THE LOST ART OF INDUSTRIAL ADVOCACY

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In 1883, Henry Charles Cutcliffe wrote the classic work "The Art of Trout Fishing in Rapid Streams". The author used his experience of North Devon streams to expose a system of fishing "founded on certain known principles, of which the different modes of fishing, when considered collectively, constitute the practical art".[1]

The meaning of the expression 'the art of' may also be illustrated by reference to Sun Tzu's "The Art of War" in which he describes the strategy, tactics and techniques of combat.[2]

These illustrations demonstrate that 'the art' of something signifies the existence of a coherent set of practices or principles, even when individual differences may exist in the exponents of that art.

I grant you these examples may not constitute the most orthodox point of reference – that, clearly, being the art of advocacy to which I will turn shortly. Nonetheless, they do constitute useful allusions. First, fly fishing is a metaphor for your CEO's success in overcoming the natural reluctance of a judicial officer to speak on the topic of advocacy - the 'lure' of the opportunity to speak on the topic of the decline of the practice of industrial advocacy was more than enough to catch this judicial Salmoninae, as Mr Ward well knows. The latter reference to Sun Tzu merely permits a brief reminiscence of my time as an industrial advocate in the 1980s.

Much has been written on the art of advocacy. I give but one recent example being the text written by Justice Scalia of the United States Supreme Court who, with Bryan Garner,

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[1] H C Cutcliffe, *The Art of Trout Fishing in Rapid Streams* (Sampson, Low, Marston, Searle and Rivington, 1883) at page vi.

[2] *Sun Tzu On The Art of War* (Lionel Giles, trans, Luzac & Co. 1910).

authored "Making Your Case, the Art of Persuading Judges".[3] There has also been resurgence in the discussion of rhetoric.[4] The literature generally describes the methods, strategies or techniques practiced in the persuasion of courts in the common law system having as its foundation an adversarial system of justice.

The art of advocacy is more than knowing the law; it consists of the art of persuading a court or tribunal, in a given factual and legal context, that the law should be applied in a manner consistent with the case presented by the advocate. As the former principal of the law firm with which I commenced the practice of law, the late Roy F Turner of Turner Freeman Solicitors, advised me in relation to industrial litigation: many will 'learn the notes' but fewer will be able to 'play the melody'.

The universality of the definition of the art of advocacy I have provided, however, conceals that the style, content and perhaps even the very nature of advocacy may vary depending upon the particular circumstances in which the art is exercised such as the nature of the adjudicative body and the legal environment. Thus, the orality with which jury advocacy was renowned may be contrasted to appellate advocacy or even advocacy in modern civil trials in which the written form dominates.[5] Advocacy in judicial proceedings may differ from administrative ones as may the nature of the inquiry before administrative bodies colour the style and content of the advocacy. No less, and perhaps more, is the case, as I will endeavour to expound, with 'industrial advocacy'; a concept which, for the purposes of this paper, will be defined as advocacy before industrial tribunals operating under industrial statutes.

The Establishment of the Art of Industrial Advocacy

The emergence of industrial advocacy as an 'art form', so described, had its genesis in the creation of systems of compulsory conciliation and arbitration during the twentieth century.

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[3] Justice Antonin Scalia and Bryan A. Garner, *Making Your Case, the Art of Persuading Judges (*2008, West).
[4] Justin Gleeson and Ruth Higgins, *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion,* Federation Press 2008).
[5] See the article by Justice Susan Kiefel, "Oral Advocacy - The Last Gasp?" (Speech delivered at the Supreme and Federal Court Judges conference, Canberra, 27 January 2010).

As Bain, Crawford and Mortimer comment in their article "Is Advocacy an Industrial Dinosaur?"[6], "the traditional industrial relations system actively encourages the parties to gravitate towards the centralised tribunal system and advocacy in order to settle industrial issues and matters".[7] Whilst the authors may understate, to some extent, the significance of conciliation within that system, it is no doubt correct to conclude that the system of industrial relations in Australia was built upon the premise of an inherent conflict within the workplace which may be regulated by the rule of law. Arbitration provided a last resort adjudicative system. That system may have taken many forms but the close connection between those historically appointed to administer industrial systems with the general court system, and the earlier interconnection between judicial and non-judicial elements of the system ensured that industrial arbitration bore all of the hallmarks of the adversarial common law court system. In New South Wales that relationship with traditional court-based processes had a particular resonance because the institution established to administer the system was constituted by a superior court of record which, unimpeded by the effect of *Boilermakers,*[8] was conferred both judicial and non-judicial functions, albeit in discrete departments, over its entire 100 year plus history.[9]

This environment was productive of the growth of not only a specialist class of barristers and solicitors having high standing in the field of law and a specialised knowledge of industrial law and industrial relations but a professional class of what might be described as 'industrial advocates' having specialised skills in practice before industrial tribunals honed out of the experience of practice before those bodies and, later in time, by the acquisition of formal training around something resembling a syllabus.

This is the context in which a body of practices, techniques and skills in advocacy emerged in the industrial arena. By 1980, there had been established in South Australia a "Handbook for Industrial Advocates" in consultation with the then President of the South Australian

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[6] L Bain, L Crawford and D Mortimer, "Is Advocacy an Industrial Dinosaur?" (1995) 3, 1 *International Journal of Employment Studies* at 93.
[7] Ibid.
[8] *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254.
[9] See *Industrial Arbitration Act* 1912 : ss 13(1), 48, Part VII, Part VIII.

Industrial Court and Commission, Mr Justice L T Olsson.[10] The authors of the Handbook discussed how there had emerged recognition of "the art" of industrial advocacy and heralded their work as a transition by advocates from learning the craft "under the wing" from more experienced advocates or by trial and error to the development of recorded bodies of learning in the techniques and methods of good industrial advocacy and the emergence of formal system training.[11] Some of you may recall the establishment of the Trade Union Training Authority in 1975 and the Clyde Cameron College in 1977 which featured courses in industrial advocacy.

In 1979, W J Holdsworth wrote the text "Advocacy and Negotiation in Industrial Relations" which may be described as 'a manual on industrial advocacy'.[12] In the period leading up to the production of the Handbook and the text, there occurred a coalescence of much of the learning in industrial law under industrial statutes. This commenced with classic works such as John Robert Nolan and Kenneth Cohen's "Federal and State (NSW) Industrial Laws" in 1948[13] which was reproduced and modified through the works of Charles Patrick Mills and Geoff Sorrell (a later Associate Professor in the Department of Economics at the University of Sydney who specialised in the teaching of industrial law) the last edition of which was published in the late 1970s.[14]

I might interpose to note that, at the time of my introduction to learning industrial advocacy in 1979, I would have been less confident than these authors as to the existence of a coherent work of learning and training in the art of industrial advocacy. My initial instruction came from none other than Charlie Oliver, the former Secretary of the Australian Workers' Union, New South Wales Branch and a powerhouse in the union movement and Labor circles in that era. Having never appeared before an industrial tribunal, I was advised by Mr Oliver that there was an urgent dispute before then Commissioner Johnson over the first strike in the bowling industry in eons. The advice and instructions I received consisted of the following: how long it would take to run to 109 Pitt Street; the art of mastering the

[10] Frank Cawthorne and Bryan Shillabeer, *Handbook for Industrial Advocates*, S.A. Industrial Court 1980.
[11] Ibid p 2.
[12] W J Holdsworth, *Advocacy and Negotiation in Industrial Relations* (Law Book Company Limited, 1979).
[13] John R Nolan and Kenneth A Cohen,. *Federal and State (NSW) Industrial Laws*, (Butterworths, Sydney 1948).
[14] C P Mills and G H Sorrell (eds) *Federal Industrial Law* (Butterworths, 5th ed, 1975).

facts by reading the file whilst in 'full flight' and that I should "take care of things". I was young at the time and managed the first part of the instruction well by something akin to an Olympic 800 metre race. The second part was relatively easy to manage as, upon opening the file, there was absolutely nothing in it. The third part proved a little more difficult. I succeeded in persuading the greenkeepers to return to work, receiving high praise from the Commissioner and even recognition from the experienced employer advocate present. Sadly, Mr Oliver was less impressed – he had spent months convincing greenkeepers to engage in some form of industrial action to prosecute a claim for improved conditions and, as he suggested (more than a little forcefully), there was now no chance of resurrecting their interest.

Changes Affecting the Art of Industrial Advocacy

I should return to my historical account. It is from the starting point of the development of industrial law and advocacy up to the 1980s that discussion about the loss of the art of industrial advocacy or even the loss of industrial advocacy, *per se*, typically proceeds. Thus, Bain *et al* commented that "since 1987, the emphasis on industrial relations has shifted away from the process of advocacy and the underlying adversarial premise towards a more co-operative integrated approach based on negotiation at the enterprise level".[15]

In the Federal industrial jurisdiction, the effective exclusion of compulsory arbitration and the emergence of a regulatory system which emphasised rule making and procedures over adjudications based on merit under the *Workplace Relations Act 1996* and successor Federal industrial statutes resulted in a noticeable shift in the nature of the adjudicatory process. Those changes were not experienced in the New South Wales industrial system but the focus on enterprise bargaining and more recent constraints over the capacity to make claims may have also affected the nature and scope of industrial advocacy.[16]

[15] L Bain, L Crawford and D Mortimer, above n 6.
[16] *Industrial Relations (Public Conditions of Employment) Regulation 2014.*

What is the Nature of the Art of Advocacy?

However, before transiting down that relatively familiar road and the implications for the art of advocacy, something more needs to be said about the art of industrial advocacy itself. That question may be framed in a slightly different way: what aspects of industrial advocacy distinguish that art form from the art of advocacy itself? Some little discussion will be required, therefore, of both forms.

If one reviews principles of advocacy in our common law system of justice at a very general level of abstraction, no distinction is immediately apparent with industrial advocacy.

Similarities with the Art of Advocacy

Justice Hayne wrote in 2007, in an address to the Victorian Bar, that "the principal task of an advocate is to persuade".[17] Justice Sackville made the point in the C7 litigation that "at the risk of stating the obvious, part of the art of advocacy is to make it easy for the decision maker to understand what issues need to be resolved and to explain clearly, cogently and consistently, how and why the crucial issues should be resolved in favour of a particular party".[18]

Taken to a slightly greater level of particularity, a similar conclusion may follow. Broadly stated, it is difficult to distinguish the core favourable attributes or skills of an advocate in trials before courts and those appearing before tribunals, albeit that the exponents of the art may vary greatly in skills based on training, experience and the like. Those attributes include: integrity in dealings with the court; adherence to sound preparation; the capacity to persuade with reason and logic and the construction of argument with precision and conciseness.[19]

[17] The Hon Justice K N Hayne AC, "Written Advocacy", (paper delivered as part of a continuing legal education programme at the Victorian Bar on 5 and 26 March 2007) at 4.
[18] *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [34].
[19] A W Street SC "The Art of Advocacy" (paper presented at Thomson Reuters' "The Art and Practice of Persuasion Seminar" on 23 September 2010) [4], [6], [25], [26], [30] to [32], [42], [55], [57], [58]; W.J. Holdsworth above n 10, 97-14; Bill Robbins "Rumpoles of the AIRC", (paper presented at AIRAANZ Conference

It is when a closer review of the techniques of advocacy before courts is undertaken, the areas of distinction grow but, I would suggest, not to the degree which might be expected from an examination at first blush.

In the common law system, advocacy can be said to be practised in the preparation of pleadings, the taking of evidence and the presentation of argument.[20] Justice Beazley points out in her paper "Advocacy, A View from the Bench"[21] that the refinement of issues through pleadings and evidence in cross-examination form essential parts of advocacy in the common law system. Good advocacy relies upon having a well organised case based on clearly framed issues which is supported by evidence and underpinned by legal authority ultimately expressed in the form of submissions. As her Honour commented[22], the function of submissions may be distilled down to a single proposition: written or oral submissions must convey the requisite information to the audience to whom they are directed.

Counterparts of these aspects of court-based advocacy may be found in advocacy carried out before industrial tribunals:

1. Adjudication before an industrial tribunal does not result in a judicial determination. The Commission however, is still required to act judicially;[23]

2. Industrial tribunals do not operate by means of strict pleadings. For example, under the *Industrial Relations Act 1996* ('the NSW IR Act'), any fettering of the exercise of the Commission's power which might be caused by adherence to formality is removed by s 163(1)(a) of the Act. Industrial tribunals:

> *…have a statutory mandate to get to the heart of matters directly and effectively as possible.*[24]

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in Brisbane, 1997), 539; Richard B. Sappey and Maryanne Winter *Australian Industrial Relations Practice* (Longman Cheshire 1992) 135 to 136.

[20] Street above n 17, at [43] and [44]; J. H. Munkman. "The Technique of Advocacy"(Stevens, 1951).

[21] The Hon Justice M J Beazley AO, "Advocacy, A View from the Bench" (paper and speech delivered at "Winning Advocacy Techniques" Seminar on 27 March 2013).

[22] Ibid 7.

[23] *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 at [25]; *Re Australian Railways Union* (1993) 117 ALR 17 at 25.

However, the tribunal is bound by the cases put by the parties unless advice is given that some departure may need to be undertaken by the tribunal so as to afford natural justice to those parties.[25]

It is also necessary to recognise the refinements in pleadings in common law jurisdictions as described by Isaacs and Rich JJ in *Gould & Birbeck & Bacon v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 ('*Gould*'). Their Honours stated "but pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest";[26]

3. Industrial tribunals are not bound by the rules of evidence but that does not mean the accepting of evidence is unrestrained.[27] First, the exclusion of the rules of evidence does not mean that the Commission may adjudicate in the absence of evidence. The governing, by equity and good conscience, of the Commission in the exercise of its jurisdiction, relates both to matters of procedure and substance.[28] In *Paula Lee v Energy Australia (No. 4)* [2011] NSWIRComm 120)('*Paula Lee*') it was stated[29] that:

> Despite the informality of process dictated by s 163(1)(a) and (b), the tribunal may not simply adopt literally any procedure considered reasonable and fair in industrial proceedings. There can be no denial of the appellant's

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[24] Buchanan J, sitting in a Full Court of the Federal Court of Australia in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 at [25]. This was found to be equally relevant to the Commission: *Paula Lee v Energy Australia (No. 4)* [2011] NSWIRComm 120 at [73]. In any event one may doubt how much this is a departure from the requirements of s 56 of the *Civil Procedure Act*

[25] *CGEA Transport Ltd t/a South Trans v Transport Workers Union of Australia* [2001] NSWIRComm 287, (2001) 110 IR 211 at [34] to [39]; see *Australian Railways Union* at 24 to 25; see *Gould & Birbeck & Bacon v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517: "*…no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are".*

[26] *Gould* at 517.

[27] *P D S Rural Products Ltd v Corthorn* (1987) 19 IR 153 at 155.

[28] s 163(1)(b). See the discussion by Gleeson CJ and Handley JA in *Qantas Airways Ltd v Gubbins* (1992) NSWLR 26at 29 to 31.

[29] *Paula Lee* at 160.

> proposition that, even though the Commission is not bound by the rules of evidence, this does not result in the Commission being able to act without any evidence whatsoever.

Secondly, the tribunal must conform to the ultimate dictates of justice in rulings it may make on evidence. I refer in that respect to Justice Evatt's statement in *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott*:[30]

> Some stress has been laid by the present respondents upon the provision that the Tribunal is not … "bound by any rules of evidence". Neither it is. But this does not mean that all rules of evidence may be ignored and of no account. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bond, every attempt must be made to administer substantial justice.

Thirdly, the industrial tribunals are bound to determine matters on the relevant evidence. As the late Jeffrey William Shaw QC stated, the ordinary test of relevance contained in the rules of evidence is equally applicable in proceedings before industrial tribunals, although not in its full rigour. Evidence should only be admitted if it is logically probative of one of the issues in the case.[31]

Fourthly, some rules may be applied in particular circumstances. For example, rules against hearsay might be applied to some extent. Justice Dey, of this Commission, when dealing with evidence sought to be tendered in a teachers' salaries case, observed that, while avoiding mere technicalities and not being formally bound by

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[30] *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 256.
[31] J W Shaw, 'Evidence and Industrial Advocacy' (June 1986) *Journal of Industrial Relations* 274, 275.

rules of evidence, the Commission should pay some regard to those rules and exclude hearsay evidence when its admission would constitute as injustice to the other party.[32] In *Amalgamated Metal Workers Union v Electricity Commission (NSW)*, a Full Bench of the Industrial Relations Commission in Court Session ruled hearsay evidence inadmissible because of its highly prejudicial nature and the absence of a practical method to test it;[33]

4. The Commission must follow the precedent set by Full Bench decisions within its jurisdiction;[34] and

5. There can be no real distinction between what Justice Beazley described as being involved in the making of submissions and their essential purpose in courts[35] and the function of submissions before industrial tribunals.

This overlap of the techniques and practices of advocates in court and industrial tribunals is reflected in an informal course the Commission intends to launch at the end of this year for beginner advocates. The course structure recognises the commonality of advocacy techniques and seeks to provide advocates with a generic toolkit for advocacy, albeit with a focus on industrial tribunal practice.

The course comprises two seminars, which cover the following, rather poetically titled, topics.

(1) Get On Up – how to appear and open your case, etc;

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[32] *Crown Employees (Teachers) and Education Officers, Department of Education, Department of Technical and Further Education, Department of Youth, Ethnic and Community Affairs Award,* 21 November 1975, unreported, save being noted at 203 IG (NSW) 1606.
[33] *Amalgamated Metal Workers Union v Electricity Commission (NSW)* (1989) 28 IR 155 at 159.
[34] *New South Wales Lotteries Corporation and Public Service Association and Professional Officers Association Amalgamated Union of NSW* [2003] NSWIRComm 143 at [30] to [36]. See, for example, *Federal Commissioner of Taxation v Salenger* (1988) ALR 25, 34 and *Reich v Client Server Professionals of Australia Pty Ltd (Administrator Appointed)* [2000] NSWIRComm 143 for how this principle is applied to the Administrative Appeals Tribunal (AAT).
[35] Justice Beazley above n 19.

(2) You Talking to Me? – courtroom management, witnesses, etc;

(3) Even Before You Walk in the Door – this covers the all-important preparation;

(4) A Book Where Men May Read Strange Matters – practice directions and Commission rules;

(5) According to Hoyle – what not being bound by the rules of evidence means in practice;

(6) Don't Ever Say "I put it to you" – cross-examination and re-examination;

(7) You Got Something to Prove, Pal? – onus of proof; and

(8) The Reply Churlish – how not to get the Commission offside.

Let me give a practical example of the application of general principles of advocacy in an industrial context.

A claim was mounted by the AWU, NSW for the improvement of the wages of employees engaged in private forests in New South Wales relying on work value principles. The Commissioner was Reginald Mawbey and the industrial advocates were, respectively, Mr Col Chalmers of the then Employers Federation of New South Wales and myself for the AWU. The day before evidence was to be taken, and after extensive conferencing and conciliation, the Commissioner, the advocates, court reporters and others descended upon some of Cooma's finest establishments with some revelry. The scene the next morning could only be described as 'tragic' but, with a sense of duty, all proceeded to a small courtroom under cold conditions with central heating. I confess for my part, the most that I could muster was to ask the very excited and 'bushy-tailed' delegate armed with three lever arch files of material to give his name, address, his work history and anything that he could

think might have changed in the work of forestry workers over the last ten years. I should also confess that is the last I could remember until being woken by a scream "I object!". Reliable account has it that at this point I nearly toppled off my chair. The Commissioner, who had been reclining asleep in a spring-back chair was catapulted forward in something resembling an attack on a castle in medieval times. The court reporter managed to spill an entire bottle of ink. The Commissioner regathered himself and in a stern, authoritative voice said "What is your objection, Mr Chalmers?", who answered in a classic moment of advocacy "I object to the witness leading the advocate".

The Distinguishing Features of Industrial Advocacy

I commence the discussion of the distinguishing features of industrial advocacy, by referring to some insights given in the respective texts on industrial advocacy to which I have earlier referred by Cawthorne *et al* and Holdsworth.

Cawthorne *et al* observed as follows:

> As a basic conceptual approach, 'industrial advocacy' combines the techniques of general advocacy with the theory of group dynamics. Thus, in its wider sense it may be said to be the "art of persuasion" in an industrial relations setting.[36]

The following passages from Holdsworth are also applicable:

> Whether a practitioner advocates or negotiates or does both, he acts as part of a structured process be it arbitration or direct negotiation. The aim of both are the same: to achieve the resolution of an industrial dispute. The dispute may be resolved wholly or in part; temporarily or permanently; or put to one side.
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> …

[36] Cawthorne at 1.

Industrial disputes involve conflict and confrontation as part of a relationship that is intended to continue after the dispute has been resolved. The conflict is not only over fact but also over opinions held by the people involved and the policies of the parties as to the future of the relationship. Each process has to allow for confrontation over real differences in the context of a continuing relationship.

The intention behind the system is that the resolution will attract a moral adherence: both parties will want to abide by the terms reached.

This will only come about if the parties have confidence in the resolution process. This confidence will stem from the knowledge that the process itself provides the opportunity for the parties to make the most of the merits of their respective positions. Right from the outset it must be emphasised that there is no question of an absolute or perfect resolution. The parties want one that works.

…

In addition to providing a means of investigating the merits or the realities of each party's stance, the resolution process does more: it provides a framework for the parties to conduct their industrial relations.

…

Because industrial relations is dealing with human beings and is an integral part of the social system it is subject to the influences of social developments. This need to meet new developments can create tensions within the dispute resolution process and between it and society.[37]

…

[37] Holdsworth above n 10, 1-3.

I turn then to some of the particular factors which distinguish the art of industrial advocacy. There are four such illustrations (in each case I will employ the NSW IR Act and the role and functions conferred upon the Industrial Relations Commission of New South Wales as the appropriate reference points):[38]

1. The Industrial Relations Commission of New South Wales is an administrative tribunal having the power, after the failure of conciliation, to undertake arbitration for the purposes of making orders or awards in the settlement of industrial disputes or the making or varying of awards.[39] The purpose of the Commission's inquiry, in that respect, is to determine whether rights and obligations should be created, although such an inquiry may involve the ascertainment of a pre-existing legal obligation or the existence of past transactions, events or conduct.[40] Whilst the nature of the inquiry conducted by a tribunal and a court may overlap to the extent that the inquiry extends into an adjudication as to pre-existing obligations, the *quasi* legislative function of an industrial tribunal in creating new rights represents a fundamental departure from the process of judicial determination. The adjudication of such rights necessarily brings with it questions of policy and value judgments. Thus, industrial advocacy will involve questions as to norms and values in a way unfamiliar with traditional judicial processes. Examples of such issues include: standards of industrial behaviour; industrial relations' theory and practice; the nature of an industry or industries; social policy and the broader economy. This raises not only different evidentiary issues but advocacy which is apt to deal with the intermix of these broad and complex issues;

[38] I have excluded from consideration in this paper advocacy before courts exercising an industrial jurisdiction of which the Industrial Court of New South Wales is one.
[39] ss 10, 17, 136.
[40] See s 175 of the NSW IR Act *State Transit Authority of New South Wales v Australian Rail, Tram and Bus Industry Union, New South Wales Branch, Bus and Tram Division* [2014] NSWIRComm 41 at [153] and [154]; *Re Ranger Uranium Mines Pty Limited & Ors; Ex Parte Federated Municipal Workers' Union of Australia* (1987) 163 CLR 656 at 663 and 664; *Taudevin v Egis Consulting Australia Pty Ltd (No 1)* [2001] NSWIRComm 340 (per Wright J, President, Walton J, Vice-President, Hungerford J). *Federated Municipal and Shire Council Employees Union of Australia New South Wales Branch v Sutherland Shire Council* (1989) 30 IR 445 at 461 (per Cahill VP); *Retail Traders Association of NSW v Shop, Distributive & Allied Employees Association of NSW* (1990) 36 IR 38 at 55 (per Maidment J).

2. A useful illustration of the first proposition, that the industrial advocate must grapple with policy considerations, *per se*, is the requirement of industrial tribunals to have regard to public policy in decision making. A useful example is the provisions of s 146(2) of the NSW IR Act which enjoins the New South Wales Industrial Relations Commission to take into account the public interest in the exercise of its functions. The inescapable conclusion is that the Commission must grapple directly with community values and expectations in a way which is distinct from the obligation that may arise indirectly in relation to, say, a criminal proceeding when the expectation may be that judgments are delivered which broadly conform with community expectations. It stands to reason that in order to persuade an industrial tribunal, the advocate must be equipped to grapple with not only private interests as reflected in the instant proceedings but much broader considerations as to the effect of the outcome of the proceedings on the public interest. The advocate needs to have a capacity to understand how the particular private or collective interest that is represented fits within the broad construct of the public interest, itself a dynamic consideration. In this respect, the industrial advocate must also grapple with a tribunal much more concerned with substantive decisions or outcomes than may arise in judicial proceedings;[41]

3. The second consideration mentioned above is the necessity to grapple with value judgments in the contest over award entitlements or the resolution of a dispute. The value judgment may of course involve a view as to the state of a particular enterprise or industry and its value to the community as well as broader considerations as to what may be appropriate for employees in a particular workplace. Advocates before courts are sometimes called upon to make submissions in relation to whether a particular state of things are unreasonable, unjust or unconscionable,[42] but industrial advocacy often requires the applicant to grapple with the much more amorphous concept of fairness. The establishment of that which is fair encompasses the prospect that new rights will be created to

[41] Alan Rose AO, 'The Adversarial Model and Administrative Tribunal' (2000) *The Judicial Review* 101, 105.
[42] See, for example, *Competition and Consumer Act 2010* (ss 20-21); *Contracts Review Act 1980*, s 7 and the *IR Act,* s 106(1)

produce that outcome. This brings with it the notion that advocacy requires an understanding of not only community values but what constitutes fairness for those employing and those employed in relation to industrial conditions or treatment of persons in employment;[43]

4. Industrial tribunals generally have reposed in them the obligation to inform themselves about matters which bear upon the exercise of their statutory functions. In the NSW IR Act this is reflected in an obligation, under s 163(1)(b), for the tribunal to "inform itself on any matter in any way that it considers to be just". As earlier discussed, this does not remove from the tribunal the obligation to act judicially, but it does mean that the tribunal will be particularly well informed as to the area of industrial adjudication both with respect to relative norms and standards as well as industrial and industry policy affecting the particular enterprise or industry under consideration. The tribunal is also likely to possess a very close understanding of the industry, enterprise and employment under consideration. This imposes a daunting obligation upon an advocate seeking to persuade an industrial tribunal as to the virtue of a particular claim or defence of a claim, particularly given the tribunals may, in accordance with the Act, have also acquired a broad understanding of economic context in which a particular claim is brought for consideration;

5. The last consideration is that raised by Holdsworth. An industrial advocate cannot approach the task as one in which he or she merely acts an advocate prosecuting a case before a tribunal in adversarial proceedings. The industrial advocate must be imbued with the obligations which reflect the scheme and objects of the industrial statutes which emphasise conciliation and must, therefore, navigate the interests of his or her client within this context. It follows that industrial advocacy must not only involve the act of presenting a case in a courtroom setting, but also involves an obligation to search for a resolution of the problem by negotiation or through conciliation so far as is reasonably practicable. This is not merely a reflection of modern requirements in civil court proceedings which emphasise mediation and

[43] See, for example, *Re City of Sydney Wages/Salary Award 2014* [2014] NSWIRComm 49 at [11] to [14]

> alternative dispute resolution procedures. The primacy afforded conciliation in the resolution of industrial disputes under the NSW IR Act, the fact that industrial matters will invariably have parties involved who will have a long term relationship and the public interest in resolving dispute harmoniously means that the skills of negotiation, compromise and conciliation form an essential part of the role of an industrial advocate.

I might note, before moving to an examination of whether these skills have been 'lost', that the preceding illustrations can do no more than point to some *indicia* of a distinct art form and cannot substitute for a full description of what may constitute that field of endeavour. Further, the actual practice of the art may bring yet another dimension. To return to my fly fishing analogy, Mel Krieger commented in 2005: "All fly casting, no matter how descriptive and analytical the directions and teachings, must finally conclude kinaesthetically - that is by feel".[44] Similar observations may be made of the art of advocacy and the specialised component of it about which we now speak.

Has the Art Form Been Lost?

The aforementioned analysis demonstrates that industrial advocacy requires a specialised set of skills overlapping with but, in some respects, different from those normally attributed to the art of advocacy, *per se*.

The question remains, however, firstly, whether the art form, so described, has been lost or, to use the metaphor chosen by Bain *et al*, 'driven to the point of extinction' and, secondly, whether, under the current system of industrial relations, that question is of any real consequence.

The answer to the first question must be given with some hesitation. In 1995, Bain *et al* tested, by statistical means, the hypothesis that the deregulation of the Australian industrial relations system had meant that advocacy was falling into disuse. The intuitive affirmation

[44] Mel Krieger, *The Essence of a Fly Cast,* 2005 http://www.christopherrownes.com/essence.htm

of the proposition was disproved by statistical material. However, that research predated the introduction of the *Workplace Relations Act 1996* and successor Federal statutes and the transfer of significant aspects of the jurisdiction of State industrial tribunals (who continue to exercise the traditional system of conciliation and arbitration) to the Federal arena in that light. It is difficult to be confident that industrial advocacy has not declined over that successive 20 year period from the publication of Bain *et al*'s work.

My own impressions are that the deregulation of the industrial relations system resulting from the aforementioned changes to industrial or workplace laws had the effect of reducing the stock of lawyers and industrial advocates possessing the requisite skillset. Organisations gradually denuded the number of industrial advocates in favour of those engaged in bargaining or negotiation processes (not possessing that requisite skillset) and the next generation of lawyers tended to be more removed from experiences and learning in the field of industrial advocacy than their predecessors. In the final analysis, in the 10 to 15 year period after the Bain *et al* analysis, there was, in my view, a net reduction in persons understanding the art of industrial advocacy or possessing the attributes associated with that art form.

That assessment needs to be counterbalanced, however, by two phenomena. The first is a resurgence of industrial law practices in industrial law firms or employment divisions of general law firms. The second is a relatively recent clamouring amongst industrial organisations to re-engage industrial advocates. That process is well under way at this very time.

It must follow, at least, that practitioners of the art form may not be described as extinct. However, I think it is also exhibited by the genuine resurgence of interest and activity in the learning and employment of these skills as evidenced by the vibrancy of this law firm and the development of the young legal talent within it.

The Value of the Art

As to the value of the art form, it may be sufficient if I was to comment that the involvement of persons with this skillset in proceedings before the tribunal which I head is more likely to assist in the tribunal meeting the objects of the Act and effectively discharge its functions. No doubt, as I have mentioned, the skills held by industrial advocates will vary depending upon experience, training and qualifications, but, at the most basic level, the exponents of the art will not only better represent the interests for whom he or she appears, but will also provide more assistance to the tribunal in discharging its statutory character.

Whilst those observations are directed primarily to the system operated under the NSW IR Act, I would not wish to be taken as confining my remarks to that system. In my view, it was a mistake to denude organisations of persons holding the requisite skillset on the basis that the system had been deregulated or its focus shifted to that of enterprise bargaining. The recent craving for persons of that ilk in the current industrial climate is not only a recognition that there has been resurgence in the use of arbitration, albeit of an informal kind, but that the skills are relevant both in the context of systems which are essentially rule or procedure driven or concerning collective bargaining. The skills of industrial advocacy are easily adapted to rule-based systems even if the procedures adopted may be more formal, just as they may be adapted to different forms of arbitral processes such as the Bluescope model innovated by the New South Wales Industrial Relations Commission. More importantly, however, to decry industrial advocacy in the context of a deregulated system directed to enterprise bargaining or even interest-based bargaining is to misunderstand, as Bain *et al* observed, that industrial advocacy had, as one of its hallmarks, negotiation and conciliation skills and contained integrative elements which are vital to the collective bargaining process itself and the production of an harmonious workplace.

CONCLUSION

It may be concluded, then, that, whilst nearly suffering a similar fate to languages which had fallen into disuse, the art of industrial advocacy is rebuilding through the acquisition of experience by, and the training of, a new set of lawyers and practitioners holding an interest

in the field. Overall, I consider, notwithstanding the different regulatory models for industrial relations and employment established under various forms of industrial legislation throughout Australia, that development will significantly contribute to the effective and timely discharge of the functions reposing in industrial tribunals in accordance with the purpose of those statutes.

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