- A distinction is made between proprietary maritime claims and general maritime claims. Proprietary claims involve claims relating to ownership or possession of a ship. General maritime claims include a wide range of claims arising from the operation of a ship.

- The legislation retains the existing distinction in admiralty law that exists between actions in REM based on maritime liens and statutory rights of action in REM based on causes of action arising under the general law and involving the ownership or operation of ships.

- Provision is made for the first time in Australian law, for arrest of surrogate or sister ships.

- Admiralty jursidiction in personam is conferred with respect to maritime claims and in addition with respect to claims for damage done to a ship.

- Concurrent jurisdiction in admiralty is conferred on the Federal Court and State and Territory Supreme Courts.

reaction to the new legislation. The Commission's report and the subsequent legislation have been received enthusiastically by academics and practitioners alike. A distinguished British commentator, Brian Davenport QC said

> The report is not only a model of what such a report should be, but ought to be compulsory reading for anyone concerned with the jurisdiction of a court hearing maritime claims. It is based on immaculate scholarship and sound common sense.

In a foreward to the Annotated Admiralty legislation, (S Hetherington, *Annotated Admiralty Legislation,* The Law Book Co Ltd, Sydney 1989) the Honourable Sir Lawrence Street said 'the new legislation is generally acclaimed by shipping lawyers'.

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the staples affair and judicial independence

> Will no one revenge me of the injuries I have sustained from one turbulent priest?
>
> King Henry II, of St Thomas Becket (1170)

reform of industrial relations: legislative background. In 1988 the Commonwealth Parliament enacted the Industrial Relations Act 1988 (Cth) which restructured the Commonwealth's machinery for settling industrial disputes by conciliation and arbitration. It repealed the Conciliation and Arbitration Act 1904 (Cth), which had governed Commonwealth activities in industrial matters for over 80 years, and which established, as its principal dispute settlement body, first, the Commonwealth Court of Conciliation and Arbitration, and later the Commonwealth Conciliation and Arbitration Commission. The presidential members of this Commission were appointed by the Governor-General and had the same status, rank and salary as Judges of the Federal Court. They held office until they resigned or reached the age of 65 and could be removed only by the Governor-General after an address from each House of the Parliament passed in the same session, on the ground of proved misbehaviour or incapacity.

The Industrial Relations Act 1988 not only repealed the Conciliation and Arbitration Act, but also established the Australian Industrial Relations Commission. This Act contains provisions similar to the former Act governing the appointment, status and conditions of appointment and

removal of presidential members of the new Commission.

the constitutional position of presidential members. In both cases, the presidential members are clearly not judges who are entitled to the protection of s 72 of the Constitution. This is a consequence of the *Boilermakers'* case (1957), which decided that the dispute-resolution functions exercised under the 1904 Act were not part of the judicial power of the Commonwealth, and so could not be exercised by judges who enjoyed the protection of s 72 of the Constitution (94 CLR 254 (HC); aff (1956) 95 CLR 529 (PC)).

The staples case. Justice JF Staples was appointed as a Deputy President of the Conciliation and Arbitration Commission in 1974. After some controversy, the then President of the Commission, Sir John Moore decided that Justice Staples would be given only a limited range of duties. Subsequently, successive presidents declined to assign even limited duties to him. However, no question was ever raised of misconduct or that he was incapable of performing the duties of a Deputy President. When the Conciliation and Arbitration Commission ceased to exist, all the presidential members of that Commission, except Justice Staples, were appointed by the Governor-General as members of the new Industrial Relations Commission. The government's position appears to be that Justice Staples has ceased to hold any office. His only legal right under the new legislation would appear to be that, by the Industrial Relations (Consequential Provisions) Act 1988 (Cth), s 81, he is deemed to have attained the age of 60 and to have retired, thus becoming entitled to a pension under the Judges' Pensions Act 1968 (Cth). Justice Staples' position seems to be that he still holds the office of a Deputy President, even though the body of which he is a member no longer exists. The Senate has now resolved to appoint a parliamentary committee to enquire into the principles that govern the tenure of holders of quasi-judicial office.

constitutional protection of federal judges. The Constitution, s 72, provides that judges of the High Court shall be appointed to the age of 70 (High Court) or, in the cases of other courts created by the Commonwealth parliament, to the maximum age fixed for that court, and shall only be removed by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of 'proved misbehaviour or incapacity'. This embodies the principle established in English law by the Act of Settlement 1704. However, the conditions of appointment of judges of State courts and of quasi-judicial bodies, like the Conciliation and Arbitration Commission, are generally governed by ordinary statutes, which may be repealed or amended by parliaments as they see fit. The NSW Court of Appeal, in two recent cases, considered the position of magistrates in that State. These decisions showed concern that legislative changes to the court structure might conflict with the principle that judicial officers should enjoy security of tenure.

statutory authorities. Parliaments may establish authorities for particular purposes. Examples include the Australian Telecommunications Commission, the Australian Law Reform Commission, the Reserve Bank of Australia and the Trade Practices Commission. The constitution and functions of these statutory authorities are governed by the statutes establishing them. If, for policy reasons, the government and parliament decided that the structure or functions of the Reserve Bank should be changed, an ordinary Act of Parliament will suffice. If the effect of a change of the constitution of some statu-

tory body is that a member of that body loses office, there is little that such a person can do. The governing principle here is that, within its constitutional sphere of activity, parliament is supreme. If parliament wants to remove from office a member of a statutory authority before that person's statutory period of office has expired, it may, for example, abolish the authority by an Act which at the same time re-establishes a new authority with similar functions. This gives the government the opportunity not to reappoint persons it does not want, and to appoint people more acceptable to it. This occurred in 1977 when the abolition of the existing Trade Practices Commission and its reconstitution gave an opportunity to the then government not to appoint to the new body a Commissioner appointed under the old Act of whom the Government disapproved.

parliamentary supremacy and the courts. In formal terms, State courts and quasi-judicial bodies like the Conciliation and Arbitration Commission are no different from statutory authorities like the Trade Practices Commission. Why should parliament not create, abolish and reconstitute them in the same way? There seems little doubt that parliaments have the legal power to do so. Most States have legislation which enacts the convention that judges will not be removed except by an address of both houses of parliament. This is justified by the principle, embodied in the Act of Settlement 1704 (UK), that if judges are to administer the law independently and impartially, they must be secure in their tenure of office, and free from political pressures. The 1704 Act followed a century or more during which the English judges had fought for this right against Queens and Kings determined to impose their will on the courts. It is possible, however, that the State legislation may be amended by an ordinary Act of the relevant parliament.

constitutional commission recommendations. The Constitutional Commission, which reported in 1988, accepted the principle of independence and security of tenure. It found some deficiencies in existing procedures for the removal of judges, and suggested the establishment of special fact-finding tribunals which would report to Parliament. It also recommended that the Commonwealth Constitution be amended to give the same protection to State and Territory judges as judges of federal courts enjoy under the Constitution, s 72: Report, 6.204.

who should be treated as a judge? Some members of statutory bodies, such as the Administrative Appeals Tribunal and the Industrial Relations Commission, perform quasi-judicial functions which require as much independence from political influence as do judges. The question of constitutional principle raised by the Staples case is whether parliament or the executive branch should give them the same protection of their tenure as judges.

the characterisation of judicial functions. The *Boilermakers'* case represents a special application of the characterisation of decision-making functions as 'judicial'. Although some earlier cases dealing with the constitutional validity of the Conciliation and Arbitration Act 1904 (Cth) emphasised that judges were given a special position by the Constitution, they did so by reference to the constitutional doctrine, originating in the United States, of the separation of powers between the different organs of government. In *Boilermakers,* the provisions of the Act establishing the Commonwealth Court of Conciliation and Arbitration were found invalid by the Privy Council and a majority of the High Court on the basis that the Constitution did not permit the same

body to decide questions of guilt or innocence and impose penalties — traditionally part of judicial power — at the same time that it made rules of general application — traditionally a characteristic of legislative power. This view implicitly denies the law-making function of judges.

what is special about judicial status? This question really needs to be answered in functional, rather than theoretical terms. Judges deserve specially protected tenure because they should be independent of pressures brought to bear on them by others. Historically, pressures from the executive government were seen as particularly undesirable. In a society where many issues affecting the rights of individuals are decided by bodies established independently of the executive government is it not equally important that the persons who constitute such bodies be as independent as judges? The answer to this question depends on just how independent of the executive government the body is intended to be. However, the courts do not have a monopoly of the protection of rights. Bodies like the Ombudsman and the Administrative Appeals Tribunals of Victoria and the Commonwealth are formally part of the executive government. Their function of reviewing the operations and decisions of the administration would be extremely limited, and would not command popular support, unless they were entirely independent of that administration and may carry out their functions in the security that members will not lose their office if their decisions offend Ministers or senior bureaucrats.

must industrial tribunals be independent? In Australia, there are historical reasons why industrial tribunals need independence, quite apart from the fact that the executive government, both as employer and as a key figure in economic policy-making, has an interest in the way in which industrial disputes are resolved. When the Australian industrial relations system was being formed, only the judiciary were perceived by labour and employers as having the independence and legitimacy which was necessary if their decisions and awards were to be respected. The original industrial tribunals were constituted by men who were also judges of the ordinary courts. When the business of courts and tribunals increased, and the functions of the industrial tribunals became more specialised, the members of those tribunals, though no longer judges of the ordinary courts, were given the same status and rank — and the same security of tenure. These were important symbols of independence and legitimacy. Security of tenure is not only symbolic. It is vital in ensuring that statutory bodies remain viable that they should both be and appear to be independent of government.

reaction from professional bodies. Several professional bodies of lawyers, and several judges and academic lawyers publicly voiced their concern at the Commonwealth government's failure to appoint Justice Staples to the Industrial Relations Commission. They did so, not necessarily out of concern for Justice Staples as an individual, but from concern that the supreme legislative power of parliament might be used to remove a decision-maker whose activities were not palatable to the Government — just as the Stuart and Tudor monarchs in England had removed judges whose judicial decisions had been unpalatable. Anglo-Australian statute law and convention recognise the independence of the judiciary to some extent, but it is specially protected only in the Commonwealth Constitution. State judges, for example, are protected by laws which, in most cases, may be altered by ordinary legislation, and there have been suggestions that the NSW Government might follow the lead of the Commonwealth and restructure its industrial tri-

bunals. After this became public the Bar Association of NSW, which had previously decided not to take any action over Justice Staples, reversed its previous position and expressed concern for Justice Staples and for the independence of judicial officers.

conclusion. While only Commonwealth judges enjoy constitutional protection, the Staples case raises the question of whether other officials, especially those who exercise quasi-judicial powers of decision, may require similar guarantees of independence. Parliament has the power to abolish the Conciliation and Arbitration Commission and similar bodies, and by that means remove all members from office. If it does so, it must accept the political consequences. When it enacted the Industrial Relations Act 1988, it did not decide that Justice Staples or any other member should leave office. Parliament provided for a successor body, which was to continue the functions of the old Commission. It allowed for continuity of membership, but left the appointment of the members of the new body to the discretion of the executive government. The decision as to which of the members of the old body should be appointed to the new was an executive decision. The question remains whether such a decision should be subject to restraint or to review because it may conflict with an established convention, or other constitutional principles not expressly written into the constitution.

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court delays

> Battledore and shuttlecock's a wery good game vhen you an't the shuttlecock and two lawyers the battledores, in which case it gets too excitin to be pleasant.
>
> Charles Dickens, *Pickwick Papers*

It was reported in the *Sydney Morning Herald* on 10 February 1989 that one of the New South Wales Supreme Court's most experienced criminal law judges had resigned in protest over what he described as the 'scandalous' and 'obscene' delays in criminal trials. Mr Justice Adrian Roden, who presided over the Milperra massacre trial and the trial of former government minister Rex Jackson, told the New South Wales Attorney-General, Mr John Dowd, in his letter of resignation, that the criminal law should be stripped of much of its technicality and legalism. He went on to criticise the work practices of lawyers in criminal trials which added to the delays. He wrote 'I know you appreciate that our criminal trial backlog and the resultant delays do not just represent a management problem — they represent a human problem.' (*The Australian* 10 February 1989)

According to the *Sydney Morning Herald*, Mr Justice Roden is known to support a system of pre-trial procedures which would speed up cases while protecting individual rights. He has also advocated the separate administration of the Supreme Court's criminal division in the same manner as the Court's commercial division.

The delays about which he was complaining sometimes resulted in accused persons being held in custody before trial for a year or more, during which time they were all presumed to be innocent and may eventually be acquitted. Mr Justice Roden said that the extent of the delay was unknown in other Australian States and in the United States and United Kingdom. He attacked the court's summer vacation between mid-December and the end of January each year, during which time five or six Supreme Court rooms remained unused, as contributing to the delay. A further cause, he said, was the priority which the Supreme Court seemed to place on the resolution of commercial cases, at the expense of criminal trials, which, he thought,