribunal, was a strong one. It was uniformly observed in this country for the first seventy years of Federation. The list also discloses how that convention is now more honoured in the breach than in the observance.

The breaches involve significant departure from fundamental principle accepted by the international community for the independence of judges and lawyers.

The foundation of the principle of judicial independence is to be found in the requirement of Article 10 of the Universal Declaration of Human Rights:

> "10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

To the same effect is Article 14 of the International Covenant on Civil and Political Rights which Australia has ratified:

> "14.1 All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

There are similar provisions in every regional charter of human rights. But how is this independence of the tribunal to be secured? That question is answered by the elaboration of international principles for the independence of the judiciary contained in a number of specialised international declarations. The Basic Principles on the Independence of the Judiciary were endorsed by the General Assembly of the United Nations.[62] It invited governments "to respect them and to take them into account within the framework of their national legislation and practice". The Basic Principles include:

> "2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> 11. The terms of office of judges, their independence, security, adequate remuneration, conditions of services, pensions and age or retirement shall be adequately secured by law.

62 A Res/40/32 (29 November 1985).

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular, ability, integrity and experience.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

The draft Universal Declaration on the Independence of Justice was recommended to member countries of the United Nations by the Commission on Human Rights at its 45th Session in 1989. Amongst the principles in the draft Universal Declaration on the Independence of Justice were the following dealing with discipline and removal:

"26 (b). The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation upon such a Court or Board.

27. All disciplinary action shall be based upon the established standards of judicial conduct.

30. A Judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

31. In the event a Court is abolished, Judges serving in that Court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another Court of the same status."

The foregoing principles have been repeated in numerous international statements about judicial independence. The Minimum Standards of Judicial Independence, adopted by the International Bar Association in October 1982, include:

"20(a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the term of services.

(b) In the case of legislation reorganising courts, judges serving on those courts shall not be affected, except for their transfer to another court of the same status."

To like effect is the Universal Declaration of the Independence of Justice, cl 2.39, adopted at Montreal in June 1983.

The result of the foregoing principles is that, at least in the case of judges - and one might say judicial officers performing the duty of judges - their tenure cannot properly be undone by a reorganisation of their courts or tribunals. Out of deference to the office (whatever view is held of the individual office-holder) such judicial officers must be afforded the opportunity of appointment to a court of the same or higher rank and status, salary and benefits of office. If the judicial officer declines, he or she must continue to receive the benefits of office of the court which is abolished. If any other practice is implemented, it presents a grave threat to judicial independence. That threat hangs as a Damoclean sword over all judicial officers in a like position. If judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is, effectively, at the will of the Executive Government, ie the politicians in power from time to time. This is contrary to international principle. It is contrary to the hard-found constitutional settlement to which Australia was hitherto regarded as hier. Until lately, it has been contrary to Australian practice.

Towards Restoring a Culture of Respect for Independence

I have said that the principles stated in terms of judges must be applied to all judicial officers. This is so because the organisation of the Bench is something which varies significantly from one jurisdiction to another. International Principles must be stated in terms which apply whatever that organisation may be. Thus, in many countries, judicial work which is done in Australia by magistrates is performed by judges. Evenin a country with a legal system so similar to our own as Canada and New Zealand the work formerly performed by magistrates (and performed in Australia by such) is now performed by persons titled "judges". Similarly, the title "magistrat", in civil law countries, is equivalent to that of a judge in our tradition. Thus, the international principles are addressed to the functions of the office-holder, not to their titles.

Many members of tribunals which are not, in law, courts (as I believe the Accident Compensation Tribunal of Victoria was) are nonetheless charged with duties which require the same attitudes of independence, integrity and courage as are required of judicial officers. Some tribunals, and even more commissions, boards and other statutory office-holders do not perform functions of adjudication requiring the same manifest neutrality. A Law Reform Commission, for example, can quite readily be classified as part of the Executive Government, with advisory, not adjudicatory functions. But the closer a tribunal approximates to the decision-making functions of a court, and the more clearly its function requires of its members an independent evaluation of facts, the application of the law and

the determination of an independent conclusion, the more important will be the application to such office-holders of the same international principles stated for the judiciary.

So much was recognised by the Joint Select Committee of the Federal Parliament on tenure of appointees to Commonwealth Tribunals. That Committee, established in the wake of the Staples affair, laid down the following principles to be borne in mind when the Parliament comes to consider the abolition of a *quasi* judicial tribunal:[63]

"(i) Abolition of a tribunal should not be used to remove the holder of a quasi judicial office unless the removal procedures applying to that office are followed;

(ii) Legislation to change the structure and jurisdiction of quasi judicial tribunals should, if possible, refrain from abolishing the tribunal;

(iii) Where the tribunal is abolished or re-structured all existing members of the tribunal should be reappointed to its replacement; and

(iv) When a tribunal is abolished and not replaced, compensation should be paid to the members of the tribunal who have lost their positions and for whom no alternative can be found."

In respect of principle (iii) the Committee further stated that:

"... all members of tribunals should be reappointed to a restructured tribunal or a tribunal replacing an existing tribunal, unless demonstrably good reasons are given for their non-appointment."[64]

Whilst one might quibble with the application of these principles as not going far enough, at least in the case of tribunals truly judicial in their character, the principles if observed would certainly represent an improvement over the current and fast developing Australian practice. They attempt to hold the correct balance between the assurance of tenure, which is important for courage and neutrality (on the one hand), and the right of succeeding governments to restructure tribunals - and for that matter courts - on grounds of policy, having nothing to do with the revomal from office of the particular judicial and other office-holders.

Neither on a national level, nor in the States, should we regard the worst as over. In the Federal sphere, the Minister for Industrial Relations, following a major strike by coalmining workers, announced the intention of the Government to abolish the independent Coal Industry Tribunal established in 1949 by the Federal and New South Wales

63 See *ibid.*, p. 4, xii-xiii.

64 *Id, para 5.22.*.

Parliaments jointly.[65] The fate of the office-holders has not been mentioned. It is expected that the President of the Tribunal will be appointed a Commissioner of the Australian Industrial Relations Commission (AIRC), a position of equivalent rank. As to the Coalfield Conciliators the note which I have seen promises no more than that "attempts will be made" to re-allocate them somewhere else within the AIRC. Meanwhile, the Opposition has announced its intention to abolish the Industrial Relations Court.[66] The Opposition spokesman (Mr John Howard) stated:

> "I have a strong objection in principle to establishing special courts because special courts over time end up doing special deals. It won't be responsible to the Attorney General. It will be responsible to the Minister for Industrial Relations and it will absorb the ambience of the industrial relations scene rather than the legal scene."[67]

If Mr Howard is faithful to the principles uniformly observed by Federal governments at least, were Parliament at his behest to abolish the Industrial Relations Court, it would simply shift its work back to the Federal Court of Australia and allow the Industrial Relations Court to wither on the vine until its last member had died or retired. At least in the case of Federal judges in Australia, their tenure is protected by the Constitution. They, at least, cannot be removed and treated as so many others have lately been. But not so, in the case of judge-like (and even judge-titled) members of other independent decision-making bodies, Federal and State.

The point of this paper has been to call to notice the growing proliferation of instances where old conventions have been rejected and expediency or political will has reigned. There may have been too many tribunals. There may indeed have been too many officers given the title of judge. But Parliament having acted in this way, it should not undo its promise lightly. If it does, it should obey international principles which have been devised by the United Nations and the international community to safeguard the independence of judges and judge-like office holders. That independence is crucial to a civilised society, espousing to live by the rule of law.

Of necessity, observance of the international principles and past Australian conventions will occasionally mean that people who would not be appointed *ab initio* to a new court or body must be offered appointment out of respect for the basic principles of judicial independence. When it is said that this contemplates sanctioning in office and appointing people who would not otherwise get there, the answer which must be given is that those people *were* in office. If there is material to justify their removal there are statutory proce-

65 See Sydney Morning Herald, 20 April 1994, 2.

66 See The Age, 1 November 1993, 3.

67 *Loc cit.*

dures to that end. The judiciary, like any other institution, is made up of people of varying capacity. We accept that fact, and even the occasional mistaken appointment, as the price which is paid for the overall public good of the assurance of the independence of judicial and like office-holders. That independence is respected, not solely or even mainly of rthe entitlements of the judge and his or her dependants. It is there for the protection of the community itself. Without assured tenure, there is always a risk that a decision-maker will bend to the will of the powerful or twist to the interests which seem to promise advantage. Without fear or favour is the boast. It must be upheld by the assurance of true independence. It is undermined by the repeated illustrationsin this country of the abolition of courts and court-like tribunals and the non-reappointment to the successor bodies of the former incumbents.

It is imperative that the significance of this issue should be brought home to those who temporarily wield political power and to the community. If those who know legal history do not lift their voices there is a risk that judicial and like decision-makers who presently enjoy independence will be returned to the embrace of the Executive Government: holding their offices only so long as the government, commanding Parliaments, wills. A few appointees, whohave proved unsuitable in the opinion of the Executive will thereby be displaced. A few unwanted tribunals and courts will be abolished. New bodies will be created and members appointed where the power of patronage can be exercised anew. But a grievous blow will have been struck at a precious feature of our constitutional arrangements. Those with a long-term vision for our institutions and a recollection that reaches back to the abject judges of King James II and his predecessors, have a duty to warn their fellow citizens of the cumulating instances which give rise to grave concern.

The way ahead is enactment of entrenched constitutional guarantees in the States, at least for judicial officers, which mirror those in the Australian Constitution. Such guarantees are now enacted (but not entrenched) in the New South Wales Constitution Act. It is vigilant decision-making by the courts of Australia, expressing the common law in a way properly defensive of the protection of judicial independence. In this respect, the international principles may be invoked to help elaborate the common law or to construe ambiguous statues in a way defensive of the tenure of independent decision-makers.[68] The legal profession should be alerted to a realisation of the importance of the issue and to its duty to explain that importance to the community and to the media which sadly sees the protests as mere examples of lawyers protecting their personal privileges.[69] Where Parliaments and governments restructure courts, tribunals and independent offices (as is their right) they should conform to the principles respectful of the independence of the

68 Mabo v Queensland [No 2] (1992) 175 CLR 1, 44.

69 A rare exception is The Advertiser, Adelaide, 1 July 1994, 16 ("There goes the judge - but why?").

office-holders of the superseded body.[70] Parliaments should keep the promises made to such office-holders. Narrow distinctions should be rejected in favour of a realistic appreciation of the high constitutional issue which is at stake. And the judges themselves must be willing to defend the independence of their offices. Not merely for themselves. But for the community which is thereby protected.

[70] See *A.F. Mason*, The Australian Judiciary in the 1990s, in NSW Bar News [Autumn/Winter 1994], 7 at 9.

ABSTRACTS

The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia

By *Michael Kirby*

One of the peculiar features of the English constitutional settlement was a guarantee of the tenure of judicial officers. They could only be removed for proved misbehaviour or incapacity by a resolution of both Houses of Parliament. The author explains the historical origins of the principle, the departures from it in colonial circumstances, its incorporation in the American and Australian Federal Constitutions and the conventional observance of the principle by all Australian Governments until very recently.

The erosion of this principle in Australia is then described. It began in the Federal sphere when Justice Staples was not reappointed to the Australian Industrial Relations Commission when the Arbitration Commission was abolished. This precedent was soon picked up with enthusiasm by State Governments. It was followed in New South Wales when the Local Court replaced the Court of Petty Sessions. Six magistrates of the old court were not reappointed. In Victoria in 1993 numerous judges and like independent office-holders have found their guarantee of tenure to be an empty one when the simple expedient has been followed of abolishing their offices. In this way nine judges of the Accident Compensation Tribunal were removed without any suggestion of misbehaviour or incapacity. In South Australia, in 1994, the Industrial Court and Commission have been abolished. Only after strong protests from the State's judiciary were offensive provisions removed which would have given the Government the power to exclude some judges from transfer to the new court. In Western Australia, the judicial member of the Compensation Board was effectively removed from office by the abolition of his position. He was, instead, appointed a temporary "Commissioner" of the District Court, but without the same judicial rank and title.

The thesis is that the accumulation of so many instances of removal of judicial officers by the abolition of their courts and tribunals has undermined, in Australia, the tenure of office-holders who must act independently and courageously - including against government. The lack of understanding in the community and in the media of the importance of the convention are major problems in defending the proper constitutional principle. The recent cases in Australia also involve departure from international principles established for the defence of judicial independence. The question is posed whether we are witnessing an attempt to undo the constitutional settlement and to return, at least members of the lower judiciary, to a position where they effectively hold office at the will of the Executive Government. Unless this trend is reversed and the convention previously observed is

restored, it is suggested that the people of Australia will suffer. They will lose the precious value of decision-makers who are independent of government. That independence has, until now, been a mainstay of liberty in Australia.

Social or Socialistic Possibilities of Market Economy – Economic Development Through Constitutional and Administrative Law

By *Christoph Müller*

After the internal collapse of the former USSR, it seemed to many that capitalism would then triumph worldwide. However, in no country in the world does there exist a pure market economy. Rather, a "mixed economy" is in existence almost everywhere. In the economy, a private sector and a public sector are to be found, with the latter regulating the structural conditions of the system through infrastructure policy, intervening in various ways in the economy, and participating directly in economic life in the form of public utilities. The systems of today can only be differentiated by considering the respective size of the two sectors (private and public) and what goals the public sector hopes to achieve. In a system of "socialistic" market economy, the public sector must assert those aims of development conducive to public wellbeing, and create clear and consistent perspectives and conditions for the private sector. In this paper, some practical and realizable examples will try to demonstrate how a "socialistic" market economy could be advantageously different from a "neoliberal" or only "social" market economy if it makes correct use of the "productive force of science", intelligent use of the instruments of constitutional and administrative law, and creative use of the possibilities of a socialistic democracy.

Review of Regulations in the People's Republic of China

By *Anke Frankenberger*

Administrative regulations are a feature of modern societies that is growing in number and complexity. In China the most obvious distinction in administrative regulations is between *fagui* and *guizhang*. Regulations in the PRC are characterized by multiple conflicts among them, and between them and laws and the constitution.
Since 1982 China has built up its legal system and in the last five years has enacted several laws and regulations concerning the review of administrative actions. There are