

A personal view of where the IRS has come from and where we should be going with it.

*Address for IRS NSW AGM Lunch
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THE HON. PAUL MUNRO

[1] Too hastily, I had taken the topic of this address to imply sufficient identity between the Industrial Relations Society and the industrial relations system in Australia for me to embroider upon the latter without straying too far from the theme. That assumption did not withstand scrutiny. The Society often runs along similar channels to the IR System but it is much more ambulatory and comprehensive in character.

[2] The IRS of New South Wales, inaugurated 14 May 1958, was the first organisation of its type to be formed in Australia. Its objectives in 2010 are largely unchanged. It was formed *to organise and foster discussion, research, education and publication within the field of Industrial Relations*. The Constitution established it on a multipartite representative basis. Over the course of its history up to the present time, the Executive Committee of the IRS has been made up of combinations of members from trade unions, employers, academics, the government sector, the legal profession, consultants and more recently students; truly reflective of the range of interests served.

[3] The birth of the IRS came 2 years after *Boilermakers*ⁱ. In that decision the High Court achieved what the Bruce Government and other administrations had failed to do: overthrow the Commonwealth Court of Conciliation and Arbitration. The Menzies Government quickly implemented policy to establish an Industrial Court and a Conciliation and Arbitration Commission. Members of the Commission, its successors and State industrial authorities have consistently been given a role as Patrons and have served in many other capacities

[4] The formation of the IRS reflected many influences but probably most important was the force of Kingsley Laffer of the Department of Economics at Sydney University; that later became the School of Industrial Relations: its counterpart is now found in the School of Business. Speaking at the first Kingsley Laffer Memorial Lecture in 1993, Bob Hawke said:

Kingsley Laffer was the founding editor of the Journal of Industrial Relations, which he edited for 18 years, and he helped to broaden the understanding of the subject, to which he devoted his life, with the establishment of the Industrial Relations Society of New Wales.

Suffice it to say that for my generation, industrial relations and Kingsley Laffer were virtually synonymous. In the universities the quality of his work was recognised beyond the discipline of economics, for he acknowledged the relevance not only of law but of psychology, political science, history and sociology to a full understanding of his chosen area of specialisation”ⁱⁱ

[5] The Journal of Industrial Relations, (the JIR), was first published in March 1959. The early issues disclose a pattern that has become the consistent formula for IRS activity. Volume 1 JIR refers to the First Weekend Convention to be held in May 1959 at the Florida Hotel in Terrigal. Kingsley Laffer outlined the function of the JIR as follows:

“The present venture, the JIR, is intended to help meet the needs of both scholars and practitioners. It will provide information and analysis concerning many aspects of the Australian Industrial Relations scene where these have been lacking and should both stimulate research and provide a forum for discussion of the results. It will also provide a channel for informed comment on contemporary events that should prove useful to all who are practising in whatever capacity in the field of industrial relations”.

[6] Since 1958, the IRS has been highly successful in bringing together representatives of trade unions, employers and Governments, the legal profession, tribunal members and academics – all of whom have contributed not only to the promotion of better industrial relations but to the better understanding of its many facets and ramifications in reducing inequality across society. The content and providers of papers published in the JIR over the 52 years of its publication build a concrete perspective. Conveniently, there is now an archive of all issues online at <http://jirj.sagepub.com>: it gives access without fee to the contents page of each issue: its search function can track authors. It might be too much to hope that IRS members generally be given low-cost access to the entire archive, but it would seem to be worth a try.

[7] In the very first article, Dr Ian Sharp, Industrial Registrar of the CAC, outlined the then operative IR system. Along with other players, the union movement, at that time covering 60% of the Australian workforce, was a significant presence. Through the generation of industrial disputes, unions, employers and their organisations were a constant in establishing operative priorities and jurisdictional limits for the IR system. Sharp's article was followed over the years by contributions from authors whose names would make up a roll call of leading thinkers and change agents over five decades. Among the first wave were: C P Mills, D C Thompson, John Kerr, Hal Wooten, Keith Hancock, Joe Isaac, George Polites, R N Herbert, Lloyd Ross, Bob Hawke, Terry Ludeke, Jack Sweeney and so on down to the present day.

[8] The most recent JIR, for June 2010, is a good reflection of the current and continuing IRS focus on priority concerns. Guest editor Dr Rae Cooper introduces and summarises a valuable set of articles that review changes in the Australian IR scene since the Rudd Labor government enacted the *Fair Work Act*. Developments over 2009 affecting industrial legislation and Tribunal decisions, labour market and wages, women and work relations, unions and collective bargaining; and, importantly, employer and employer association matters are each expertly reviewed. Supplementing that overview and analysis of the Australian scene are two articles that explore employment relations issues and developments in Japan and globally.

[9] Greater sensitivity to the significant international dimension of industrial relations and the need for a platform on which to influence and shape the way in which the interests involved interact led to the establishment of the International Industrial Relations Association (IIRA) in 1966. With IRS participation, it was formed in response to a growing need to develop and exchange knowledge in the field of industrial relations, at the international level, and provide the academic and the practitioner with a forum for discussion and research.

[10] That Association, whose 15th World Congress was successfully hosted by the IRS of Australia in Sydney last year, now has over 1,000 members worldwide including prominent industrial relations scholars and practitioners. Subjects such as globalisation, new technology, gender, HIV/AIDS, employee involvement, occupational safety and health, industrial relations, labour law, human resource

management, international labour standards, social dialogue, labour administration, informal economy, and many other topics are discussed during its congresses. The Association is located in the Industrial and Employment Relations Department (DIALOGUE) of the International Labour Office in Geneva, Switzerland. In my view, that linkage to the ILO, tenuous though it may be, is a precious affinity for the IRS. Like the ILO, the IRS and the IIRA is each integrally concerned with continued recognition of representative bodies of employers and employees. The IRS functions in a nation that is bound by ILO Conventions and exhorts trading partners to respect them. I understand that very recently, the IIRA resolved to change its name to the **International Labour and Employment Relations Association**.

[11] The IRS was intended to promote a free exchange of opinions, an understanding of another person's point of view, and new friendships – all factors designed to create goodwill and understanding in the field of Industrial Relations. The substance of that claim is most manifest to those who have made use of the variously labelled IRS residential conventions/conferences and special topic meetings or seminars. My experience as a participant dates from the 1970s in Victoria, prior to my being appointed to the AIRC. An important feature of such functions was the consistent presence of members of that tribunal and its state counterpart. Sir Richard Kirby, Robinson and Maddern JJ, each in their own ways, generously encouraged informal discussion with them. In recent years I have perhaps paid less than my full dues in attending such events though I am familiar with activities and levels of attendance generally. The most recent NSW IRS Annual Conference attracted over 100 participants. An array of speakers reflected the full spectrum of the makers and shakers of the contemporary IR arena: the relevant federal and State Ministers, their Opposition counterparts, leading academics and practitioners and senior members of federal and State tribunals.

[12] The quality of the JIR, of the Annual Conferences and the level of membership, (around 700), are measures of vitality. It seems to me that the IRS is in robust good health and in no sense could be thought to have lost its way or be in need of direction from the likes of me. There is much force in an observation put to me that the way we are headed is the same place from which we have come; there is no need to fix what ain't broke. One exception might be made. There are reasons why

the name of the Society should be changed in a manner matching the International Labour and Employment Relations Association. That name would more closely reflect the changes in regulatory systems and in academic disciplines. However there are connotations of collectivism alive in the reference to industrial relations. No less important is the fact that 5 State Industrial Relations Commissions survive. There is no sign yet that any will be rebadged as Fair Work Wherever-we-are.

[13] Acknowledging the vitality of the IRS is not to deny that like us all, the IRS is adrift in a sea of change: it can never take its position for granted.

- What are the most significant changes affecting the IRS environment?
- How do they impact on the IRS?
- Are there ways or directions in which the IRS activities and services might be improved as Australia lines up either to *go forward or stand up for real action?*

The most significant changes:

[14] **Source of power:** A fundamental change permeates the national system of labour and employment relations. The functional head of federal legislative power has been switched. The Commonwealth no longer is confined to providing laws for the settlement of industrial disputes; it now regulates the relationship of a corporation with its employees. Consequential to that change, the Parliament now asserts a plenary legislative power over all aspects of that relationship between a national system employer and a national system employee. The exercise of the power effectively supplants a broad spectrum of the States' direct and indirect legislative roles.

[15] **Character of system:** The system within which industrial and other relevant relationships operate is for the first time substantively national in character. That character is reinforced by the partial referral of relevant State legislative powers by all States other than West Australia.

[16] **Participants and key personnel:** For most of the last century the dominant participants in industrial relations were the unions and employer associations, the tribunals, and the Federal and State governments. In the zero sum game applicable to industrial relationships, federal legislators and their direct legislation have gained ascendancy in the new national system. That change entails tensions with and

pressure on the roles and security of the representative and institutional interests that interact within the IRS.

[17] Objects and processes of regulating relationships: The changed and reconfigured fundamentals of the regulatory system have been directed to bringing about a major change at the micro-level to the objects and processes of the system. Forms of collective and individual bargaining at enterprise level supplant the use of compulsory arbitration of disputes across and within industries. Rights, duties and protections are expressed predominantly in statute. The statutory prescription overlays subordinate legislation by regulation, modern award and approved enterprise agreement. The prescribed rights, duties and protections apply to and are enforceable by individual national system employers and employees. Unions and other collective entities are accorded standing but such representative or direct entity access is less extensive and circumscribed by conditions in particular contexts.

[18] Exceptions to the national system are important and very much within the scope of IRS concerns. **State industrial Tribunals** survive in all states save Victoria. Justice Roger Boland summarised the position in a paper for the 50th Annual Conference.ⁱⁱⁱ In NSW there is bipartisan support for retaining the Industrial Relations Commission. Apart from any lack of confidence in the maintenance of a national system acceptable to the States, the States might have more confidence in retaining systems they have designed themselves to deal with their sensitive public sectors. **Independent contractors and other business operators** constitute a second but rapidly growing form of employment outside the national system. Over 1 million workers, one in 10, are independent contractors. Workers in that category have increased by 6.4% over the previous year. Together with what the ABS now defines as *other business operators*, persons engaged in those non-standard forms of employment now constitute almost 19% of the workforce. That level of exception from the national system is significant in itself. For the IRS it is especially significant when juxtaposed with other workforce details. Casual employees make up another 20% of the workforce but, as employees at common law, they are within the national system. About 20% of the workforce are union members.

[19] The implementation of the Rudd *Forward With Fairness* program realised a drive toward a national system. That drive had many formulations and frustrations

throughout the last hundred or so years. In 1993, Paul Keating foreshadowed change to enable workplace bargaining above or underpinned by a safety net of award standards determined by arbitration. Writing about that proposal Bob Hawke observed that it reflected a suggestion by Laffer in 1962, “a thought 30 years before its time!” Laffer had envisaged a path to “advanced approaches” to higher productivity; through mutual trust leading to agreements worked out by the employer, the employees and their union.^{iv}

[20] As Justice Boland observed in his conference paper, the national system is the product of the Rudd government taking advantage of the opportunity presented by the High Court’s confirmation of the validity of the WorkChoices legislation.^v That opportunity though was the sum of many parts derived from a complex of legislative packages, economic policy imperatives and other High Court decisions from 1993 on. Together those parts achieved what past governments, and the Australian people through referenda, had failed or refused to do: overthrow the revolutionary system of arbitration of industrial disputes and supplant it with direct legislative regulation of labour and employment relationships. Dead, buried and cremated as WorkChoices might be said to be, its skeletal remains and entrails are embedded in the foundations of the national system. Like the relics of saints, the bones of WorkChoices in the national system might inspire devotion or its opposite; or they might rise to roam again.

Impact upon the IRS.

[21] In my view, none of those changes demand a fundamental reorientation of the IRS function or profile. However, the design of IRS programs should take into account:

- the greater degree of politically partisan influence over the design and operation of the national system;
- the increasing individualisation and personal insularity of the workforce and the related decline in and discouragement of collective voice in workplaces;
- the increased vulnerability of industrial tribunals, and representative organisations operating within the national system;

- matters affecting the capacity of participants to adjust to change and to the need to set and achieve objectives consistent with processes of the national system.

[22] In the most recent issue of the JIR, its erstwhile editor Russell Lansbury nominated four key issues in relation to working lives and workplaces. He urged that they should become *pillars upon which a new social contract between the workforce, employers unions and government should be based*:

- sustainable employment consistent with labour market flexibility and individual security
- the improvement of the quality of work life through high-performance work systems motivating the workforce and building a productive economy.
- securing more effective mechanisms of voice and collective representation for people at work.
- the generation of a unified approach to achieve a long-term retirement income security for the nation.

In my view, Lansbury's pillars mark out an appropriately contemporary focus for the IRS into the medium term.

[23] There is an almost immediate agenda for analysis and discussion of ways and means of securing effective mechanisms of voice and collective representation. There is a readily accessible set of factors that demand much closer analysis than has occurred to date. They include the legislative provisions affecting dispute content, process and representation; the character of any right to raise grievance and associated duties on employers and employees; and the power of internal referees, tribunals or independent third party enabled to determine disputes; evaluative data based on various models and experience. The use and potential use of dispute resolution procedures in the national system is a law and policy topic. After the FWA's decision in *Woolworths*^{vi} the topic should be seen as low hanging fruit ripe for research and discussion. Were the Coalition to take office after the election any abridgement of access and involvement in DRP processes would only add value to the study

Should the IRS expect real action on the way forward to 2013?

[24] There is manifest and widespread fatigue across the IRS spectrum. It stems from coping with change and the prolonged adjustment to transitional measures. That

fatigue reinforces a contingent consensus that the structure and content of the national system should be allowed to settle down. It seems that Prime Minister Rudd may have succeeded in neutralising industrial relations as a political issue. Two years ago at another IRS Annual Conference, Prof Ron McCallum accused him of wishing to *settle the labour law question once and for all by gaining business acceptance of his rather mild changes, putting labour law to bed in order to press ahead with social democratic reforms embodying social inclusion, education revolution, high trust workplaces- as did Tony Blair in Britain.*^{vii}

[25] I have not found any evidence of Prime Minister Gillard backing away from the assertion that the new workplace system achieved a fair balance between all interests concerned. Implicitly that seems to mean questions about the national system are settled. The ALP National Conference resolution on *Delivering Fairness for Working Families* is a historically bland prescription. It deals with only four topics:

- support for a test case to vary modern awards to provide adult pay rates for 20-year-olds;
- commitment to develop policy and programs about workplace deaths;
- noting Australian union concerns about recommendations by the Workplace Relations Ministers Council concerning the harmonised occupational health and safety scheme and commitments to jointly consult;
- expressing belief that one set of laws should apply regardless of the industry in which people work; and pressing for coercive investigation powers and enforcement activities to be consistent with civil liberties, limited in scope and even-handedly applied, especially in relation to the construction industry.

[26] Those matters apart, it might be thought that the ALP goes forward to the election in the hope that the evil that WorkChoices did lives on, the good is soft interred with Fair Work Australia's bones. Minister Simon Crean yesterday confirmed to *Workplace Express* "Fair Work Australia is the ALP policy".

[27] In this electoral cycle, the Coalition too seems devoutly to be wishing for employment relations to be neutralised as a political issue. Mr. Abbott's policy launch speech made no mention of any matter pertaining to the relations of employers and employees. Only in the first week of the campaign, did the spectre of WorkChoices pop-up from wherever it was laid in bier, coffin or crematorium. Thus far, the dismissal of Kevin Rudd excepted, even the alleged failings of the union movement

have not attracted much campaign rhetoric. No Coalition Workplace Relations policy statement has been released

[28] The Shadow Minister for Employment and Workplace Relations is Senator Eric Abetz. Senator Jim McClelland is the only precedent I can recall for the corresponding Ministry being occupied by a member of the Senate. Senator Abetz addressed the IRS Conference in May but seems not to have been allowed outside Tasmania since the election was called. He did have a non-speaking presence as a guest seated beside John Howard at the Liberal Party policy launch; that might be a subliminal promise of things to come. I can see some common sense in keeping him well in reserve.

[29] In February this year, he undertook a searching cross-examination of Justice Giudice at a Senate Estimates Committee. The engagement did not reach the heights of the Abetz-Godwin Gretch dialogue, (perhaps His Honour needed more schooling from the Tasmanian tiger), but the record of it is stimulating.^{viii} Justice Giudice is not an agency head with responsibility for the FWA budget; the insistence that he attend the Committee proceedings for questioning is demeaning to an office responsible for quasi-judicial functions that are its highest responsibility. The IRS properly in my view submitted that the Senate should not require his Honour's attendance. The dismissive and ill informed manner with which members of the committee examined Justice Giudice reflects a lack of respect for the FWA as an institution. Such disrespect is manifest from Senator Abetz's utterances in other forums.

[30] With deep respect, after reading the transcript of the Senate Estimates hearing of Justice Giudice, I was left wondering. It seems ignorance of the law and the relevant legislative scheme is no longer an affliction; it has become a Parliamentary privilege. Certainly, from the evidence on transcript, Mr Abbott ought not go to Senator Abetz for advice about how to access a downloadable application for a take-home pay order from the FWA website. The Senator was not alone in his inability to distinguish between the agencies that make up the institutions of the national system. But his and the general bewilderment should demonstrate to Ms Gillard and Mr Rudd that if Fair Work Australia is the nomenclatural answer, it must have been a very silly question.

[31] Some sort of good might yet be extracted from the Estimate Committee's extraordinary insistence on interrogating the statutory officeholder responsible for leading the institution charged to act as independent umpire in a quasi-judicial manner. The transcript of the February 2010 hearing and whatever sequel there is to it could be used as the basis for scholarly assignments testing industrial relations literacy. The IRS or another suitable academic agency might also use them to excite better understanding of the processes of Senatorial legislators. A more systematic exposure of such antic proceedings might be reciprocally instructive.

[32] Senator Abetz spoke in April to the HR Nicholls Society: *Fairness for All-through commonsense and flexibility.*^{ix} That speech might stir a broader interest across the IRS around a point that, not unsurprisingly, did not find its way into the speech made to the IRS Conference a month later. Senator Abetz asserted that organisations of employers, AIG and ACCI among them, *ignore the best interests of the 80% of forgotten people, the business people who do not join a particular organisation.* He continued that it would be his challenge to ensure that the Coalition is the voice of those forgotten people in the workplace relations' space. It would follow that it is not only employee organisations that are within the implicit target of the promise to tweak the national system to *restore the focus of our workplace laws to the workers and those that employ them.*^x

[33] Thus far however nothing more has been seen of a tweaking agenda. A relative silence has settled over workplace relations issues; just as it did during the campaign for the election in 2004 after published dismissals of any intent to do more than was disclosed in the Election policy. The ACTU is almost alone in attempting to find audience for apprehensions about a re-emergence of the reduced protections and lower safety net associated with WorkChoices. But Mr Abbott seems not to be answering his mail. The ACTU Secretary Jeff Lawrence first wrote to Mr Abbott on 19 July asserting *there is enormous scope for a Liberal Government to alter the operation of the Fair Work Act by regulation.* The letter demonstrated such potential by referring to at least 198 sections of the relevant legislation that would enable the Minister to enact changes by regulation. It contended that changes to the regulations could effectively bring back the worst aspects of WorkChoices and reduce

rights at work. The letter ended with a variation on the *when will you stop beating your wife* theme. Mr Lawrence asked Mr Abbott to desist from making further deceptive comments on workplace relations and attempting to mislead the Australian public over his real intentions. And looked forward to an urgent reply.

[34] Mr Lawrence followed up on 4 August to demand answers to *a number of unanswered questions about the Liberal's workplace relations policies*. He asked Mr Abbott *to rule out* changes to specific existing protections relating to unfair dismissal, minimum standards redundancy pay and individual contracts. The detail of the questions relates to specifics that are plausibly indeed probably threatened should a Coalition government be elected. There is good reason to believe that the Coalition will “tweak” the national system *to take the unfair dismissal monkey off the back of small business, to make transitional employment agreements less transitional and individual flexibility agreements more flexible*. Even so Mr Lawrence loaded several questions in a way that makes it likely that Mr Abbott will provide no oxygen to the ACTU's attempt to resuscitate voting workers sensitivity to the Coalition's vision of workplace relations. For instance Mr Lawrence wanted to know: *Do you now repudiate your abuse of government funding to impose the Howard Government's industrial relations agenda?*

[35] There is other skirmishing by the usual suspects around the fringes of the electoral campaigns. An ACCI survey of almost 1200 respondents reported that workplace relations and regulations was only moderately important as a reform priority; medium and large businesses being more concerned than small business.

[36] The retail industry employer organisations and a line of barrackers in the commentariat are making much of the plight of secondary school students. Flexible use of them is not accommodated by the three-hour minimum per engagement or start for casuals and part-time employees prescribed in the relevant modern award. A schoolboy in Terang, Victoria, has become an icon. The one-size-fits-all character of the relevant provisions in the modern award has been lampooned.

[37] The use of the instance highlights the minefield generated by advocacy of the kind in an electoral context. What was good for the ACTU goose is now good for the ganders of the retail trade. There are many ironies about details of the case and the

tendentious point taking associated with it. Among them is the circumstance that provision to allow for a two hour minimum shift for part-time work in certain exceptional circumstances was included in principles established for part-time work agreements by the New South Wales Industrial Relations Commission in the State Part-Time Work Case 1998.^{xi} Of course that precedent does not stretch to Victoria or to the modern award. But its existence suggests that there may be a more rational way of resolving conflicting interests involved. It should be of concern to the IRS that the case is a symptom of a well-evolved process. Since about 1991 public invective against the independent umpire, usually backed by public or private political lobbying of the Minister to take up a position, has become a conditioned response by representative bodies seeking to overcome the effect of decisions by the tribunal. Is it altogether too late to ask whether the representative bodies concerned ever give consideration to the resultant damage to the tribunal, to the public perception of it, and eventually to the representative bodies themselves as the political pendulum swings?

[38] The AIG and the AMMA are among the representative organisations that have been vocal about their respective election time agendas for legislative change. They do not appear to have attracted much of an audience. Overall, the outlook from an IRS perspective is that the outcome of the election is unlikely to change the major settings of the national system. We can expect more of the same if the ALP holds office. If the Coalition succeeds, it seems likely there will be an immediate resumption of attempts to reduce union voice and roles in workplaces and an expansion of individual employee agreement making arrangements. In time, some form of shaking out the safety net and other protections to minimise restrictions on managerial flexibility should be expected.

ⁱ R v Kirby: Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

ⁱⁱ R.J.L. Hawke: *Industrial Relations in Australia: a Turbulent Past, an Uncertain Future*. The Journal of Industrial Relations: September 1993: Vol 35 No.3 at 475

ⁱⁱⁱ Boland J: *In Defence of Industrial Tribunals*. May 2010 IRS of NSW 50th Annual Conference, Kiama.

^{iv} Hawke: op cit, at 481; Laffer K. (1958) *Compulsory Arbitration and Collective Bargaining*, Journal of Industrial Relations, vol. 4 no. 2 (May), at 417-433.

^v *State of New South Wales v Commonwealth of Australia* [2006] HCA 52; (2006) 81 ALJR 34.

^{vi} FWA Full Bench:

^{vii} Professor Ron McCallum: *Australian Labour Law and the Rudd Vision: Some Observations* (16 May 2008) Paper to the Industrial Relations Society of NSW 48th Annual Conference.

^{viii} Senate Hansard: Education, Employment and Workplace Relations Legislation Committee estimates hearing: 10 February 2010 at 77- 97

^{ix} Available at <http://abetz.com.au>

^x Senator Abetz: *Address to the New South Wales Industrial Relations Society* 14 May 2010 from abetz.com.au

^{xi} State Part-Time Work Case [1998] NSW IR C142 (26 March 1998)