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FAIR WORK COMMISSION

SIR RICHARD KIRBY ARCHIVES

MELBOURNE, 19 NOVEMBER 2024

RECORDS, ARCHIVES AND THE LONG
JOURNEY TO FAIR WORKING
ENTITLEMENTS IN AUSTRALIA

The Hon. Michael Kirby AC CMG

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DECISION-MAKERS AND THEIR ARCHIVES

People and communities eventually progress to the point that they realise the need for institutions that will determine disputes between individuals, collectives and governments. When this happens, it does not take long for them to establish tribunals and courts. Of their nature, such decision-making bodies normally require a degree of permanency, both institutional and individual.

In the Western tradition, such developments can be traced back to the decision-makers of ancient Egypt, Babylon, the Hebrews, Greeks and Romans. They wanted to give a measure of predictability to life and to replace unbridled power and repeated conflict with rules and law. The creation of decision-making personnel, tribunals and courts soon

* Text for an address at the Sir Richard Kirby Archives of the Fair Work Commission, Melbourne, 19 November 2024.

** Deputy President of the Australian Conciliation and Arbitration Commission (1 January 1975 – 23 September 1984); Chairman of the Australian Law Reform Commission (1975-84); Judge of the Federal Court of Australia (1983-4); President of the New South Wales Court of Appeal (1984-96); President of the Court of Appeal of Solomon Islands (1995-6); and Justice of the High Court of Australia (1996-2009).

followed. To ensure that they operated successfully, they secured respected personnel who set about recording their decisions.

Consistency and convenience inevitably resulted in the production of records to settle any current and future controversies and to help guide future conduct. Initially, this was done on stone; later on papyrus; subsequently on cloth; eventually on paper; and ultimately in digital records. Such records were selected and stored. They were needed to identify, for subsequent proof, how earlier contests had settled the rights of particular parties when still relevant. Later still, such records were extrapolated to encourage consistency and to guide future decision-makers in dealing with other parties and like issues. The experience of humanity was that conflicts would keep happening. Records were needed to help prevent or quell them.

The legal system of Australia can be traced to the Roman, Anglo-Saxon, and Norman rulers of England. King Henry II of England reigned from 1154 to 1189. With the aid of his Norman bishops and clerks, he began the creation of royal courts. The oldest of these were the coroners' courts, which doubtless had a good system of records. However, not far behind was the Court of Chancery, designed to relieve the monarch, personally, of the tedium of deciding individual cases. The records of that court were kept as "rolls". The keeper of those records was, from at least 1286, designated the "Master of the Rolls". This office survives to this day and is now second only to the Lord Chief Justice of England. There is a similar office in republic of France described as the Keeper of the Seal. The officeholders had several peculiar functions: including as recorders of Jewish converts to Christianity. In England, the collection of records much

later became the Public Records Office. This was a genesis of the British National Archives.¹

All advanced countries have archives, both for individual and communal purposes. Many have a central core of records established and maintained by government. The institutions of government also have their own record system that contributes to the national collection. Such is the case of the archives of national courts and tribunals, of which the archives of the Fair Work Commission (FWC) are amongst the most important in Australia.

I was one of three somewhat unusual presidential appointees who joined the national industrial relations tribunal (then named the Australian Conciliation and Arbitration Commission) pursuant to decisions of the Whitlam Government (1972-5). We were: The Hon. Elizabeth Evatt;² the Hon. Mary Gaudron;³ and myself.⁴ We each went on to serve in other national and international bodies. But we were each proud of our appointment to the Arbitration Commission. Mary Gaudron repeatedly asserted that it was “more fun” than her other distinguished accomplishments. She had a distinctive way of making hard work in hearings in abattoirs “fun”.

Each of us left behind an archive in the national industrial relations tribunal. That body reached back to the original Commonwealth Court of

¹ Records of the Master of the Rolls and the Rolls (Chapel) Office, 21 October 2020 at the Wayback Machine, accessed 21 October 2020, National Archives of the United Kingdom.

² Hon. Elizabeth Evatt AC, appointed Deputy President (DP) of the Arbitration Commission (1973-76); Chief Judge, Family Court of Australia (1976-88); Chancellor, University of Newcastle (1988-94).

³ Hon. Mary Gaudron KC, was DP of the Arbitration Commission (1974-79); Solicitor-General (NSW) 1981-87); and Justice of the High Court of Australia (1987-2003).

⁴ See the writer’s appointments at ** above.

Conciliation and Arbitration.⁵ My appointment coincided with that of Dr Joseph Isaac.⁶ Like other presidential members and commissioners, he was an outstanding officer of the Commonwealth. He had a rich knowledge of industrial relations law. He was also an erudite and civilised university man. It is therefore unsurprising that he was called upon to launch the institutional archives of the current iteration of the national work that tribunal FWC, that are now being renewed.⁷

An institutional archive for a body such as the FWC is necessarily something more than an “excellent library on industrial relations and related matters”. That is a separate and different institution. Of course, over the years, such a tribunal accumulates a wide range of materials important to practitioners and scholars. However;⁸

“[The archives] are more selective and narrowly focused in their collection and more active in their dedication to filling the gaps in it. In this case, although located within earshot of the Commission’s library, they identify themselves as a specialised collection, devoted to preserving documents, books, photographs and other memorabilia together in one place, and attempting to give as complete an account as possible of the life of a unique institution. Most archives are secreted in basements or warehouses, away from

⁵ Established by the Conciliation and *Arbitration Act 1904* (Cth) s6. The original Commonwealth Court of Conciliation & Arbitration operated 1904-1956; the Commonwealth Conciliation and Arbitration Commission followed in 1956-73; the Australian Conciliation and Arbitration Commission (1973-88); The Australian Industrial Relations Commission (1989 -2006); The Industrial Relations Court of Australian (1994-2018) the Australian Fair Pay Commission (2006-2009); Fair Work Australia (FWA) (2009-2013); Fair Work Commission (FWC) (2013 -). The Fair Work Commission is established under the *Fair Work Act* (2009) (Cth).

⁶ Professor the Hon. Joseph E. Isaac AO) (Deputy President of the Australian Conciliation and Arbitration Commission (1974-87).

⁷ J.E. Isaac, “Opening of the Sir Richard Kirby Archives” (25 October 2004) (AIRC).

⁸ Isaac, *op cit*.

the public gaze. These archives are different; they are more like a museum, although, I hasten to add, not of an institution long gone, but a continuing lively body.”

COURT RECORDS AND THEIR ARCHIVES

Unlike the United Kingdom, the United States courts did not have a record-keeper to be the permanent archivist of the federal judicial branch. Each branch or agency was responsible for maintaining their own documents. Sometimes, this resulted in the destruction or loss of records. A centralised federal archives establishment was created in Washington in 1934 to afford it independence and funding. The *Records Administration Act* eventually gave birth to the Federal Archives. In part, this initiative with the result of the destruction by fire, in December 1978, of a huge collection of newsreels that included some relating to the courts. That loss was a huge blow to their institutional history.

A special volume was published in 1992 as the *Oxford Companion to the Supreme Court of the United States*.⁹ No topic or sub-topic on “archives” or “records” was included in it. Because of the great importance and huge interest in the US Supreme Court, it can be assumed that the internal records arrangements make provision for the Court’s archives. A facility in the Supreme Court building makes available for sale much non-original memorabilia. A court historical society focuses on the history of the Court and its doctrinal development of constitutional and other legal principles.¹⁰

⁹ K.L. Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, (OUP), New York, 1992.

¹⁰ *Ibid* “History of the Court”, 373-404.

A certain scepticism about the lessons being derived from the history of the Court is evident in the following observation written 20 years ago:¹¹

“When the litigation is felt to be the central means for achieving rights, lawyers – mostly white and male – tend to be in charge; they tend to define the problem and set the parameters.”

The keeping of federal records by the National Archives of the United States presented some difficulties for maintaining historical records in fraught political circumstances. President Donald Trump, in his first term, “would often rip, flush, and otherwise discard records which would then have to be reconstructed and reclaimed by White House and NARA archivists. Additionally, according to many former staff, [President Trump] would keep certain records that otherwise should be returned.” He treated them as his own.¹²

It can be hoped that the archives of the independent branch of government are usually being kept more scrupulously: both for access and display (where that is appropriate) and for the historical record (in other cases). Recent events in the United States have underlined the importance of integrity in archival record-keeping and access.

In Australia, an equivalent encyclopaedic text on the High Court of Australia does have a section, written by the High Court’s then Chief Executive, on the subject of “Archives” of the court.¹³ This records:

¹¹ Ibid, 404.

¹² *Politico*, 10 June 2020.

¹³ A.J. Blackshield, M. Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia*, OUP, Melbourne, 2001. See C. Doogan, “Archives”, *ibid*, 30.

“The archives of the Court consist of its accumulated documents and records. The collection begins in 1903 and includes Registry files for every case that the court has considered, files relating to the administration of the court, and a variety of judges’ notebooks left with the court by some past Justices.”

In early 1994, the High Court of Australia recruited a consultancy firm to conduct a survey of the records maintained by the Court and to provide a strategic plan for their management. Recommendations called for the Court to “employ additional staff and incur additional expenditure. This did not occur.”

The huge backlog of paper records was such that the High Court building in Canberra was soon running out of available space and capacity to manage its archives. A records disposition program was established in conjunction with the Australian Archives Authority. The records from 1903 to 1930 were transferred to storage in the Canberra suburb of Mitchell. Other records remain in the building in Canberra. However, [the Court] “lacks the resources to comprehensively organise, index and manage them.” The Chief Executive observed:¹⁴

“A great challenge will confront future historians who wish to use the records in their research. Over time, records not immediately needed by the Court will be progressively transferred to Australian Archives.”

¹⁴ Loc. cit.

When assumptions about the entitlement of Archives to reject applications under Freedom of Information legislation were revealed in the “Palace Papers” litigation,¹⁵ requests for, or demands upon, the confidentiality of some official court papers (including by extension some materials produced under compulsion in litigation) present challenges not previously authoritatively determined.

Most observers of the Palace Papers litigation, relating to correspondence between the Governor-General (Sir John Kerr) and various High Court Judges over the dismissal of the Whitlam Government in 1975, accepted and praised the ultimate approach of the High Court in that matter when it struck the balance between the protection of legitimate confidentiality and privacy (on the one hand) and access to matters of legitimate public interest (on the other).¹⁶ That litigation and its outcome truly demonstrate the way Australian archival policy tends to err on the side of favouring the public interest over the occasional desire of depositors for privacy. This is surely how it should be.

A further illustration of this ongoing controversy, relevant to public access and its denial, can be seen in the “Dixon diaries” that were recorded by Justice [later Chief Justice] Sir Owen Dixon during his service on the High Court of Australia. Dixon kept detailed records, written in “minute handwriting and great detail”.¹⁷ They contain highly personal (and sometimes sharply critical) observations upon judicial colleagues and others. Also

¹⁵ *Hocking v Director-General, National Archives of Australia* (2020) 271 CLR 1; J. Hocking, “The Dismissal Dossier, The Palace Connection, Everything you were never meant to know about November 1975” (Melbourne Uni Press, 2017)

¹⁶ M.D. Kirby, “250 Years of the Crown in Australia: From James Cook to the Palace Papers (1770-2020)” (2021) 95 ALJ 520 at 529-537. Cf G. Roberston, “The Crown in Australia: From James Cook to Charles III, Another Perspective” (2021) 95 ALR 539 at 548-550; M.D. Kirby, “A Response to Geoffrey Robertson QC” (2021) 95 ALR 567 at 568.

¹⁷ P. Ayers, “Dixon Diaries” in *Oxford Companion to the High Court of Australia*, above n.12, 222-224.

upon family members and close friends. Sir Owen Dixon refused a request, sent to him by the National Librarian in Canberra, shortly before his death, reporting that his predecessor, Chief Justice Latham's private papers had been deposited with the National Librarian. The Librarian asked Dixon to deposit his archive. He refused and went on to express his concern that his private letters to Latham could be revealed by Latham's action "to any prying stranger who might ask to see them". Dixon's biographer comments that he would "almost certainly have destroyed the diaries had he believed they would ever end up [in public hands]".

More recently, an important section of the Dixon diaries was published, covering the years April 1942 to September 1944, when Dixon served as Head of Mission (Ambassador) to the United States of America, a close ally to Australia in the Second World War. His entries are certainly part of valuable historical records. They have now been published, unredacted. Their publication reinforces knowledge of the serious conflicts between Dixon and his former judicial colleagues, especially H.V. Evatt.¹⁸ These records (and others concerning Dixon's service for the United Nations on the national assignment of the disputed territory of Kashmir) indicate that some care, but with limited controls, need to be maintained, at least for a time, in respect of some archival records of public officers. This is a subject that FWC will need to determine in the first instance, if access to the Sir Richard Kirby Archives becomes more feasible and insistent.

¹⁸ Right Hon. H.V. Evatt KC, Justice of the High Court of Australia (1930-40); Member of the Australian Parliament, Minister for External Affairs and Federal Attorney-General (1941-49); Chief Justice of NSW (1960-63).

THE VITAL IMPORTANCE OF FWC ARCHIVES

Having laid the ground by these remarks for addressing the inevitable character of official decision-making to settle individual disputes and to lay down principles for a community; and illustrating the opportunities and some potential dangers of uncontrolled archival openness, I now wish to return to the Sir Richard Kirby Archives and their importance for this occasion. And to remember the undoubted importance of the Fair Work Commission for Australian citizens, historians and litigants before the Commission. Specifically, it is appropriate to consider this new exhibition drawing on the Archives and where it should go next. In unveiling the priceless historical records of the institutions that have successively served the Australian people, since the first of these institutions was created by the Federal Parliament in 1904, we need to reflect upon what is disclosed; and what it tells us about Australian history.

Commenting in 2002 on the fact that it had taken almost 100 years to establish the archives of the Commission, Deputy President Isaac asked what this time lapse said;

“... about one of the most important institutions in this country that it should have taken [so long] for it to establish its archives. Undue modesty? An oversight? Undue pressure to attend to more immediate tasks? A lack of confidence in itself? Intimidated by eminent soothsayers predicting its impending demise in almost every decade?”¹⁹

¹⁹ J.E. Isaac, “Opening of the Sir Richard Kirby Archives” above n.7, at 1.

There was absolutely no reason for modesty a lack of self-confidence in the FWC or its predecessors, then or now. From the start, it was one of the most important tribunals of the Australian nation. As in the United States, only one court was expressly envisaged by the Constitution itself: namely, in Australia, the High Court of Australia.²⁰ Subject to limitations, the role of the Judicial Committee of the Privy Council was envisaged; but could be diminished by the Federal Parliament, as indeed it was.²¹ State Supreme Courts were also envisaged;²² as was an Inter-State Commission, an unfulfilled idea.²³ However, apart from the High Court of Australia, only one other tribunal was necessarily envisaged and quickly created.²⁴ Under the Constitution, federal legislative power over “industrial disputes” was to be strictly limited to a provision of dispute resolution by the particular process of “conciliation and arbitration”. This machinery or institutional mechanism necessarily involved the creation of a national resolution mechanism. Not by direct general legislation in the subject matter. But by means of an institution determining individual disputes by “conciliation and arbitration”.

It was this express, emphatic and much fought over provision that led me, in the High Court, to reject the mighty shift towards the use of the corporations power in the Australian Constitution to deliver what had emphatically been refused at the time the *Australian Constitution* was negotiated and adopted.²⁵ Only one other Justice of the High Court

²⁰ *Australian Constitution*, s71. See also 72, 73, 75, 76, 77.

²¹ *Australian Constitution*, s74. See also *Privy Council (Limitation of Appeals) Act 1968* (Cth).

²² *Australian Constitution*, s106.

²³ *Australian Constitution*, s103.

²⁴ *Australian Constitution*, s51(xxxv).

²⁵ *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 205-207 [481]-[484] applying *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371 per Dixon CJ, Fullagar, Kitto and Taylor JJ agreeing at 373; Windeyer J agreeing at 377.

(Justice Callinan) agreed with me in invalidating the *Work Choices* legislation. However, the orders of the majority in that decision swept aside a century of intricate law that had been envisaged and applied by the successive federal statutes for laws on conciliation and arbitration. I adhere to my dissenting view. However, reality suggests that it will not be embraced by politicians from either side of the aisle. Or, probably, by the High Court of Australia itself.

Inferentially, in light of the *Work Choices Case*, it would have been possible to create institutions that would have been entirely different from the old commission. But, to the extent that this was attempted, it did not endure. A decision-making evaluative Commission survived. It continues to afford a venue, personnel, motivation and talent to provide “fair work” solutions to industrial disputes or labour or work disputes. Thus, the germ of the institutional idea that lay at the heart of s51(xxxv) of the *Australian Constitution* remains to this day; but in a different receptacle with much more limited powers. Yet a clue to the envisaged continuity can be seen by the simple task of comparing the limited size of the 1904 Act, establishing the Arbitration Court, with legislation that today governs the work of the Fair Work Commission. Labour standards and entitlements still have to be applied. But according to criteria that are less amenable to ethical and evaluative assessment.

When I was young, it would often be a close-run thing to decide which was the more powerful and influential national tribunal operating in Australia: the High Court or the Arbitration Commission? Our principal daily source of national information, the ABC Radio news, was full of reports of the Arbitration Court, and later the Commission. They dealt with the bread and butter issues of the nation. They pushed forward advances

in women's wages and employment rights; the rights of First Nations people in the employment context, until that time so long neglected by the general law.²⁶

As Deputy President Isaac reminded his audience at the launch in 2002, Sir Richard Kirby often said that probably the most important decision he had delivered in his long service was in the 1966 *Cattle Station Industry (Northern Territory) Award* case.²⁷ That is where the Bench of the Arbitration Commission awarded the same wages to Aboriginal as to 'white' stockman. It eliminated an enormous differential between their differentiated wages.²⁸ It took a number of false starts and a further 26 years to elapse before the High Court gathered a majority, and the will, to uphold the equal right to a land title for Australian Aboriginals. For them, land title had been denied by the general law in Australia for more than 150 years.²⁹

In my last decision in the High Court, on the day of my retirement in February 2009, a majority of the Court could not be found to invalidate the Northern Territory Intervention by federal authorities on the ground of the failure to consult the First Nations people before modifying or depriving them of their property rights.³⁰ My decision was to the contrary. I was alone on that occasion. However, the basic principle of equality in dignity

²⁶ J. Scutt, "Affirmative Action and Equal Pay" in *Women and The Law* (LawBook Co, Melbourne, 1990) at 83-91.

²⁷ *Cattle Station Industry (NT) Award* (1966), 113 CAR 651; *Pastoral Industry Award* (1967) 121 CAR 454 at 457-8; *FMWU v EH Lines AG* [1975] AILR ¶ 1010 (Slow Workers Clause). See also *AWU v Director, Department Aboriginal and Islanders Advancement* [1979] AILR ¶ 250.

²⁸ Isaac, above n.7, 5.

²⁹ *Mabo v Queensland [No.2]* (1992), 175 CLR 1 at 42. Also, *Wik Peoples v Queensland* (1996) 197 CLR 269.

³⁰ *Wurridjal v The Commonwealth of Australia (NT Intervention Case)* (2009) 237 CLR 309 at 245-308 [24.5]; and [320].

and rights had been insisted upon in the Arbitration Commission, 43 years earlier.

The last occasion on which an exhibition under the auspices of the Sir Richard Kirby Archives, took place was in 2006 and on the theme of 'Women and the Commission'. The address on that occasion was given by Commissioner Dianne Foggo.

As Commissioner Foggo pointed out, in her remarks, there was some uncertainty about the focus of that second exhibition. Should it be women "in" the Commission? Or should it be the critical role the Commission had played, over decades, to enhance the role and rights of women at work. And to established gains for women workers so as to overcome discrimination between employees based on their gender?³¹ That second exhibition sought to provide representative samples of the role of women in the workforce and the role of the then Australian Industrial Relations Commission in deciding key cases affecting the advancement of rights of women workers to enjoy true equality in pay and conditions.

The first woman to be appointed to judicial office in Australia was the Hon. Justice Roma Mitchell (Supreme Court of South Australia, 1965); Elizabeth Evatt and Mary Gaudron were, as said, appointed to judicial office in the Commission in 1973 and 1974. The first woman to assume the role of President of the Arbitration Commission was Justice Deirdre O'Connor in 1994. In 1990, she had been the first woman appointed a judge of the Federal Court of Australia. By 1994, 30 years after the first

³¹ Commissioner Dianne Foggo AM, "Women and the Commission". Address on the opening of Second Exhibition of the Sir Richard Kirby Archives. It was pointed out that, to the time of that address, after establishment of the original Arbitration Court, only 20 women had been appointed as members of the Court or Commission.

such appointment, 24% of the members of the Commission were women. Interviews with the Hon. Justice Judith Cohen and Commissioner Pauline Griffin, two further “early” members of the Commission, deserve recognition and celebration. As Dianne Foggo emphasised, “both women and men, and the people who have played a part in the deliberations of the Commission” deserve celebration.³²

Part of the struggle for ‘equal pay’ for women workers dates back to the history of women’s trade unionism in the late 19th and early 20th centuries.³³ In the early days, there were many separate women’s trade unions, formed in the 1880s and 1890s. They covered women telegraphists, tailoresses, barmaids, waitresses, laundry workers, general female workers, shop assistants, cooks and pantry maids. Only one of these unions, the telegraphists, survived the serious Depression of the 1890s.

It was easier in those early decades for men to unite and to organise. Not being classed as “bread winners”, women were never eligible for award pay calculated on that hypothesis. They were not entitled to relief work when unemployed. Only one women’s trade union secured registration in 1901, the first year of the *Industrial Arbitration Act (NSW)*. In 1909, five years after the federal Arbitration Court began to function, Annie Golding, a prominent activist, claimed that, while men’s wages and benefits improved after the introduction of compulsory arbitration women’s wages had not.³⁴

³² See M. Thornton, “Affirmative Action, Merit and the Liberal State” (1985) [2] *Australian Journal of Law & Society*, 28-29-30, 31 and 34; Carol O’Donnell and N. Golder, “A Comparative Analysis of Equal Pay in the United States, Britain and Australia” (1986), 3 *Australian Feminist Studies*, 59 at 64-66. See also *National Wage Case* (1983) 291 CAR 3.

³³ *Ibid*, 84.

³⁴ Scutt, above n. 26 at 84.

Not until 1912 did a Judge of the federal Arbitration Court see the wisdom of awarding equal pay to men and women competing for the same work.³⁵ This was Justice Higgins giving his famous reasons in the Commonwealth Arbitration Court in the *Rural Industry Award for Fruit Pickers*. In 1907, in *Ex Parte HV Mackay*,³⁶ (*The Harvester Case*) the same Justice Henry Higgins, in the federal jurisdiction, established the principle that, as a man was obliged to keep a wife and family, his rate of pay should, in any award, take these obligations into account. Whilst this was sometimes progressive, so far as male workers were concerned, it was actually contrary to the equality of women's rights. It failed to acknowledge that women's pay should equally take into account their frequent need to support dependants, where that was the case. It ignored the reality that not all men supported dependants on their wages. And some women did so. Yet, this was a deep differentiation that was to last a very long time. Indeed, the basic principle endured until the 1967 *National Wage Case* adopted a male minimum wage and a "total wage". Yet, even then, this advance still endorsed the notion of the "male breadwinner" rule. But change was on the way.

The 1969 *Equal Pay Case* saw a future Prime Minister, R.J. Hawke, as ACTU advocate, arguing for the elimination of differential pay between women and men's wages. The Commission came part of the way. It enunciated nine principles required to be satisfied in order to apply true "equal pay" in federal awards for women's work of "equal value".³⁷ Still, securing change was difficult because 90% of women in the paid

³⁵ Ibid, 80-86.

³⁶ (1907) 2 CAR 4.

³⁷ (1967) 118 CAR 655. See also (1969) 127 CAR 142.

workforce were in occupations that were predominately female. Using OECD evidence, Mary Gaudron, as advocate, pressed the Commission for further progress on female economic and social justice.³⁸ She chalked up important successes.

There is no doubt that differentiation in the work that was open to most women was highly adverse to the achievement of full equality. The idea of extra pay to men, in order to cover their dependants, was difficult to budge. The project to achieve the change is recounted in the decisions of the successive federal arbitral tribunals. The recent *Stage 3 Aged Care Decision* of the Fair Work Commission and the creative submissions and imagination that went into the compelling writing of that decision, is the inspiration for this opening of a new exhibition on equal pay, that is our task today.

This exhibition will be enhanced by display of the recording of addresses given (and recorded) by some of the leading members of the FWC. The decision to relaunch the Archives of FWC and to organise sound and visual recordings of key players (as well as the conduct of moot hearings and other academic events) to recapture the arduous journey to our current position. All of these are to be welcomed and enthusiastically applauded.

So far as we could discover, Sir Richard Kirby and I were not related. Yet our lives intertwined and often pursued compatible objectives, of justice and equality.³⁹ The Sir Richard Kirby Archives contain a great wealth of

³⁸ Mary Gaudron and Michal Bosworth, "Justice: Australian Women and the Law (1788-1979)" (Hall & Iremonger, Sydney, 1979) 161.

³⁹ M.D. Kirby, "Sir Richard Kirby, Mediation and Industrial Relations Today", Industrial Relations Society of Victoria, unpublished, Melbourne, 20 November 1996.

information and material to retrace the steps on the very long journey that has brought us to the present point in the struggle for employment, justice and equality. Other recent decisions up to the 2022-24 *Aged Care Decisions* show how, under the guise of “traditional” female employment, economic injustice can be disguised and hidden from those who are not alert. It has taken the strongly reasoned decisions of Commission members, encouraged by advocates and refined by challenging arguments, to secure the fundamental objective of true equality in wages for men and women.⁴⁰ Equality for other separate categories of employment is a separate story. This is a long history. The journey is not yet concluded. When the history is told, and illustrated, in exhibitions at FWC as we witness today, they will inspire newcomers to advance still further the never-ending challenge based on fair work principles and entitlements.

If my life had taken a different course (as it quite easily could have done in 1975 or even on 1984) my appointment to the Arbitration Commission in 1975, might have marked out my life’s career and the principal challenges of my professional work.

In the events that occurred, my career ultimately took a different path. However, I have always remembered my origins as an advocate before the Arbitration Commission; my fidelity to the principles of equal dignity and rights of all working people as envisaged by the *Universal Declaration of Human Rights*. Standing up for those principles has not always been the history of Australia’s arbitration bodies and tribunals. However, there

⁴⁰ Marilyn Pittard, “Women and Flexible Work” in Becky Batagol et al (Eds) *The Feminist Legislation Project: Rewriting Laws for Gender-based Justice*, Routledge, London, 291; Commentary by Alexandra Heron, *ibid* 312. See also Rebecca Dickson and Paula Gerber “Increasing Female Participation in Construction: Legislation for Gender Equity”, *ibid*, Chapter 17, 116 ff.

have been many noble achievements along the way. I am sure that there will be more in the future. Instances of reasoned justice demand and encourage the idea that there be more of them. The history of the Australian evolution of arbitral institutions makes it easier for us to display, and demonstrate, past injustices and to move further towards future industrial justice.

The Sir Richard Kirby Archives are not, and should not be, confined to the long saga of women's struggle for equality in the workplace. True, it is a very important chapter in the Australian tradition. But so is the treatment of First Nations people at work. And of other minorities of Australian workers, seeking a fair go in their conditions of work.⁴¹ So far as we both knew, Sir Richard and I were not related. However, perhaps the Archives should accept a new research project to explore whether there is a genetic link. Certainly, there is a strong link of values and ideals.

I honour the Fair Work Commission and its members. I celebrate the Sir Richard Kirby's Archives. There should be more exhibitions by the Archives. They should be on more and completely different topics. Future topics could explore and illustrate instances in the attainment of equality and justice for other particular sub-categories of workers.⁴² Documents

⁴¹ Such as direct or indirect racial discrimination (casual employees); sexual harassment of men and women workers (*Callaghan v Loder* 1983 AILR ¶ 318; denial of basic privacy rights of workers (*Marine and Power Engineers ("The Accolade")* 1976 AILR ¶ 68; rights workers obliged to work in confined spaces (*Ship Carpenters & Joiners Award* (1959) 92 CAR 120 at 132; extension of industrial democracy (1978) 20 JIR 203 (entitlements to maternity and parental leave); provision of protective clothing and equipment; rights of workers subject to dangerous work (*Australia Fertilizers Ltd v AWU* 1983 AILR ¶339; or to exceptionally dirty work, (*John Lysaght Port Kembla Award* 1973 AILR ¶ 237; provision for any isolation and other special disabilities, *BWIU & Telfer* 1976 AILR ¶ 63; hardlying allowances for loss of recreation, air conditioning or other basic essential conditions in work (*"The Abel Tasman"*), (1973) 148 CAR 467; discouragement of the "casualization" of an industry, *Shop Assistant Rates Case* (1957) 56 AR (NSW) 331 at 344, De Baun, J; Provision of Compassionate leave in cases of family bereavement, *Re Commonwealth Hostels* (1962) 100 CAR 231; *Shop Employees (State) Award*, 1977 AILR ¶ 233 and many other instances.

⁴² See M.D. Kirby (Ed. P. Punch) *Industrial Index to Australian Labour Law*, CCH 1983.

and interviews should continue to be collected. Records should continue to be gathered. Every decade presents new challenges. I have no doubt that the Fair Work Commission, within its statute, will rise to the demands of the present and the future. The process of hearings in public, advocacy, debate and evidence will assure that the quest for equal dignity and justice never ceases. And wins further laurels and deserved praise.