

H.R. NICHOLLS
ANNUAL CONFERENCE

Wednesday 8 February 2017

The Trust, Melbourne

“The Importance of Ideas “

Peter Costello

Thank you for inviting me to address your annual conference. It is good to be back.

The historical record will show that I was one of four signatories to a letter which invited people to a seminar, to establish the H.R. Nicholls Society, here in Melbourne in February 1986. As such I can claim to be a founder of the Society. But in fact, as is well known, the real founder of the Society was the person who thought up the idea, investigated and seized upon the story of H.R. Nicholls, rounded up the signatories to the letter and assembled all those who wrote and delivered papers at that Conference. They were subsequently printed in the first book of the Society: "Arbitration in Contempt".

The genius behind that was Ray Evans. Ray died in 2014. I have not had the opportunity to pay him the respect he deserves at a meeting of the Society so I hope you will forgive me if I take a brief moment to do so.

Ray Evans was an "ideas" man. To spend time with Ray was to have the opportunity to discourse over fascinating subjects of wide breadth. Usually our conversation would be peppered with quotes from Shakespeare and the Bible, and cover the origins of western civilisation, the industrial revolution, the modern economy, the free market system, theological controversy and, if they were at all interesting, the politics of the current day. He was eclectic in his interests.

Ray trained and worked as an Engineer and for a while was an academic, Deputy Dean in the then School of Engineering at Deakin University. As a student, he had been President of the Melbourne University ALP Club and later a union delegate to ALP conferences. He supported Captain Sam Benson, an ALP member of the House of Representatives, who was expelled over his support for the war in Vietnam and successfully re-elected as an independent in 1966. By this action Ray severed his association with the ALP but he kept up with a great number of people who were on the right of Labor or close to the DLP who had been educated at Melbourne University in the late 50's early 60s, people like Gerard Henderson, Brian Buckley, and Paddy O'Brien. At some point he had an epiphany and embraced free market economics. By the early 1980s he was working on public affairs at Western Mining Corporation alongside CEO Hugh Morgan.

I think I came into his orbit through Hugh and Western Mining and from our first meeting it was as if we had resumed a conversation that had started years before. We were both active supporters of the Cold war effort against communism, keenly aware of the misuse of union power, took an interest in philosophy, and knew the hymns of the Methodist Church! We swapped books/articles/cuttings on a regular basis. One of the things Ray had, that I didn't, was an expense account which allowed us to settle some of our discussions over very long lunches.

It was one of the formative relationships of my life and I will always be grateful for his friendship.

Ray's full name was Neville Ray Evans. He was born in 1939 and named after the then British Prime Minister, Neville Chamberlain. Chamberlain was the Hero of Munich – "Peace in our Time". Although he was Prime Minister when Britain went to war over Poland, by 1940

Chamberlain and the men of Munich were very much on the nose. Churchill had become Prime Minister, and the family dropped the “Neville” part using only his middle name - Ray. Whether that was the cause, I think Ray had a horror of appeasement throughout his whole life. He believed in fighting on principle whatever the consequences, and ever the more so if the cause was hopeless. One of his most endearing features was a sunny optimism.

Ray was fond of quoting one of his Communist opponents who after the Communist Party was outlawed, its assets seized, and many of its leaders rounded up under Menzies’ Communist Party Dissolution Act, famously declared: “Never mind comrades. Worse is better”.

You have to understand the Marxist concept of dialectal materialism to know what he meant. Most of us who were educated in the 1970s could, a skill we developed from the tedious lectures on Marxist theory that were given to us by our University Professors.

If Ray were here tonight surveying the state of Australian industrial relations legislation I think he would declaim with great glee: “Never mind comrades. Worse is better”.

Who would have thought that an obscure editor of The Hobart Mercury would be resurrected and made famous 75 years after his death, and his name preserved to this day? Who would have thought it? Well Ray Evans would have thought it.

H.R. Nicholls was a colourful character. In his early days he was very much a man of the left. He was a miner at the Eureka Stockade but left shortly before the firing began. As you know he wrote an editorial criticising Henry Bournes Higgins, a Judge of the High Court, and a Judge of the Court of Conciliation and Arbitration. Higgins was the father of Australia’s regulated system of industrial relations. He regarded this as his crowning achievement and was hyper-sensitive to criticism. He arranged for Contempt of Court proceedings to be bought against Nicholls with the object of sending him to jail. His fellow Judges in the High Court didn’t think much of the idea and gave the Contempt application short shrift.

What makes Nicholls interesting is that he recognised that self-important characters parading themselves as guardians of the public interest in the Arbitration Court needed a brush with reality, so he decided to take them down a peg or two. He did it in a humorous way. The pompous can never stand humour. Higgins took the bait, and in the end looked even sillier when his fellow High Court Judges refused to back him. It was an important victory for freedom of speech, but also for the idea that all institutions in a democratic society should be subject to robust scrutiny. This includes Fair Work Commissioners, High Court Judges, Reserve Bank Governors, Treasury officials as well as our politicians. Nicholls displayed how conservative criticism is best done with a glint in the eye and a touch of humour. One of the things that draws people to the conservative side of politics is the pomposity of the left.

In political judgements, if I think I am right, naturally I think those of opposing views are wrong. But we should always bear in mind that the possibility is the reverse. The ideologues of the left however, do not just think their opponents are wrong they think they are morally repugnant. They believe that since their views are morally superior it must be moral inferiority that animates conservative views – a desire to exploit the weak or make money at

the expense of others. They do not for a moment consider conservative views might be genuinely or rationally held. To them, there is only the moral and the immoral. That is why they are so liable to want to close down debate. In their view it is not a question of arguing out an issue and coming to a considered conclusion – it is a question of eliminating immoral views which will only lead to immoral (conservative) conduct.

The run-in between the mischievous H.R. Nicholls and His Honour, H.B. Higgins was really a stalking horse to take down the oh-so-self-important-and-economically-illiterate priests and priestesses of Australia's industrial relations orthodoxy. Ray went on to do the same in a host of other causes. When he took issue with global warming he used language that sent his opponents apoplectic – for example, the pamphlet he wrote entitled "Thank God for Carbon". The objectives of this Society are four-fold:-

1. To promote discussion about the operation of industrial relations in Australia including the system of determining wages and other conditions of employment.
2. To promote the rule of law with respect to employers and employee organisations alike.
3. To promote reform of the current wage-fixing system.
4. To support the necessity for labour relations to be conducted in such a way as to promote economic development in Australia.

Let me go to each separately. First, I have always thought that the strength of this group has been its ability to document particular industrial disputes and to promote discussion about whether the outcomes are ones we would want or expect from a well-designed industrial relations system. As we know there is quite a body of literature that has been published by the Society, (in my time covering the Dollar Sweets Story, Mudginberri, the Wide Comb dispute) that has promoted discussion about how the industrial relations system operates.

The second objective of the Society is to promote the rule of law with respect to employers and employee organisations alike.

The report of the Royal Commission into Trade Unions and Corruption (The Heydon Commission), has informed us on how well the rule of law is going in relation to employee organisations. Corruption flourishes and indeed there are certain industries – most notably the commercial construction industry – that are largely lawless. Not much has changed in that industry since my first introduction to it – working on the BLF Deregistration case of 1981. There have been several deregistration cases and Royal Commissions since but lo and behold the CFMEU is still practising the same conduct on building sites as it was 35 years ago!

One of the things that has changed over the last 30 years is the content of the laws which apply to industrial action. They have been significantly watered down. Back in 1986 the Trade Practices Act prohibited secondary boycotts under Section 45D and 45E. These provisions have been watered down so that proscribed boycott activity is allowable if the dominant purpose of the conduct relates to working conditions. Of course if the required procedures are followed in negotiation for a proposed enterprise agreement industrial action may be

“protected”. This means unions are given civil immunity from the law. The law is suspended for the time in relation to them. Whether this promotes the rule of law is an interesting question. It means disputes can run longer and be more damaging.

Recent indications are that the return of the Australian Building and Construction Commission might be up and operating sooner than previously expected. That would be welcome.

The third objective is to promote reform of a current wage fixing system. In this I think the Nicholls Society was, for a time, successful. In 1986 the country was governed by centralised wage fixing laid out in national wage cases. In the early 1990s the Keating Government engaged in industrial relations reform, allowing the opportunity for an enterprise bargaining, to promote a more de-centralised agreement making process rather than the industry-wide-award system. Following that from 1996 the Coalition Government introduced Australian Workplace Agreements which would allow individual agreements subject to statutory minima. Later the Coalition introduced the Work Choices package which lessened the statutory requirements further. The system was more flexible, but paradoxically enshrined by central, Commonwealth legislation.

The election of the Rudd Labor Government meant all that could be reversed and it was. It took wage fixing arrangements back to their pre-Keating period, or perhaps the Keating period of 1993 if you equate an EBA with the enterprise bargaining system of 1993. My point here is that comparing the system now to that of 25 years ago, shows little change in wage fixing arrangements.

This does not mean that the labour market is as regulated today as it was 25 or 30 years ago. The big difference is that economic forces have bypassed unionism and made it irrelevant in large swathes of the economy. In 1986 the rate of unionisation was 46%. Today it is below 15%. There are still highly unionised and therefore highly regulated industries - industries like commercial construction, supermarket retailing, and commercial transport. But the real growth in employment in Australia has been in service industries, franchising, IT - areas that are not unionised and therefore less regulated by the industrial relations arrangements. Unions are more politically powerful today but they are economically much weaker. Unionism is a feature of the 20th Century. It will not be a feature of the 21st Century.

Which brings me to the last of the objectives of the Society:

“To support the necessity for labour reforms to be conducted in such a way as to promote economic development in Australia”.

Economic forces at work in Australia today have resulted in employment growing in non-unionised and lightly regulated areas. If these areas were unionised or regulated they would not prosper because they would be out of step with the rest of the world. For example, unionism does not exist in the competitive world of the internet start-ups. Internet entrepreneurs are not the kind of people to demand award conditions, fixed hours of work, penalty rates and the like.

Where the industrial regulator is still powerful in Australia, and rates of unionisation still high, is in those industries which are not trade exposed, that is not subject to import competition. This is the reason why the construction industry can maintain heavy unionisation and unproductive practices. You can't import a finished commercial high-rise building if a domestically produced one proves too expensive. The construction industry is not exposed to international competition. Provided the industry can maintain uniformly uncompetitive arrangements on all the different players in the domestic industry, it is safe because it cannot face any disruption from external competition.

This has also been the case in Supermarket and Department store retailing although there is import competition starting to come from companies like Aldi. It will be very interesting to see how the unionised and regulated supermarkets – Coles and Woolworths respond to this challenge.

I don't feel that I need to comment much on whether the current Industrial Relations system promotes economic development because in the last two weeks a quite comprehensive analysis of that has been done by a former Vice President of the Fair Work Commission, Graeme Watson. Late last month Watson resigned from the Commission by a direct letter to the Governor-General and a separate letter to the Employment Minister, Michaelia Cash in which he said "I do not consider that the system provides a framework for cooperative productive work place relations and do not consider it promotes economic prosperity or social conclusion". "Nor do I considerate it be described as balanced".

Watson is no radical and having spent the whole of his working life in the industrial relations system he is in a position to know. It is a measure of frustration that he took the action that he did. He wanted to use his resignation as an opportunity to highlight flaws of the system. He gave it his best shake. He thought, like Samson in the Bible, he would shake the pillars of the system and bring it down on the heads of the Philistines.

It was an unprecedented action.

But the most notable reaction was the silence.

Judith Sloan, who understands the industrial relations system well, wrote a very good analysis in The Australian. Other than that I have seen little media comment. As far as I have been able to ascertain there has been no public statement from the Minister or from other more senior members of the Government responding to the Watson criticism and resignation.

Here we have a situation where one of the most senior members of an expensive and powerful Government body, an insider, has blown the whistle on the failure on that organisation to serve the purposes for which it exists, in particular its failure to promote economic prosperity. No member of the Government apparently feels the need to respond.

Australia is limping along at the moment with a Budget deep in deficit, low productivity growth, with higher unemployment than we would like and apparently there is no great concern that the Institution at the heart of wage setting might be undermining our economic prosperity.

Does the Government agree with the Watson analysis? We do not know.

There are two alternatives. One is that the Government believes that the system is working well and needs no change. The second is the Government knows the system is not working well but since it has no intention of changing it, it sees no point in admitting it.

To change things requires a diagnosis of the problem and then hard work to cultivate an appetite to change it.

We all know there is a bi-partisan agreement today on the fact that there should be no change to the Rudd-Gillard wage-fixing apparatus. It is even something that unites both the liberal and the conservative wings of the current Government.

This Country puts little focus on enhancing productivity and puts little effort into structural reform. One of the criticisms Kevin Rudd made of me when he was posing as an “economic conservative” in the lead-up to the 2007 election was that our Government had lost energy and the rate of growth in productivity was falling. I predicted his election would not improve it. It did not. In fact it killed productivity growth. But nonetheless back in the early 2000s it was thought that slow productivity growth was an indictment on an incumbent Government, - by both sides of politics.

These days there is little debate about structural reform or micro-economic reform. We do not focus on enhancing the drivers of productivity growth.

This is where the people of “ideas” become important. The political class needs people who can think and explain ideas to it, who can challenge it and nourish those who want to do something about it.

At the moment we are in a populist political cycle. Somebody needs to keep the flame alive for policy because we will have to come back to these issues – how to make our economy more productive, how to improve economic growth, how to develop economic prosperity. Our political class is not focussed on this at the moment, but if things continue as they are it will be forced, by crisis, to re-focus on it. Someone, somewhere, should be doing the work to be ready when they finally realise they have to do something.