Queensland Industrial Relations Commission
Annual Conference 2003
University of Queensland Staff and Graduates Club
Tuesday 20 May, 9:15am

Chief Justice Paul de Jersey AC

Introduction

It is a great pleasure for me to be present at this seminar. As a former President of the Industrial Court from 1996 until 1998, I maintain a keen interest in the operation of the bodies represented here today. My colleague Justice Moynihan, also a former President, in a foreword to Ron Howatson's history of industrial tribunals in Queensland, wrote that the bodies have "contributed to stability in society … providing a sound basis for development and change" (*They'll Always Be Back*, 1998, vii). I feel I'm on firm ground in echoing that sentiment.

The capacity of courts and tribunals to contribute in that way to society depends on several factors, perhaps the most fundamental of which is the independence of those who adjudicate the disputes that fall for consideration. That independence is not an ideal to be aspired to; it must necessarily be guaranteed. Chief Justice Malcolm of Western Australia has averred:

> "… a strong, independent judiciary forms the foundation of representative democracy and observance of the rule of law and human rights" ("The Importance of the Independence of the Judiciary," address to the Western Australian Society of Labour Lawyers, 17 September 1998).

His Honour's views are reinforced by countless essays devoted to the topic of judicial independence. I suppose my ambition should this morning be limited to delivering an address remembered as one of the 300,001 ever delivered on the subject of judicial independence! However, despite a diversity of authors and publications, essays on this topic focus almost exclusively on independence in courts *per se*. Only a very small proportion of the literature is directed at the importance of maintaining the independence of tribunals or commissions. Yet independence is not a luxury to be enjoyed only by Chapter III courts; its perpetuation is equally important with quasi-judicial decision-making bodies also, and certainly industrial relations tribunals.

My perception is that Industrial Commissioners have inevitably found themselves at much closer quarters, than courts of law, with those affected by their decisions. Also, history confirms, those appointed will often have come from a period of deep immersion in the interests of either employee, or employer. History also shows, fortunately, that Commissioners have been astute to both the need to maintain distance from the parties, and not to communicate with one absent the other; and also, to put any partisan persuasion well and truly behind them upon appointment.

Definitions of Judicial Independence

But before dealing with specific tribunals in any depth, it is worthwhile to reflect on the scope of the concept of "judicial independence", and some of the more generic threats to its continued health.

Perhaps most central to the concept is an absence of external influence. Thus, judicial independence has consistently been described as:

> "… the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice free from coercion, blandishments, interference, or threats from governmental authorities or private citizens" (Rosenn, "The Protection of Judicial Independence in Latin America" (1987) 19 *University of Miami Inter-American Law Review* 1);

and then in the parliamentary context, as:

> "… the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control" (Green, "The Rationale and Some Aspects of Judicial Independence" (1985) 59 *ALJ* 135).

On the useful Canadian analysis in *Valente* [1985] 2 SCR 673, judicial independence embraces three crucial primary aspects: secure tenure, financial security and institutional security. As to those aspects, a guaranteed term of appointment is necessary so that judicial officers are not concerned about making decisions to please the body responsible for their possible reappointment. Financial security is necessary, it is said, to ensure that those officers are not tempted to accept bribes – although there fortunately seems no need for that justification in contemporary Australia. Institutional security, or control over administration of the court, prevents, among other things, the other branches of the government from influencing the allocation of Judges to hear particular cases. Each of those aspects of independence characterises the Commission.

As Professor Shetreet has reminded us ("The limits of judicial accountability: a hard look at the *Judicial Officers Act* 1986" (1987) 10 *UNSW Law Journal* 3, 6-7), however, judicial independence is a concept with a number of limbs: there is, on the one hand, the personal independence assured by security of tenure and conditions, the securities to which I have referred; then there is what he terms "substantive independence … that is, in the discharge of [the] official function"; additionally there is the "collective independence of the judiciary as a whole … corporate or institutional independence of the judiciary"; and finally, there is "the internal independence of the Judge, which refers to his independence *viz a viz* his judicial superiors and colleagues."

While speaking of our independence inter se, I should however add that that should in no way be jeopardized by adopting the approach to administrative management which in my experience undoubtedly works best, and that is the actively collegial approach, with all affected appreciating the nature of the issue, contributing their views, and participating in the making of the requisite decision. To my mind, there should be but few decisions falling outside that corporate realm. The disadvantage of proceeding otherwise is the risk that decisions be misunderstood, or not, to use the contemporary vernacular, "owned" by all affected. A great advantage of an enthusiastically collegial approach is the injection of a wealth of experience and wisdom into the process. I am confident had I not actively tapped the views of my colleagues over the last few years on any matter of managerial significance, the Supreme Court would not today be marked by the harmony, productiveness, and streamlined management which my colleagues and I have collectively been able to achieve. And plainly, none of that collegiality has in any degree imperilled our independence as individual judicial officers. I firmly believe the collegial approach indispensable in order to promote the public interest, and I strongly commend it to you.

Threats to Judicial Independence

For the Westminster system to operate democratically, the independence of the non-political judiciary must be absolutely secure. In the words of Montesquieu, "there is no liberty, if the power of judgment be not separated from the legislative and executive powers." Of course in a democracy the creating and administering of the law must be subject to the will of the people. But to ensure the impartial application of the law, the judiciary must be completely immune from political pressure.

Accordingly, while judicial officers are dedicated to public service, they must not be considered "public servants", the designation of those who administer the Executive – which stands separately. Public servants implement ministerial policy while Judges deliver justice according to law – at no-one's behest.

But political or executive interference is not the only theoretically possible source of external influence to be encountered. The last few decades have witnessed a great elevation in the level of interest shown in the work of courts and tribunals by the media. The media, it seems to me, has much more actively pursued a role in drawing attention to perceived unjustified trends in certain areas of judicial decision making, and of course, the area of criminal sentencing is the prime example. The media performs a very important role in informing the public about such matters, but judicial officers must be careful not to allow a media view as such to regulate their independent approach.

While the courts "do not decide cases by reference to every shift in public opinion, the judiciary must keep a weather eye on basic community values in order to retain the relevance of their decisions to that community" (Chief Justice Malcolm, "Judicial Independence and Accountability," address to the Third Worldwide

Common Law Judiciary Conference, 5 July 1999). This is of course a very important consideration for the Commission. The difficulty lies in accurately discerning enduring community views, for ordinarily courts and commissions cannot responsibly react to what may turn out to be temporary shifts in public opinion, or plainly minority views. This is where the responsibility borne by the media is substantial, although we ourselves bear a burden. As put by Chief Justice Doyle ("The Well-Tuned Cymbal" in *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, 1997, 43):

> "To focus upon how the media depict the courts is too limited an approach. The judiciary should itself initiate and provide information about the judicial system. It should do what it can to provide the public with a balanced account of its work. To put it bluntly, it is not enough to do what we can to help the media improve the quality of information that it provides to the public. The judiciary should have its own program for informing the public about its work."

And in Queensland we are doing our best in that regard.

Now in our Queensland system, the separation of powers, which complements and in part assures the independence of the judiciary, is not complete. That is because the judiciary materially depends on the other arms of government: the Executive is the paymaster of the Judges, and provides the resources on which the court and commission system depends. This position in Queensland is to be contrasted with what obtains, as examples, in the High Court, the Federal and Family Courts and the Supreme Court of South Australia. I do not presently raise this matter by way of active criticism of our system, although one cannot in principle overlook the circumstance that the separation of powers in this State is for that reason at present incomplete. My lack of active criticism is explained by

its not having any particular, adverse practical consequence; certainly, so far as the courts are presently concerned.

Judicial Independence in the industrial relations context

How secure and healthy, then, is the independence of the bench in the industrial relations context in Queensland? In this state, the present institutional framework is established by the *Industrial Relations Act* 1999. Pursuant to that Act, Queensland has an Industrial Court, a superior court of record, and it also has an Industrial Relations Commission. It is in relation to this latter body that concerns about independence are seemingly more likely to arise.

According to Justice Sheller of the New South Wales Court of Appeal, and Chairman of the Judicial Conference of Australia, tribunals such as the Industrial Relations Commission:

> "represent a compromise between, on one hand, the process of courts, which tends to be at least costly and may be slow and is designed to produce the highest standard of justice, and, on the other, the unchallengeable administration of such matters by public servants without recourse to hearing" ("Judicial Independence," Annual Conference of the Industrial Relations Commission of New South Wales, 3 May 2002).

While tribunals do represent a compromise, and may not necessarily exercise judicial power in the classical sense, the concept of judicial independence is at least as vital in their case. Sir Anthony Mason places special emphasis on the importance of maintaining judicial independence at all levels of the judicial

hierarchy, although his expression perhaps involves an unintended "grading" of the bodies involved. According to him:

> "Unless we put in place provisions which preserve the independence of … members of tribunals, we run the risk that interference with the independence of … tribunal members will eventually contribute to the erosion of judicial independence as it applies to judges" ("The Appointment and Removal of Judges" in *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, 1997, 34).

Of course, independence in the tribunals is critical for their own effective operation, not just as a protection of judicial independence.

In large part, Sir Anthony's call appears to have been heeded in Queensland. Safeguards necessary to protect the independence of both the Industrial Court and the Industrial Relations Commission are clearly in place. The Court is constituted by the President (s 247), who holds office until resignation or compulsory retirement at age 70, and can only otherwise be removed on proof of mental or physical incapacity or misbehaviour to the Legislative Assembly (s 245). Equally importantly, Commissioners of the Industrial Relations Commission are appointed with the same guarantees of tenure (ss 260, 263).

These guarantees are fundamental and appropriate. As Peter Sharkey, President of the Western Australian Industrial Relations Commission, has pointed out, "security of tenure … is most applicable in a jurisdiction such as this where the members deal with organisations of employers and employers or the government of the day on a regular basis" (Address to a meeting of the Employee Relations Committee of the Law Society of Western Australia, 6).

In addition to guaranteed tenure, the *Industrial Relations Act* provides "The president [and] the commission … in the exercise of jurisdiction … have the protection and immunities of a Supreme Court judge exercising the jurisdiction of a judge" (s 337). This provision reinforces the entitlement of the president and commissioners to incidents of judicial independence other than secure tenure.

On those bases, the legislation governing the Industrial Court and the Industrial Relations Commission does as I have said appear to incorporate safeguards adequately adapted to the protection of the independence of its officers. Unfortunately, however, history teaches us the principle of judicial independence may suffer attacks even where apparently adequate fortifications surround it.

I am reminded particularly of the issues that arose some years ago in the Commonwealth sphere surrounding Justice Staples. This material has been traversed many times previously, but its reconsideration is instructive in this context. As we all will recall, Justice Staples was appointed a Deputy President of the Australian Conciliation and Arbitration Commission in February 1975. His views came to be regarded by some on the Commission and outside the Commission as unacceptable. Justice Kirby, a former Deputy President of the Commission, in a paper on the subject, makes special reference to "Staples J's unconventional approach to the resolution of industrial relations problems (and … his colourful expression on the Bench and in written decisions)" ("The Removal of Justice Staples – Contrived Nonsense or a Matter of Principle?" (1990) 6 *Australian Bar Review* 1, 11).

The then President of the Commission, Sir John Moore, whose responsibility it was to allocate work to commissioners, dealt with Justice Staples by virtually refusing to allocate him work. The subsequent appointment of Justice Maddern as President of the Commission served only to further enervate the situation.

The impasse was broken with the abolition of the Australian Conciliation and Arbitration Commission and the establishment of an Australian Industrial Relations Commission. The President and all the Deputy Presidents of the former body were appointed to the new body, with the one exception of Justice Staples. That decision provoked a distinctly negative reaction, from, among others, the International Commission of Jurists, the Law Council of Australia and several state bar associations and law societies.

As you may also recall, a similar situation arose subsequent to the Justice Staples affair in relation to a proposal to abolish the Industrial Court of South Australia without providing for the re-appointment of all judges of the Court. Fortunately, that controversy was resolved in a more appropriate manner, and the particular threat to judicial independence evident in both cases has not arisen again. In that sense, I am encouraged to note the recommendations of a Parliamentary Joint Select Committee considering the Justice Staples matter, including that:

> "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 … when a tribunal is abolished and re-structured, all existing members of the tribunal should be re-appointed to its replacement …"

Plainly, Queensland does not presently find itself in anything approaching such a perilous situation. One is consequently tempted to consign these matters to a dark corner of one's memory. However, it is important to acknowledge that all the statutory safeguards in the world may not suffice to protect the independence of the bench in extreme circumstances such as those that prevailed in relation to Justice Staples. In such cases, it is the responsibility of the legal profession to be

alive to the potentially devastating effects of a collapse of judicial independence and to react accordingly.

Judicial Accountability

Now it is important, when speaking of judicial independence, not to overlook its significant corollary, judicial accountability. As Sir Ninian Stephen has pointed out:

> "In today's world judicial independence, while it remains as essential as ever it was to the maintenance of the rule of law and just, free and ordered society, is more dependent than ever it was upon the judiciary maintaining in difficult times standards both of efficiency and of unquestionable integrity; and distancing themselves from all inferences which might be seen as affecting their integrity" ("Judicial Independence Depends on Standards On and Off the Bench" (1989) 24(9) *Australian Law News* 12, 14).

Judicial accountability is achieved in a number of ways. Formal accountability is secured through discharging the obligation to give comprehensive reasons for judgment, and through the appeal process. Judicial officers could not these days follow the advice given by Lord Mansfield to a general appointed Governor of an island in the West Indies, finding himself obliged therefore to sit also as a Judge. It is said (Jackson, *Natural Justice*, 2nd edition, 1979, 97) that Lord Mansfield said to him:

> "Be of good cheer – take my advice and you will be reckoned a great Judge as well as a great commander in chief. Nothing is more easy; only hear both sides patiently, then consider what you think

> justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong."

On the contrary, of the obligation to give reasons, Chief Justice Gleeson ("Judicial accountability" (1995) 2 *Judicial Review* 117, 122-124) has said:

> "This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from Judges, how many other decision-makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those made by Judges, are made by people who may choose whether or not to give their reasons."

Less formal accountability is facilitated fundamentally by the obligation to conduct judicial proceedings in public, and as follows, not to receive private communications from one party absent the other. Proceeding in public exposes judicial officers who do not display the requisite qualities to the prospect of public assessment by the people, their peers and the press and media. Public comment and criticism can be powerful forces for enhancement of the quality of judicial performance. It is worth recalling the reference by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 447 to the words of Bentham:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice…publicity is the very soul of justice. It is

> the keenest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself, while trying, under trial…the security of securities is publicity".

We should all be comfortable with the prospect of reportage of any aspect of proceedings, save of course those necessarily in camera. But whether in this State court proceedings are to be televised remains an open question. For my part, I am rather influenced by the view of Mr Michael Beloff QC when in the United Kingdom delivering the 1999 Atkin Lecture: "Comprehensive coverage of cases would stupefy. Edited coverage would distort. All television corrupts, selective television corrupts absolutely."

A more recent form of public accountability is achieved through the statutory obligation on courts to publish annual reports, or their voluntarily undertaking that responsibility. Such reports draw public attention, importantly, to rates of disposition of caseloads, and that may lead to pressure for more expedition. Such reports also tend to highlight judicial initiatives in the area of continuing education. The people expect their Judges and tribunal members to keep up-to-date in their areas of expertise. In terms of current reasonable expectations, judicial officers will be properly accountable only if they do so, and are seen to do so.

I suppose in one sense proper accountability will be guaranteed by strict observance of the ethical constraints which regulate all aspects of our judicial and quasi-judicial presentation. They are usefully covered in the “Guide to Judicial Conduct” published last year by the Council of Chief Justices. The content of that work is as applicable to Commissioners as to Judges, and I strongly commend it for your perusal and consideration.

Conclusion

These are weighty issues, but important ones. It is certainly vital for the maintenance of the rule of law in society that safeguards adapted to the protection of judicial independence are in place. But perhaps ultimately, the most important aspect of judicial independence is an acknowledgement and understanding of the concept on the part of judicial officers themselves. As put by Sir Anthony Mason, and again his remarks apply to Commissioners just as they do to Judges:

> "Judicial independence is not a quality that is picked up with the judicial gown or conferred by the judicial commission. It is a cast of mind that is a feature of personal character honed, however, by exposure to those judicial officers and professional colleagues who possess that quality and, on fortunately rare occasions, by reaction against some instance where independence has been compromised" ("Judicial Independence," address to the Australian Judicial Conference, 2 November 1996).

I congratulate you on your commitment to addressing this most fundamental notion of the independence of the bench. But additionally, I implore you to pursue actively that commitment in the fulfilment of your activities as commissioners. Consistently with Sir Anthony's comments, the development of a cast of mind favouring neutrality and independence is one of the greatest attributes a judicial or quasi-judicial officer can possess.