THOMAS MCCAWLEY'S TENURE ON THE QUEENSLAND SUPREME COURT AND INDUSTRIAL COURT: A POLITICAL APPOINTMENT?

SCOTT GUY*, TONY MCKINNON** AND
BARBARA HOCKING***

INTRODUCTION

This paper examines the philosophical and political orientation of Thomas McCawley — a judge of the Queensland Supreme Court and a member of the Queensland Industrial Court in the early part of the twentieth century. McCawley's appointment to the Queensland Supreme Court has often been considered to be a controversial "political" one that was made by the then State Labor Ryan Government to implement labourist political policy. His appointment was perceived to be made at the time in preference to other more senior and better qualified lawyers. Many contemporary academics have subsequently agreed with this interpretation and have regarded McCawely's appointment to the Queensland Supreme Court bench as an essentially "political" one that was made to ensure consistency between the political and the judicial branches of the Queensland Government.

It is the intention of this paper to undertake a reinterpretation and re-evaluation of McCawley's appointment to the Queensland Supreme Court and the Industrial Court of Queensland and to examine his underlying political and philosophical beliefs whilst being a judge and member of the Industrial Court. McCawley's academic writings during this time will also be examined with a view to more clearly ascertaining his political and philosophical orientation. As we will attempt to demonstrate, McCawley was essentially social democratic or labourist in outlook and it is difficult *not* to interpret his appointment to the Supreme Court and the Industrial Court as being "political" in nature given his subsequent judgements on the Industrial Court and Supreme Court.

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* Lecturer in Law, Griffith University; BA (Hons), LLB (Hons.) (UQ), Grad Dip Legal Prac. (QUT) PhD (UQ) Legal Practitioner, Supreme Court of Queensland.

** Barrister-at-Law.

*** Associate Professor in Law, Queensland University of Technology.

McCawley's Appointment to the Queensland Supreme Court and Industrial Court

Thomas McCawley was appointed as a President of the Queensland Court of Industrial Arbitration in early 1917 and was appointed as a Judge of the Queensland Supreme Court later that year.[1] His appointment by the Queensland Labor Government to these positions — under the leadership of T.J. Ryan and subsequently E.G. Theodore — was controversial since it has been acknowledged that there were more senior and better qualified members of the legal profession that could have been appointed in preference to McCawley.[2] The appointment of McCawley to the Industrial Court has been perceived as an essentially "political" appointment in which T.J. Ryan sought to secure the election of a judge who was sympathetic to the underlying aims and ideals of the *Industrial Arbitration Act* and who held, more broadly, political and philosophical values consistent with the Labour Party.[3]

It needs to be acknowledged, however, that there were other motivating factors, as well, for the appointment of McCawley to the Industrial Court and the Supreme Court and these included McCawley's Catholic background and the attempt, on the part of the Labor Party, to assert Catholic influence and to take judicial appointments away from the legal profession.[4] Yet undoubtedly a principal reason for McCawley's appointment to the Supreme Court bench was his close philosophical alignment with the ideals behind the introduction of the *Industrial*

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1 See Malcolm Cope A Study of Labor Government and Law, Bachelor of Arts Thesis, University of Queensland, 1972; Malcolm Cope "The Political Appointment of T.W. McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief justice of Queensland" (1976) 9 *University of Queensland Law Journal*, 224.

2 McCawley's appointment to the Supreme Court was opposed by two leading Queensland barristers: Arthur Feez KC and Charles Stumm KC who contested its validity on what was said to be "purely legal and constitutional grounds" *In re McCawley* (1918) Qd R 62 at 64. According to Forbes: "In 1917 Thomas William McCawley was made Chief Judge of the industrial court and later in the year a judge of the Supreme Court. The appointment was both a symptom and a cause of tension between the Ryan Labour Government and the legal profession. Professional leaders were disturbed by the government's impatience for legal and social change. The government felt that senior lawyers and elderly judges were seeking to frustrate its programme by legal as well as political action...But politics apart McCawley's appointment gravely infringed the leading barristers' claim to a monopoly of judgeships...": J.R.S. Forbes, *The Divided Legal Profession in Australia* (Sydney: Law Book Co. 1979) 165-6. According to Cope, "The Profession viewed the appointment as a means whereby the Government was attempting to indirectly increase the number of Supreme Court Judges. The Profession voiced its objections in the form of a duty to protect the traditional method of selection for judicial appointments": Cope, above n 1, 228.

3 Cope, above n 1, 224; Tim O'Dwyer, *Amici Curiae – The Role of the Lawyers in the McCawley Case (*MA Thesis, Griffith University, 1994, ch. 4; Ross Fitzgerald *"Red Ted": The Life of E.G. Theodore* (University of Queensland Press, Brisbane, 1994), 66.

4 According to Cope: "The appointment of McCawley over the heads of other members of the Legal Profession was seen as an attempt to assert Catholic influence and to take Judicial appointments away from the Legal Profession" Cope, above n 1, 226.

Arbitration Act and his philosophical sympathy for the political orientation of the Australian Labor Party.[5]

These considerations raise the issue as to whether McCawley's appointments to the Industrial Court and Supreme Court were ones based on pragmatic grounds where he was selected because the incumbent Labor Government was anxious to secure men who were "temperamentally fitted for the work of this kind"[6] or whether McCawley was appointed because of more essentially philosophical reasons. For example, McCawley may have been appointed to the Industrial Court of Queensland by E.G. Theodore and later the Supreme Court by Ryan because of his commitment to social justice;[7] his concern with ameliorating more significant socio-economic inequalities that were produced by market capitalism;[8] his advocacy of the need for (as well as the importance of) government regulation of the economic and industrial spheres;[9] and his keen interest in promoting the wages and the conditions of the poorer sections of society.[10] Certainly, it would seem that Malcolm Cope perceives Thomas McCawley's appointment to the Industrial Court in essentially pragmatic, *as well as* philosophical (and sectarian), terms — one in which McCawley was not only selected because of his legal technical competence and suitable knowledge but also because he was philosophically aligned with (or, as Cope describes, using the discourse of E.G. Theodore at the time, "temperamentally fitted to") the ideals underpinning the *Industrial Arbitration Act*.[11]

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5 According to Cope: "McCawley envisaged the development of a whole new field of law with which the older members of the Legal Profession had no experience. McCawley had helped draw up the Act and knew precisely the aims and intentions of government...It was therefore no use appointing a judge who would upset the principles upon which the Act was founded...When McCawley took his seat on the Court he made this obvious and acknowledged that his functions were, in part, legislative...": Cope, above n 1, 229.

6 The Queensland Premier, E.G. Theodore, who was primarily responsible for having McCawley appointed to the Industrial Court, defended the appointment by declaring, at the time, that "in the appointments to the Arbitration Court the Government was anxious to secure men of legal standing and ability who were also 'temperamentally fitted' for the work of this kind": *The Courier*, 9 January, 1917.

7 According to Cope: "McCawley was very much concerned with the issues of social justice and what means could be employed to bring about the effective improvement of the less well-to-do in society": Cope, above n 1, 228.

8 See Thomas McCawley *Industrial Arbitration* (Brisbane: Government Printer, 1924). See below.

9 McCawley, in this respect, was familiar with, and approved of, the work of H.B. Higgins – the second President of the Commonwealth Arbitration Court.

10 See McCawley, above n 8, 229.

11 According to Cope: "...what Theodore probably envisaged was a Judge with a suitable knowledge to carry out a new form of law which the *Industrial Arbitration Act* was aimed at. To that extent, McCawley's appointment was a political one, one consistent with the values of the Labour Party": above n 1, 228.

THE ACADEMIC WRITINGS OF THOMAS MCCAWLEY

There is significant evidence in McCawley's writings and judgements (as President) of the Industrial Court of Queensland to support this interpretation of Malcolm Cope's that McCawley in fact was appointed for partly philosophical reasons and that his underlying political philosophy was closely in tune with the overall orientation of the *Industrial Arbitration Act*. His writings, in particular, evidence pro-labourist and, in some particular cases, social democratic or even *socialistic*, tendencies — ones that advocate significant government regulation of the economy and industrial relations; that promote workers' rights; and that seek to undermine or oppose any form of unfettered market coordination of industrial conditions and wage determination. Certainly, this "labourist" philosophical orientation and his alignment with the underlying political ideals of industrial arbitration — and, by extension, government intervention in, and regulation of, the industrial and the economic spheres — is most explicitly reflected in his account, *Industrial Arbitration*, which was written in 1924.[12] It is this account to which attention is now turned.

MCCAWLEY'S ATTITUDE TO INDUSTRIAL ARBITRATION

McCawley's underlying labourist and *reformist* political temperament is particularly evidenced in *Industrial Arbitration* which was written following his term as President of the Industrial Court.[13] In this account, McCawley provides an outline of the development of State (and Queensland, in particular) arbitral and wage board systems, as well as the federal arbitration system.[14] He also seeks to outline some of the perceived criticisms of industrial arbitration.[15] The underlying objective on McCawley's part in this account is to provide a concerted *defence* of industrial arbitration, in particular, and government regulation of industrial relations, more generally, and to draw attention to the desirability for the need for (at the very least) some form of intervention in the industrial sphere. His account is

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12 McCawley, above n 8. There are several commentaries which touch on, and briefly canvass, McCawley's attitude to industrial arbitration: Dennis Murphy "Edward Granville Theodore: Ideal and Reality" in Dennis Murphy, Roger Joyce and Margaret Cribb (eds.) *The Premiers of Queensland.* (St Lucia: University of Queensland Press, 1990), 315; Mark Bahnisch *History of Pay Equity in Queensland.* Queensland Government Submission, Pay Equity Inquiry, No. B1568 of 2000, Attachment 1.

13 See also Thomas McCawley "Industrial Arbitration in Queensland", *International Labour Review*, March, 1922, 393. McCawley undertook correspondence with Henry Bournes Higgins and subsequently approved of his legal approach to arbitration: for an insight into Higgins' approach see H.B. Higgins *A New Province for Law and Order* (London: Conslatile & Co. Ltd).

14 At the outset, McCawley acknowledges "that the regulation of wages and conditions of labour has by Boards or Courts has become general" and this form of public regulation accordingly justifies close academic attention and scrutiny: McCawley, above n 8, 34.

15 Ibid, 34. McCawley concedes in *Industrial Arbitration* that the efficacy of industrial tribunals and wages boards are contentious and, specifically, that the "extent to which they have contributed to industrial peace will always be in controversy; so also will the extent to which they have contributed to industrial justice...": McCawley, above n 8, 34.

particularly instructive since it (on the one hand) advocates the extension of legal regulation into industrial relations,[16] but (on the other hand) conceives this legal regulation as being distinct from other forms of regulation in that it should be governed by the "new sciences" of economics and that it should seek to import equity and social justice into its application.[17]

A recurrent theme in *Industrial Arbitration* and one that evidences McCawley's reformist perspective is the potential for industrial arbitration to bring (or impose) a new rational and objective ordering into the industrial sphere and to serve as a mechanism through which to promote industrial organisation and, as a result, social justice and equity.[18] This is a particularly Marxian concept where reliance is placed on science and rationality to secure industrial progress and to facilitate advances in working conditions and wages. As will be seen below, McCawley's concept of the arbitration process was essentially predicated on a "scientific" methodology — one in which economics, statistics and political science would provide the basis or foundation on which to ascertain the "cost of living" and through which to formulate industrial awards.[19] Inevitably this firm faith in scientific discourse and methodology would have, indeed, been partly a consequence or outgrowth of McCawley's awareness and approval of the English Fabian tradition and, in particular, the writings of George Bernard Shaw and Sidney Webb.[20]

Another theme of *Industrial Arbitration* and one that evidences McCawley's labourist political sympathies is the criticism levelled at free market or laissez-faire capitalism. McCawley expresses the traditional social democratic (or socialist) concern over how labour is perceived in capitalist market relations to be a commodity — one which can be bought and sold by the employer — and considers this to be in tension with the continued effective functioning of the industrial relations system.[21] Throughout McCawley's judgements when sitting as President of the Industrial Court of Queensland, he expresses his approval of the fundamental concept of industrial arbitration (and its exposition in the *Industrial Arbitration Act*) and how it seeks to overcome or usurp the market in fixing wages and conditions and providing a more socially just and equitable criteria for the

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16 Like his federal counterpart, H.B. Higgins, McCawley emphasises the need for a "new province" for law and order: Higgins, above n 15. McCawley was significantly influenced by Higgins and described Higgins as a "great lawyer": Thomas McCawley "Industrial Arbitration in Queensland" (1922) 5 *International Labour Review,* 385 at 408.

17 Q.W.N. (1917) 11 per McCawley CJ when acting as President of the Industrial Court of Queensland and when he sought to draw attention to the key aspects of the Industrial Arbitration Act. See also Dennis Murphy "Labour Relations- Issues" in D.J. Murphy, R.B. Joyce and C.A. Hughes (eds.) *Labour in Power: The Labour Party and Governments in Queensland 1915-57* (Brisbane: University of Queensland Press, 1980), p. 249.

18 Ibid, esp. 63-7.

19 Ibid, 63.

20 McCawley had read the Fabian tracts, such as S. Webb *How to Pay for the War Being Ideas Offered by the Fabian Research Department* (London Fabian Society at the Book shop George, Allen and Unwin Ltd, 1916).

21 Ibid, 38. In *Industrial Arbitration*, McCawley is adamant that "labour should not be regarded as a commodity": McCawley, above n 8, 38.

establishment. In this respect, McCawley goes so far in *Industrial Arbitration* as to suggest that there would need to be, in the future, revision or modification of the wage relationship underpinning capitalism if the industrial relations system was to continue as an effective and, indeed, viable framework.[22]

McCawley's labourist political tendencies were also particularly reflected in his approval of the essentially interventionist nature of Queensland industrial relations legislation[23] and his disappointment that the promise "was not fulfilled", or subsequently born out, with the later introduction of the *Industrial Peace Act 1912* which was (according to McCawley) essentially punitive in its operation towards unions and workers.[24]

McCawley's labourist political orientation was further illustrated in his articulation in *Industrial Arbitration* of a set of principles that should underpin industrial regulation.[25] These principles could all be regarded as being essentially reformist in orientation and ones representing a social liberal critique of laissez-faire — or free market — capitalism.[26] They embraced the belief that labour should not be regarded as a tradeable commodity; the right of labour to the payment of adequate wages; the right to equal remuneration for work of equal value; the right on the part of workers to equitable economic treatment; the right of employees to work a maximum of eight hours each day; the requirement for the abolition of child labour; and the requirement for regular inspections of workplaces to monitor the conditions of

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22 Ibid, 42. This attitude was particularly evidenced in McCawley's approval of Griffith's speech in Queensland Parliament in 1890 when he sought to introduce the "Elementary Property Law Bill" — a Bill moved by Griffith which sought to promote industrial order during the Queensland shearer's strike. During the debate on this Bill in 1891, Griffith commented on the New South Wales Royal Commission 1891 into industrial disputation and expressed the view that "the then relations of employer and employee could not continue very much longer without a review": cited in McCawley, above n 8, 41. In his speech, Griffith anticipated that some reforms to capitalist market relations may, indeed, be required if the industrial relations system was to continue — one that would need to move beyond the introduction of Courts of Conciliation and Arbitration. As he declared: "I think the fundamental error is that labour is a thing to be bought and sold": cited in McCawley, above n 8, 41. The significance of this particular speech on the part of Griffith – and his initiation of the "Elementary Property Law Bill" — is that McCawley approved of these quite radical and distinctive proposals and noted (when examining Griffith's Bill) that: "Queensland gave promise early of leading the way in industrial legislation, but the promise was not fulfilled": cited in McCawley, above n 8, 41.

23 Ibid, 42.

24 One aspect which Thomas McCawley was critical of under the *Industrial Peace Act 1912* was that the new system of industrial boards and courts did not recognise unions, even though they were bound by its awards and were liable for substantial fines for breaches and strikes.

25 Ibid, p. 38.

26 In *Industrial Arbitration*, Thomas McCawley, indeed, was supportive of a moderated market in which government regulation of the industrial and economic realms would produce "a more equitable distribution of wealth": McCawley, above n 8, 67. In this respect, he approved of the fact that regulation "of wages and conditions of labour had become general": McCawley, above n 8, 67. Even though this regulation had "not acted as a panacea for all industrial ills..." and while he concedes that "the extent to which they have contributed to industrial peace will always be in controversy," McCawley concluded that "sweeping general condemnation is not justified...": McCawley, above n 8, 36.

women in the workplace.[27] In this respect, McCawley did clearly envisage a role for government in ameliorating the more inequitable and unjust elements of market capitalism and one where it could advance the interests of labour.[28] As Malcom Cope argues, McCawley "conceived of the role of the state as one of taking active action to aid and alleviate the conditions of the working people of the state."[29] McCawley, then, was not Marxian in his conception of the state since he did not consider it — or more specifically the arbitral process or the Court of Conciliation and Arbitration — as an instrument of capitalist oppression, but rather as a mechanism through which to enhance the rights and the entitlements of workers and improve working conditions in general.[30]

This concern with reforming the more fundamentally inequitable characteristics of the industrial relations system under market capitalism was an outgrowth of McCawley's general political stance and his formative intellectual influences. McCawley had read, and was sympathetic to, the Fabian writings of George Bernard Shaw, G.D.H. Cole and Sidney Webb.[31] Fabianism, in the late 1800s, attempted to provide a critique of the operation of market capitalism and sought to demonstrate precisely *how* capitalism would (eventually) evolve into a more regulated, interventionist and socially just political and economic order.[32] Sidney and Beatrice Webb, for example, perceived the various social and industrial reforms of the nineteenth century (for example, the introduction of factory acts, mines acts, housing acts, education acts and other related social protection legislation) as the precursors or the antecedents to a more socialistic institutional and political framework.[33] In this respect, McCawley's intellectual preoccupation with Fabianism would have, indeed, inevitably influenced and shaped his keen interest in the legal and the political regulation of the industrial sphere,[34] as well as

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27 Ibid, p. 38.

28 See .R. Hall *The McCawley Story, Paper Presented to the Industrial Relations Society of Queensland*, 29 July 2003.

29 Cope, above n 1, p. 228.

30 In this respect, McCawley was a keen disciple of Henry Bournes Higgins – the second President of the Federal Court of Conciliation and Arbitration. Higgins perceived the arbitral process as an important mechanism for promoting industrial harmony and improving workers' rights and entitlements: see H. B. Higgins *A New Province for Law and Order*. London: Dawson, 1922; Higgins "A New Province for Law and Order" (1915) 29 *Harvard Law Review*, 13. Murphy, for example, perceives McCawley as "something of a disciple" of Higgins: Denis Murphy "Labor Relations — Issues" in D.J. Murphy, R.B. Joyce and C.A. Hughes (eds.) *Labor In Power: The Labor Party and Governments in Queensland, 1915-57* (University of Queensland Press, Brisbane, 1980), 249. According to Cope: McCawley "conceived the role of the state as one of taking action to aid and alleviate the conditions of the working people of the state. This was made apparent when the Government introduced measures directed towards the introduction of social justice and the regulation of industrial conditions and relations": McCawley, above n 1, 226.

31 Cope, above n 1, p. 228.

32 See, for example, Ian MacKenzie *The First Fabians*. London: Weidenfeld, 1977.

33 Sidney Webb and Beatrice Webb *A Constitution for the Socialist Commonwealth of Great Britain*. London: Longmans, 1920.

34 Denis Murphy has described McCawley "as a social reformer who saw the law as being a potential instrument of reform, rather than remaining an instrument of conservatism and

his concern with utilising the "rational" sciences of economics and politics as mechanisms through which to engineer a more regulated and equitable industrial relations framework.

McCawley's principled "labourist" orientation is also reflected in his support for the trade union movement and the underlying principle of trade unionism.[35] McCawley was critical of the Conservative Queensland Premier Digby Denham's *Industrial Peace Act* of 1912[36] — an Act that established the Industrial Court — because of the fact that it was *unsympathetic* to the interests of labour and trade unionism. A particularly regrettable feature of the *Industrial Peace Act* from the standpoint of labour — according to McCawley — was its non-recognition of unions and the prohibition that it imposed on the undertaking of strikes.[37] In condemning this legislation, McCawley critically observed that the general political and institutional environment within which the Act was passed was not one conducive to unionism and the advancement of the status and the rights of workers.[38]

Given this principled political predisposition to unionism and labour rights, as well as his objection to the underlying philosophical or political orientation of the *Industrial Peace Act,* it is, therefore, unsurprising that McCawley was selected by the Labour Government to implement the provisions of the *Industrial Arbitration Act 1916 (Qld)*[39] as President of the Industrial Court.[40] McCawley, in this respect, was particularly supportive of the enactment of the *Industrial Arbitration Act 1916*[41] *precisely* because it *was* sympathetic to the principle of unionism and because it "reversed the policy of the 1912 Act towards unions."[42]

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reaction against reform": Denis Murphy, "Edward Granville Theodore: Ideal and Reality" in D. Murphy and R. B. Joyce (eds.) *The Premiers of Queensland.* Brisbane: University of Queensland Press, 1990, p. 304. See also Hall, above n 28.

35 McCawley, above n 8, 48.

36 The *Industrial Peace Act of 1912* established the Industrial Court and this was to apply to, and preside over, all callings mentioned in Schedule II. Part II of the *Industrial Peace Act* provided that the Industrial Court was to be constituted by a judge or acting judge sitting alone and he was to have jurisdiction over all industrial matters submitted to him by the registrar by an employer of not less than twenty employees."

37 McCawley, above n 8, 50.

38 McCawley noted that: "The Act was passed in an atmosphere of hostility to unionism": McCawley, above n 8, 50.

39 See Ross Ross Fitzgerald *"Red Ted": The Life of E.G. Theodore* (University of Queensland Press, Brisbane, 1994), 66.

40 Cope, above n 1, 229. According to Malcolm Cope: "McCawley completely supported the Government's ideas that the new Act was based on the full recognition of unionism": Cope, above n 1, 229.

41 To obtain an overall context of the Act see Ross Fitzgerald and Harold Thornton, *Labor In Queensland: From the 1880s to 1988* (University of Queensland Press, Brisbane, 1998), 25-7; B. H. Matthews "A History of Industrial Law in Queensland with a Summary of the Provisions in of the Various Statutes" (1948) 4 *Royal Historical Society of Queensland Journal*, 150 at 156-62; Charles Bernays *Queensland Politics During Sixty (1859-1919) Years* (Queensland Government Printer, Brisbane, 1919), 183-4.

42 McCawley, above n 8, 52.

While the *Industrial Arbitration Act* itself did not include an express provision affording the Supreme Court of Queensland jurisdiction to grant preference to unions McCawley was still in favour of the Act since the Industrial Court of Queensland (with McCawley as President) had held that it had full power to grant preference to unions[43] under its terms. In this respect, McCawley's underlying sympathy for the principles of unionism and his general amenability to industrial arbitration would have greatly weighed in his favour as a candidate for the position of Judge of the Industrial Court.[44] It is in this context that Malcolm Cope perceives McCawley as being an essentially "political" appointment on the part of Theodore and the Labour Party.[45]

As was shown, however, it appears that McCawley also held significant labourist views and was strongly committed to the pursuit of social justice and to utilising the law as an instrument for (social democratic) reform in the interests of labour. Theodore and the Labour Party were undoubtedly aware of these views held by McCawley and, in this even stronger philosophical context, it would seem that McCawely's appointment was a "political" one. As David Hall argues, the Labour Government at the time was aware of McCawley's commitment to the Fabian tradition and these views were in accord, or consistent with, its underlying intentions in enacting the *Industrial Arbitration Act*.[46]

McCawley's preference for government intervention and for the regulation of industrial relations was particularly reflected in the strong defence and philosophical rationale he provided for the need for industrial arbitration in Queensland.[47] His commitment to the arbitral process was particularly evident

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43 See (1917) QWN 2. As President of the Industrial Court of Queensland, McCawley found that the provisions of the *Industrial Arbitration Act* were "sufficient to enable the Court to award preference to unionists in an industrial dispute. It was decided in 1900 by the Court of Appeal of New Zealand in *Taylor and Coply v. Mr Justice Edwards* 18 NZLR 876 that practically identical provisions of *The Industrial Conciliation and Arbitration Act 1894* conferred such a power on the Arbitration Court of that Dominion...The Legislature of Queensland in *The Industrial Arbitration Act of 1916*, in using language similar to that used in the New Zealand Act, must be regarded as having known of the interpretation which had been put upon it by the Federal Court of that Dominion. What inference is possible other than that it was intended that the Court should have similar power?": (1917) QWN 2.

44 Timothy O'Dwyer *Amici Curiaen The Role of the Lawyers in the McCawley Case*, Master of Arts Thesis, Faculty of Humanities, (Griffith University, 1994), 35-48.

45 Cope, above n 1, 228. As Cope, indeed, argues: "Despite the opposition's interpretation of the phrase 'temperamentally unfitted' what Theodore probably envisaged was a Judge with a suitable knowledge to carry out a new form of law which the *Industrial Arbitration Act* was aimed at. To that extent, McCawley's appointment was a political one, one consistent with the values of the Labor Party": Cope, above n 1, 228.

46 As Hall argues: "McCawley, who had had a hand in the drafting of the *Industrial Arbitration Act 1916* knew perfectly well the intentions of the Government and the Government knew perfectly well McCawley was in the English Fabian tradition i.e. that he had believed that the law should be harnessed as a tool of reform": Hall, above n 30, 1.

47 McCawley, above n 20, 47-8. See also Thomas McCawley "Industrial Arbitration in Queensland" (1922) March, *International Labour Review*, 393. In *Industrial Arbitration*, McCawley presented what he regarded as the common misconceptions in relation to industrial

where he outlined the criticisms and (what he regarded as) the misconceptions — at that time — commonly levelled against arbitration and then sought to systematically repudiate them.[48] McCawley's presentation of what he perceived as the misconceptions regarding industrial arbitration is of particular relevance since many of these criticisms are propagated in a contemporary political and economic context against arbitration by groups such as the H. R. Nicholls Society.[49] The arguments and data McCawley adduces in support of a role for the arbitral process are particularly *social democratic* in orientation since they are predicated on the assumption that basic social and economic equality is not only essential for the exercise of individual liberty — a traditional *social liberal* contention — but also that some degree of social and economic equality is desirable *in itself*. As pointed out below, for example, McCawley cited data to demonstrate that the arbitral process produced, in fact, *greater* wage compression (or economic equality) in Queensland and that this was perceived by him to be a genuinely *desirable* state of affairs.[50]

In defending a role for the arbitral process, McCawley sought to counter the contention that it militated against economic efficiency and that it produced unemployment.[51] McCawley's defence of industrial arbitration, in this respect, was significant since he implicitly attempted to undermine the classical liberal or libertarian contention that government intervention was essentially inefficient, unproductive and inconsistent with a properly functioning market economy.[52] This belief in the supposed deleterious effects of arbitration was a common one at the time and was particularly evident (for example) among the more conservative

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arbitration, such as that it promotes inefficiency; that workers have suffered by reason of industrial arbitration; and that arbitration has promoted industrial disputation. The principle argument (at that time) against arbitration, according to McCawley, was that it had contributed to industrial disputation: "It is blamed because it has not acted as a panacea for all industrial ills and sometimes it is charged with being the cause of all industrial ills...Instead of bringing peace it had brought only strikes and turmoil": McCawley, above n 8, 36.

48 On balance, McCawley argued that industrial arbitration *had* promoted industrial peace and improved the status and the conditions of workers. According to McCawley, the "sweeping general condemnation" of industrial arbitration "is not justified": McCawley, above n 8, 36.

49 See, for example, H. R. Nicholls Society, "Arbitration in Contempt': the Proceedings of the Inaugural Seminar of the H.R. Nicholls Society", Melbourne: H. R. Nicholls Society, 1986. The arguments marshalled by McCawley to counter the criticisms of industrial arbitration also coincide with many of the contentions raised in a contemporary political, economic and legal context to the support a continuing role for industrial arbitration: see, for example, Joe Isaac and Stuart MacIntyre (eds.) *The New Province for Law and Order – 100 years of Australian Industrial Conciliation and Arbitration.* Sydney: Cambridge University Press, 2004.

50 McCawley, above n 8, 67.

51 Ibid, 48.

52 Prior to this period, several members of the 1890s Convention Debates were significant advocates of a free market or laissez-faire industrial relations and economic system: see Samuel Griffith and John Downer. Classical liberalism has been articulated by A. Smith *An Enquiry into The Nature and Causes of the Wealth of Nations* (Strachun: London, 1776); F.A. Hayek *The Road To Serfdom* (Routledge: London, 1976); F.A. Hayek *Law, Legislation and Liberty: The Political Order of a Free People.* (Routledge: London, 1982); A. Nozick *Anarchy, State and Utopia* (Blackwell: Oxford, 1974).

members to the federal constitutional convention debates.[53] McCawley, however, demonstrated that there was no empirical evidence to indicate that industrial arbitration *did* prejudice or compromise economic growth[54] and declared that arbitration "has functioned comparatively well in normal times."[55]

Several other common charges levelled against industrial arbitration were also outlined by McCawley and sought to be addressed by him. In particular, McCawley presented the argument that arbitration has not enhanced the conditions and the status of workers but, rather, has served to diminish their industrial rights and entitlements.[56] This charge, he demonstrated, was not supported by the empirical evidence — in particular, he pointed to such evidence as the fact that Queensland employees now worked for a 44 hour week; that the effective purchasing power of workers had been increased; that yearly holidays had been introduced; that arbitration had promoted (and not weakened) unionism; and that a "living wage" has been introduced.[57]

McCawley's strong belief, in this respect, that industrial arbitration could be used to advance the rights and entitlements of workers closely resembled those of H.B. Higgins[58] and reflected a more *social democratic* — as opposed to a Marxian — philosophical orientation. McCawley was of the firm opinion that the instruments of the state — such as wage boards and arbitral tribunals[59] — could be utilised to ameliorate the excesses of industrial capitalism and to protect the interests of labour.[60] Interestingly, while this firm belief in arbitration was consistent with the attitudes of H.B. Higgins, it was contrary to the views of many members of the labour (or union) movement in the period following Federation who were, in

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53 See the contributions of Samuel Griffith and John Downer who suggested that a federal arbitral tribunal would interfere with individual property and civil rights; promote disincentives to work; and, ultimately, prejudice market efficiency. According to Griffith, an arbitral tribunal "might entirely depreciate the value of a property in a State or drive an industry out of a State....We ought to hold fast by the principle that we are not going to interfere with the rights of property in the States": Australasian Convention Debates, Sydney Convention, 1891, 782.

54 Ibid, 48.

55 Ibid, 48. McCawley asserted that economic efficiency and unemployment in the Australian economy can be attributed to other factors: "In some, perhaps in many cases, arbitration may be a contributing factor to inefficiency, but I am disposed to think that, just as arbitration was alleged by many employers to be the general cause of unemployment, so employers often attribute to arbitration inefficiency due to other causes": McCawley, above n 8, 48.

56 Ibid, 44.

57 Ibid, 44. McCawley concluded that "the allegation that the workers have suffered by reason of industrial arbitration is not true of hand-workers and not true of all brain workers": McCawley, above n 8, 44.

58 In this respect, see John Rickard *H.B.Higgins* (Allen and Unwin: Sydney, 1984).

59 For an excellent account of the development of arbitration tribunals and wages boards across the various States of Australia in the 1800s: see William Pember-Reeves *State Experiments in Australia and New Zealand* (Macmillan: Melbourne, 1969).

60 In this respect, see McCawley's outline of the main features of the *Industrial Arbitration Act*: (1917) Q.W.N. 11.

general, sceptical of the benefits of arbitration.[61] McCawley's advocacy of arbitration, then, was a reflection and an extension of his Fabianism and his commitment to using the state (and the law) as an instrument for advancing the interests of the working class.[62] His defence of arbitration and other state instruments of industrial regulation (such as wage boards) repudiated Marxian philosophy and the attitudes of the more radical members of the labour movement that advances in workers' rights could not be promoted through the instrument of the state.[63]

Similarly, McCawley's labourist political tendencies were also evident in his repudiation of the contention[64] that industrial arbitration had served only to exacerbate industrial disputation and industrial turmoil and not to diminish it — as was its purported aim.[65] In *Industrial Arbitration* he emphasised the point that industrial arbitration now provided a mechanism through which industrial reform could be introduced with less friction and (less) confrontation than had been previously been the case under the *Industrial Peace Act 1916* (Qld).[66] As further evidence of his implicit faith in the state as an instrument through which to promote the overriding public interest, he declared that arbitration could be used to:

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61 During the Australian Constitutional Convention Debates, for example, labour was ambivalent to the inclusion of a federal industrial relations provisions and, ultimately, a power over industrial arbitration was only sought by it to avoid conservative members at the Conventions from developing a more damaging and potentially regressive provision: see Mark Hearn and Greg Patmore "Freedom or Federation", (2001) 122 *Workers Online*, 1. In this respect, see the contributions of Victorian unionist, William Trenwith, who doubted the efficacy of arbitration in advancing the interests of workers: Melbourne Constitutional Convention, 1898, 195. Further, throughout the first half of the twentieth century, the Victorian labour movement and the (Victorian) newspaper, *Tocsin*, also became a vocal sceptic of the benefits flowing from industrial arbitration: see H. Anderson (ed.) *Tocsin: Radical Arguments Against Federation*. (Drummond: Melbourne, 1977). Also, see Stuart MacIntyre "Neither Capital Nor Labour: the Politics of the Establishment of Arbitration" in S. MacIntyre and R. Mitchell (eds.) *The Foundations of Arbitration* (Oxford University Press: Melbourne, 1989) who argues that the establishment of arbitration was not primarily due to the labour movement or pressures on the part of the working class.

62 As David Hall argues, McCawley generally perceived industrial arbitration "as a means of advancing the material position of workers rather than as a body to improve industrial relations between employers and employers." He believed, in this respect, that the law and the state "should be harnessed as a tool of reform": Hall, above n 30, 1.

63 McCawley, in this respect, advocated an extension of the jurisdiction of the Federal Industrial Arbitration Commission. He agreed with H.B. Higgins that it should extend beyond the resolution of purely *interstate* disputes to the resolution and adjudication of *any* disputes: see McCawley, above n 8, 10.

64 In *Industrial Arbitration,* McCawley outlines the contention that arbitration "is blamed because it has not acted as a panacea for all industrial ills and sometimes it is charged with being the cause of all industrial ills…": McCawley, above n 8, 36.

65 See (1921) Q.W.N. 1 in which McCawley emphasises that the purposes or the aims of the Act were to promote industrial peace.

66 McCawley, above n 8, 44-45. As McCawley declares: "Necessary adjustments were brought under a system of industrial arbitration with less turmoil…less friction, more logic and more equality than in countries where there was no arbitration…": McCawley, above n 8, 44-5.

> ...obviate some strikes, shorten the duration of some strikes, lessen the bitterness and lead to a better understanding both by the combatants and public of the merits of disputes....[67]

There are elements here not only of McCawley's Fabian political tendencies, but also of more significant *social democratic* political leanings. In particular, McCawley was keen to draw attention to the fact that in New Zealand and in those European countries with a tradition of significant industrial regulation — whether through arbitration or wages boards — these nations had been *more* effective in promoting industrial harmony than in those nations (such as England and the United States)[68] which have not evidenced nearly *as significant* regulation of wages and industrial relations.[69]

McCawley's commitment to labourism, indeed, was further evidenced in his commitment to, or concern with, greater socio-economic equality.[70] Underpinning his advocacy of arbitration was an assumption, in this respect, that it would produce enhanced economic equality and greater social solidarity among the working class. For example, in *Industrial Arbitration* McCawley adduces various economic and industrial data to demonstrate that industrial arbitration has produced significant "wage compression" in which the wages of unskilled workers have risen at the expense of the middle class.[71] What is significant here is that this greater economic equality — one which is achieved potentially at the expense of individual freedom — is perceived by McCawley as being an inherently desirable or positive outcome.[72] In this respect, McCawley prioritised the social democratic ideals of (economic) equality and security over the liberal (or classical liberal) ideals of individual freedom and liberty. His Fabian and essentially social democratic — or socialistic — ideals therefore are clearly apparent in his (positive) association between arbitration and enhanced social and economic equality.[73]

McCawley's perception of industrial arbitration as a mechanism for promoting greater social equality and comparative wage justice for workers was undoubtedly influenced and, indeed, reinforced by his familiarity with (and approval of) the writings of Henry Bournes Higgins.[74] McCawley was a close adherent of Higgins'

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67 McCawley, above n 8, 45.

68 However, McCawley does not explicitly refer to these countries.

69 McCawley, above n 8, 45.

70 Ibid, 67.

71 Ibid, 67. At one point in the account McCawley approvingly declares that: "It is probable here, as in other countries, that the improved standard of the wage-earner has been obtained largely at the expense of the middle class — the investor as well as the salaried middle class": McCawley, above n 8, 67.

72 There are further reflections of McCawley's Fabian socialist tendencies when he comments that industrial arbitration has produced "a more equitable distribution of wealth" and "a greater [economic] share in the prosperity of the boom period...": McCawley, above n 8, 67.

73 Cope, above n 1, 226.

74 Higgins' influence on McCawley is very evident in *Industrial Arbitration*. McCawley, for example, has described Higgins as "a great lawyer": Thomas McCawley "Industrial Arbitration in Queensland" (1922) 5 *International Labour Review*, 385 at 408.

political philosophy and his technical and systematic approach to arbitration and shared his belief in the use of arbitration as a mechanism to pursue social and economic justice for the poorer sections of the working class.[75] Higgins argued for the legal regulation of the industrial realm — that is, that it should be regarded by lawyers as a "new province for law and order"[76] — and that industrial law should be developed and be expounded (as in other areas of law) through the application of systematic judicial reasoning and legal precedent.[77]

Such an approach — and its utilisation for achieving comparative wage justice for the working class — is evident in Thomas McCawley's emphasis in *Industrial Arbitration* for the greater need for analytical rigour and careful judicial reasoning in the Industrial Court of Queensland.[78] McCawley, in particular, called for the use of comprehensive scientific statistical data by the Court to determine the cost of living and the minimum or "living" wage and to make the application and the enforcement of the law to the industrial realm a more methodologically systematic and accurate enterprise. In this respect, McCawley approved of Higgins' attempts to "rescue arbitration from mere empiricism and lay the foundation for the establishment of a new province of law and order."[79] As he declared:

> The importance of the work of Mr Justice Higgins lies, in a large measure, in his having formulated principles, justifying them by closely reasoned judgements and applying them consistently...Opportunity and empiricism were thus discouraged and a certain amount of order, uniformity and consistency were evoked...[80]

Despite this emphasis on the need for greater analytical rigour and systematisation, McCawley was also keen to emphasise that the Industrial Court — under the *Industrial Arbitration Act* — should also be governed by the discretionary principles of equity and social justice in its application of the industrial law.[81] In this respect,

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75 Cope, above n 1, 228. As Cope argues: "McCawley was also familiar with the work which H.B. Higgins, the President of the Commonwealth Arbitration Court, had begun. McCawley realised that Higgins was successful in formulating principles on industrial law, and had justified them in closely reasoned judgements. These had had constantly applied....Both McCawley and Higgins agreed that law and Arbitration Courts could contribute much to the settlement of industrial disputes as well as the improvement of wages...": Cope, above n 1, 228; Murphy, above n 30, 249. See also Nicholas Aroney "Politics, Law and the Constitution in *Thomas McCawley v. The King*" (2006) *Melbourne University Law Review*, 1. As Aroney point out, there was also some correspondence between Higgins and McCawley in which the latter described Higgins "as the sheet anchor" of the entire system of industrial regulation in Australia: Aroney, (2006), 11.

76 Henry Bournes Higgins *A New Province for Law and Order.* (Harrop: London, 1922).

77 See Nettie Palmer *Henry Bournes Higgins* (Harrop: London, 1931); John Rickard *H.B.Higgins* (Allen and Unwin: Sydney, 1984).

78 McCawley, above n 8, 31. At one point, McCawley emphasises that: "...The judgements of Justice Higgins opened up a new avenue of advancement for employees and greater ingenuity was shown by them in brining their claims before the federal tribunal": McCawley, above n 8, 31.

79 McCawley, above n 8, 27.

80 Ibid, 31.

81 McCawley, as above n 8, 58-9; (1917) Q.W.N. 11.

Thomas McCawley perceived the arbitral process and the Industrial Court as being partially distinct from strict legal processes — one that was based not on strict legal precedent and (strict) legal rules, but rather one that was guided by "equity and good conscience."[82]

His approach contrasts to Sir Owen Dixon's "strict and complete legalism"[83] and allowed a greater degree of latitude and discretion to the Industrial Court to ensure that fairness was achieved. McCawley, in fact, warned against the adoption and application of strict legal principles or a *strict legalism* in *Industrial Arbitration* precisely because this could frustrate the realisation of substantive fairness, social justice and a fair result.[84] As he declared, "the natural [judicial] tendency to adhere to precedent may block the way to progress."[85]

This concept of the arbitral process as being somewhat distinct from pure legal principles — and, indeed, more essentially *progressive* than pure legal principles — is also reflected in McCawley's conception of arbitration as being one that was also a partly scientific and objective enterprise, rather than a purely legal one.[86] McCawley believed that the "new sciences" of economics, statistics and political science could provide the necessary data and required background that was needed to formulate industrial awards and to resolve and adjudicate on industrial disputes.[87] Implicit in this concern with developing a more scientific and more

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82 Ibid, 58-9. As President of the Industrial Court of Queensland, McCawley declared that it was not bound by normal positive legal rules and precedent but would instead, McCawley argued, be guided by the principles of equity, good conscience, and the substantial merits of the case.

83 Owen Dixon *Jesting Pilate and Other Papers and Addresses* (Law Book Co.: Melbourne, 1965); see also Garfield Barwick "Retirement Address" in Tony Blackshield and Geroge Williams (eds.) *Australian Constitutional Law and Theory* (Federation Press: Sydney, 1998).

84 In this respect, McCawley's approach closely aligned with that of Higgins' who believed that the sphere of industrial action should still be treated, in some respects, as being separate from the sphere of the law, since an excessively legalistic approach may produce significant injustice and inequity: see Higgins, above n 78, 22.

85 McCawley, above n 8, 49.

86 Ibid, 58-9. McCawley's preoccupation with the "new sciences" was particularly evident in his decisions relating to the determination of a minimum or a "living wage" and his ascertaining of the cost of living: see McCawley, above n 8, 63; see, for example, (1917) Q.W.N. 35; (1918) Q.W.N. 12; (1921) Q.W.N. 1.

87 In this respect see (1918) Q.W.N. 12. This decision involved the determination of an award as to the Bricklaying Trade in the South-Eastern Division of Queensland. In that decision, McCawley, as president, criticised the "rough estimate" of the award of the Commission and the inadequate nature of the statistical data upon which the Commission made its decision. McCawley declared in that case that: "The statistical information available seems hopelessly inadequate....For the due determination of these matters, it is manifestly desirable that the relevant facts should be ascertained with such scientific precision as may be reasonable ascertainable....If we may say so with respect, it appears to us that the Commission, having ascertained the reasonable standard of comfort, should have embarked upon an inquiry (or, if they had no power, they or some other Commission should have been empowered to embark upon an inquiry) as or what standard, higher or lower could be born by the community and what steps, legislative or administrative, would ensure that the worker received sufficient money to enable him to maintain and attain that standard" : (1918) Q.W.N. 12

objective approach to the arbitral process was that this would, in turn, produce a more progressive and socially just industrial relations framework.

McCawley, in this context, believed that it was possible for the Industrial Court of Queensland to calculate, indeed, *scientifically* the cost of living and to determine precisely a living or minimum wage.[88] In this respect, his approach reflected a distinctly Marxian or social democratic emphasis which equated science and objectivity with characteristics such as "progress" and "justice".

This concern on the part of McCawley with the "new science" raised his broader concern with establishing a more systematic, scientific and technical approach to wage regulation. McCawley was keen to expressly articulate the principles or the criteria on which wages should be set or be established in Australia Up until this point, McCawley insisted, there had been insufficient analysis and investigation into the principles underpinning — and which should underpin — wage determination and wage regulation in Australia. In *Industrial Arbitration,* for example, McCawley emphasised that "the basis of wage regulation in Australia has not been scientifically considered" and that (accordingly) "it is high time that there should be a thorough national overhaul of the method of wage adjustment by the most expert investigators available."[89]

Consistent with his essentially centralist and social democratic orientation McCawley asserted that any form of wage regulation should commence or be undertaken at a federal or national level since "a substantially higher standard of living must come, if at all, through federal action or a combination of the States."[90]

Further, (according to Thomas McCawley) wage regulation should be tied to the price of commodities rather than rent since this would have the effect of promoting *higher* wage settings, thereby facilitating greater market demand in the economy and producing less unemployment. In this respect, McCawley's political and economic outlook was an essentially social democratic and Keynesian[91] one which rested on the premise that enhanced equality and increased wages for labour — or reflationary measures — would, in effect, stimulate the economy and militate against high levels of unemployment. It was precisely this (Keynesian) reasoning that lay behind his advocacy for linking wage regulation with the price of commodities (and not rent). For example, in one part of *Industrial Arbitration* he declared that:

> It [such wage regulation] might have resulted in the more equitable distribution of wealth — a greater share for the employee in the prosperity of the boom period — had

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88 (1918) Q.W.N. 12

89 McCawley, above n 8, 61.

90 Ibid, 62.

91 McCawley cites the writings of John Maynard Keynes on several occasions in *Industrial Arbitration.*

> wages risen even more rapidly and higher with the price of commodities than rent and it might have resulted in less unemployment...[92]

McCawley's advocacy of wage regulation and a high minimum or a living wage was, however, by no means socialistic or Marxian in orientation since he did not argue that wage determination should be *entirely* divorced from, or independent of, industry and the capacity on the part of the private sector to pay for such wages. Indeed, McCawley was of the firm view that pragmatic or practical considerations — such as the community's capacity to pay for the wages of its labour — should play an equally important role as considerations of equality and social justice for labour. Yet, consistent with his concern with ensuring that wage regulation was more "scientific" in orientation, McCawley emphasised the difficulties that were associated with actually determining or ascertaining productivity and also of identifying what precise weight should be accorded to it in fixing wage levels.

In a more general context, McCawley's labourist leanings were also illustrated by his concern with the need to (scientifically) determine the extent to which industry should be subject to government and arbitral regulation — or, in other words, to ascertain, in fact, what is the optimal level of arbitral regulation which is needed to reduce unemployment and to counter industrial disputation. This emphasis on identifying the (precise) appropriate levels of regulation is consistent with his underlying commitment to the "new science" and his (essentially social democratic) faith in governmental regulation as a means of promoting more desirable social and economic outcomes. In *Industrial Arbitration*, for example, he declares that:

> The problem of unemployment constantly faces the Court in making awards. It is highly desirable that each industry should be surveyed with a view to ascertaining how far it is practicable to regulate the industry so as to reduce unemployment. [93]

This commitment on the part of McCawley with the "new sciences" and their capacity to realise more progressive outcomes was also reflected in his concern with the composition of the Arbitration Court. McCawley drew attention to the fact that judges may have insufficient expertise to adjudicate on, and, indeed, regulate industrial relations disputes. They had, in effect, "no practical knowledge of business."[94] Accordingly, he suggested that one mechanism for promoting greater expertise on the Queensland Arbitration Court was also to incorporate representatives from employer and employee groups as part of a more essentially corporatist framework — a type of representative system that was also already present in both Western Australia and New Zealand.[95] This explains, to some

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92 McCawley, above n 8, 62.

93 McCawley, above n 8, 64.

94 Ibid, 72.

95 As McCawley declares: "Under the Queensland system, the judge is not assisted by employer or employee representatives...In Western Australia and New Zealand the judge is assisted by representatives of employees and employers...The judge has no practical knowledge of business...": McCawley, above n 8, 67.

extent, his approval in *Industrial Arbitration* of the wages board system which was in existence in some of the States and which had unfettered (administrative) power to regulate the wages and conditions of labour and which was composed of experts.

Unlike arbitral tribunals, there was no requirement or pre-condition for the presence or the existence of an industrial dispute before the jurisdiction of wages boards could be triggered. McCawley entirely approved of the wages board framework and their unrestricted power to set the wages and working conditions of labour. For example, he observes in *Industrial Arbitration* that the "wages board system has done some pioneering work in the fixing of wages."[96] Implicit in McCawley's observations is that the greater administrative power that was wielded by wages boards would make them a far more efficacious method of industrial regulation than (the more limited mechanism) of arbitral tribunals. This countenancing of the wages board system illustrates McCawley's social democratic orientation and his general sympathy for the desirability of untrammelled administrative or "expert" regulation.[97]

McCawley's general (social democratic) orientation to administrative mechanisms of accountability was also particularly reflected in the arguments that he marshalled — in *Industrial Arbitration* — for having industrial relations regulation performed by wages boards than by Parliament. In particular, he emphasised that wage boards were preferable to Parliament for the specialised function of setting wages and labour conditions since they were, in fact, composed of technical experts who were better equipped to make such determinations. Furthermore, when falling under the ambit of wages boards industrial relations issues would not be a party political matter but rather would be perceived or would be considered to be an essentially objective and scientific one. Finally, where wage regulation and determination was undertaken by administrative tribunals, then (according to McCawley) wages and conditions would not, in effect, "swing with the political pendulum."[98]

Another indicator of McCawley's social democratic orientation was his commitment to several fundamental underlying principles which (he believed) should serve to orient or guide the operation of industrial arbitration. The first principle was that labour should not be perceived or regarded as commodities that can be exchanged and traded for any price — but rather as individuals with fundamental needs and rights that should be satisfied. This is a central principle of Fabian and social democratic political philosophy — one that draws attention to the need for wage determination to be, in some respects, independent of the free market. A second guiding principle, according to McCawley, was the right on the

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96 McCawley, above n 8, 76.

97 According to Malcolm Cope: "McCawley considered that political power could be used for both good and bad ends...McCawley hoped that the men who staffed Arbitration Courts would be men of "great altruistic qualities". As an Arbitration Court judge he was determined to make judgements and assessments about working conditions...This again highlights his suitability so far as the Labour Government was concerned" Cope, above n 1, 226.

98 McCawley, above n 8, 83.

part of labour to form associations or to join unions. A third principle was the right on behalf of labour to the payment of adequate wages and generally to receive equitable economic treatment. A further principle, in this particular respect, was the requirement for equal remuneration for work of equal value.[99]

A further illustration of McCawley's progressive or social democratic orientation was his preference for implementing a genuinely centralised and national framework of wage fixing as opposed to one that left wage regulation to the auspices or jurisdiction of the States. McCawley emphasised the need for uniform national standards pertaining to wages and industrial conditions and, in this respect, he insisted that no State alone could effectively regulate industrial wages and conditions since any coherent and integrated wages framework would need to originate at a federal or a national level. At one point in *Industrial Arbitration,* McCawley advocated establishing or implementing a Royal Commission to make recommendations relating to the setting of national standards on wages and conditions.[100]

Furthermore, in the absence of a Royal Commission, McCawley recommended the development of informal cooperation among judges so as to promote more uniform wages and national industrial conditions.[101]

Reflecting his essentially social democratic and labourist orientation, McCawley sought to emphasise the benefits which would, indeed, flow from the establishment of a Royal Commission into wage fixation. According to McCawley, had such a Commission been created, Australia would have, from an early point in its political history, embraced a truly standardised basic wage:

> Had a Royal Commission been appointed consisting of judges of the various States, charged with determining what was a reasonable basic wage under the existing system of payment to employees, it is quite possible that a wage would have been determined which would have been regarded as the standard throughout Australia...[102]

Consistent with his concern in seeking "scientific solutions" McCawley was "in favour of appointing men with a knowledge of economics...." for the Commission.[103]

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99 McCawley, above n 8, 91-98.

100 As McCawley argued: "No State can effectively deal with this question...The matter must be considered from a national point of view by an able Commission...The Commission should be asked to recommend an Australian standard of hours: McCawley, above n 8, 100.

101 As he again stated: "Some effort should have been made by the judges to meet together and consider whether some newer approach could be made to uniformity on those matters": McCawley, above n 8, 101.

102 Ibid, 102.

103 Ibid.

McCawley's progressive or social democratic orientation is also particularly reflected in his advocacy of constitutional amendment or constitutional reform. In *Industrial Arbitration*, McCawley is critical of the limited terms and framing of the conciliation and arbitration power suggesting that effective industrial relations regulation required a grant of a more plenary form of power to the Commonwealth. In this respect, he argues that a desirable approach would be, indeed, to accord Federal Parliament with concurrent power to legislate on industrial matters. As he stated:

> The Federal Parliament would not, however, be limited...to arbitration, but would have power to lay down an Australian standard of hours and devise a central court with branches in the States, ensuring a reasonable amount of uniformity with due consideration to local convenience...[104]

These social democratic tendencies are also reflected in his judgements on the Industrial Court and it is these judgements to which attention is now turned.

McCawley's Judgements on the Industrial Court of Queensland

Indications of McCawley's essentially social democratic orientation are also reflected in his judgements when sitting on the Industrial Court. His judgements, in this particular respect, indicate a strong advocacy for government intervention; a highly regulated industrial relations framework; a commitment to labour rights and a minimum wage; and a genuinely centralised and national wage fixing system.

The importance of industrial regulation and the impact which it could potentially perform was emphasised by McCawley in a decision of the Industrial Court in 1917.[105] In this decision, as President, McCawley sought to "to draw attention to some outstanding features of *The Industrial Arbitration Act of 1916*" and the significant impact which it was to have in regulating industrial activity and the economy more generally. Specifically, he was concerned that the status and the functions of the Court of Industrial Arbitration — under the *Industrial Arbitration Act* — should not be downplayed and should be perceived as being *equivalent* to the courts of law. As McCawley declared:

> ...[The] importance of the functions of the Court of Industrial Arbitration need not be emphasised. Its decisions will touch upon almost every phase of industrial activity in the community. A single award may directly apply to many thousands of people; bring about considerable changes in social conditions and substantially effect interests of financial magnitude...The Legislature has conferred upon it the widest powers, has created it a branch of the Supreme Court, has given its Judges the status of Judges of the Supreme Court and has enacted elaborate safeguards against the interference with it of other tribunals.[106]

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104 Ibid, 103.
105 Q.W.N. (1917) 11.
106 Q.W.N. (1917) 11.

According to Cope, McCawley completely endorsed the *Industrial Arbitration Act's* commitment to utilising courts of law "to the fullest to provide a comprehensive means of regulating industrial conditions"[107] by making the Industrial Court of Queensland an integral part of the judiciary and by ensuring that the President of the Court was to be a member of the Supreme Court. Such an attitude was particularly reformist — or social democratic — for its time since McCawley was repudiating the traditional separation of judicial and non-judicial functions that underpins classical liberal constitutionalism. He would seem to have endorsed — in the specific case, at least, of the Court of Industrial Arbitration — a more dynamic, flexible and, indeed, cooperative relationship between the judicial and the administrative branches and a heightened status for tribunals.

Comparisons can be drawn between McCawley's advocacy for a heightened role for the Industrial Court and the *Industrial Arbitration Act* and Henry Bourne Higgins' advocacy for a "new province of law and order" in the industrial realm and the need for the legal regulation of industry and industrial relations. Like Higgins, McCawley acknowledged a new role and purpose for the law and for developing a new regulatory legal apparatus in Queensland. As Cope argues, the *Industrial Arbitration Act* envisaged "a whole new field of law with which other members of the Legal Profession had no experience."[108]

McCawley also drew attention to the importance of the fixing of the minimum or "living" wage[109] in the *Industrial Arbitration Act* and the how this was to be set at such a level as to sustain a wife and a family of three children. In essence, married men were to be paid more than married women. As he declared:

> The minimum wage of an adult male employee shall be not less than is sufficient to maintain a well-conducted employee of average health, strength and countenance and his wife and a family of three children in a fair and average standard of comfort, having regard to the conditions of living prevailing among employees in the calling in respect to which such minimum wage is fixed and provided that in fixing such minimum wages the earnings of the children or wife of such employee shall not be taken into account.[110]

Although now perceived as being discriminatory, McCawley's commitment to this principle evidenced his strong commitment to the belief that other considerations — such as concerns related to social justice and equity — than purely "market" ones should also determine the fixing of wage levels. This was to be a theme which was to recur in his judgements on the Industrial Court of Queensland. For example, McCawley was later to emphasise the principle that wages should increase as

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107 Cope, above n 1, 227.

108 Q.W.N. (1917) 11.

109 According to s 9 (3), the Court is empowered to make a declaration as to the minimum rate of wages to be paid to either sex.

110 Q.W.N. (1917) 11.

industry's ability to pay increased and, in this way, he hoped to protect the interests of the less financially secure employees.

However, McCawley's approach to the concept of the "minimum wage" was not entirely "socialistic" since it focused on the industry's capacity to pay or afford wages. In this respect, his judgements on the Industrial Court of Queensland also reflected a pragmatic and utilitarian orientation — one in which industrial and economic development was to take priority over objectives related to social justices. For example, in a 1921 decision, McCawley J rejected an application for an increase in the minimum wage — so as to be higher than New South Wales levels — on the basis that it was contrary to the interests and continued viability of industry and employers:

> After very carefully consideration we have come to the conclusion that it would be inimical to Queensland industries and therefore to employers and employees alike if we were now to adopt a higher minimum wage for the average industry than that adopted as the basic wage In New South Wales....[111]

Hence, his underlying philosophical approach was essentially a utilitarian one in which he equated the interests of employees with those of the ongoing sustainability and the profitability of industry.

Nevertheless, despite this, the ideals of social justice and equity were for McCawley important justifications for maintaining a State-wide minimum wage. For example, in the above 1921 decision, McCawley (as President) was required further to adjudicate on whether there should be any difference in the basic rate of the minimum wage between the Central and South-East Districts. McCawley specifically rejected this proposal on the grounds that it would promote inequity and would facilitate both undesirable social and economic consequences since employers would relocate to areas with lower minimum wage requirements. In this judgement — as well as in various others — McCawley therefore emphasised the virtues of centralism and a State-wide minimum wage. As he declared in his decision in 1921:

> We have now come to the conclusion that there should be no difference in the basic rate in the Central and South-Eastern districts...If the wages are lower in Brisbane, the tendency is for manufacturing industries to gravitate to Brisbane. It is not desirable that the Central District should be hampered by competition from Brisbane merchants or manufacturers paying lower wages.[112]

McCawley's approach to the minimum wage also reflected a greater rationalisation of the method in which wages were determined. In this respect, it evidenced a more *scientific* methodology and an innovative use of statistics and other economic data. In McCawley's first decision requiring him to frame an award and fix the minimum

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111 Q.W.N. (1921) 1.
112 Q.W.N. (1921) 1.

wage in 1917 he emphasised the need to consider factors associated with the "cost of living" and to utilise statistical analyses.[113]

A later decision — requiring McCawley to determine whether a Bricklaying Award applied to the Commissioner of Railways — also reflects McCawley's commitment to a more scientific and objective methodology. Here, he drew attention to the necessity to "examine the wages fixed by those authorities and the methods by which they have been arrived at".[114] In commenting on the federal bricklaying award and the manner in which the federal Arbitration Commission arrived at it, McCawley expressed the view that "the statistical information available [to the Arbitration Commission] seems hopelessly inadequate."[115] McCawley, indeed, criticised the approach undertaken by the Commission in arriving at the federal (bricklaying) award, as well the (inadequacy of) statistical data or information upon which the award was based:

> If we may say so with respect, it appears to us that the Commission, having ascertained the reasonable standard of comfort, should have embarked upon an inquiry (or if they had no power, then some other Commission should have been empowered to embark on an inquiry) as or what standard, higher or lower could be born by the community and what steps, legislative or administrative, would ensure that the worker received sufficient money to enable him to maintain and attain that standard. Whether with the statistical information available, or with any additional information, they could have elected, they would have been able to arrive at a reasonably certain conclusion upon the question of fact involved, is doubtful.[116]

In then reaching a determination as to the appropriate minimum wage, McCawley declared that:

> For the due determination of these matters, it is manifestly desirable that the relevant facts should be ascertained with such scientific precision as may be reasonably ascertainable.[117]

Despite this commitment to a more scientific method in adjudicating on disputes and in fixing the minimum wage, McCawley was concerned to ensure that the approach of the Industrial Court of Queensland was one that was guided by the dictates of "equity, good conscience and the substantial merits of the case."[118]

McCawley's Judgements as a Judge of the Supreme Court of Queensland

113 Q.W.N. (1917) 11.
114 Q.W.N. (1918) 12.
115 Q.W.N. (1918) 12.
116 Q.W.N. (1918) 12.
117 Q.W.N. (1918) 12.
118 Q.W.N. (1917) 11.

This commitment to the principles of "equity, good conscience and the substantial merits of the case" were further evidenced in aspects of the decisions delivered by the Supreme Court during the period in which Thomas McCawley was a member. These decisions reflected a compassionate attitude to the plaintiffs who had been denied recovery through overly strict and excessively technical applications of the law. They further evidenced a significant "rights"-based orientation — one in which he was prepared to grant remedies to aggrieved complainants whose rights had been trenched on by public entities.

This was particularly illustrated in the decision of *Metropolitan Water Supply and Sewerage Board v. Jackson*[119] which overturned a decision of the Industrial Magistrates Court in Brisbane. This case specifically involved the Metropolitan Water Supply and Sewerage Board which was empowered to undertake "sewerage works" in accordance with the *Water Supply and Sewerage Act* and which, in this particular case, constructed a drainage system under Elizabeth, Eagle and Creek Streets in Brisbane City adjoining the property of the respondents. The drainage system, however, occasioned damage to the respondent's property by weakening the foundations upon which the buildings were constructed. The respondent therefore initiated legal proceedings against the Board for contravening s 143 of the *Water Supply and Sewerage Act* which provided that:

> Except as by this Act is otherwise provided, if any person sustains any damage by reason of the exercise by or on behalf of the Board by any of the powers conferred by this Act...full compensation shall be made to such person by the Board...

It was argued on behalf of the appellant Board that it was, in this case, not undertaking "sewerage works", but rather "drainage works" and, furthermore, that it was a delegate of the Crown which should, indeed, have immunity from prosecution under the provisions of the Act.

The Magistrate found for the respondent and the Supreme Court then, unanimously, — with McCawley J among its presiding judges — upholding the decision. Specifically, McCawley J, in delivering the judgement of the Court, advocated a wide interpretation of the terms "sewerage works" and argued that the Court should avoid excessively narrow and overly legalistic constructions of the provisions of the *Water Supply and Sewerage Act* — ones which served to preclude the applicant from securing his rights and remedies under the Act where the Board caused damage to his property:

> We are of the opinion that the expression "sewerage works" is used in its ordinary sense, that Fulton was working as an excavator on sewerage works and that the respondent was guilty of a breach of award.[120]

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119 (1924) Qd.R. 87

120 (1924) Qd.R. 87 at 91.

The approach of the Supreme Court of Queensland in protecting and promoting the rights of the respondent was distinctive in that it sought to narrow the scope of operation for the invocation of Crown immunity by the Board. As stated above, it was argued on behalf of the Metropolitan Water Supply and Sewerage Board that it could not be perceived in the manner of a stranger or a trespasser since it was, in essence, a governmental entity and therefore a delegate of the Crown. As a consequence of this, it was argued by the Board that it could exercise "all the rights of, exemptions from, the Crown" and therefore be quarantined from prosecution by the respondent. It was thus contended by the Board that it should be considered an "adjoining owner" rather than a "trespasser" for the purposes of liability under the *Water Supply and Sewerage Act.* Accordingly, the issue for determination then by the Supreme Court was whether the Metropolitan Water Supply and Sewerage Board could "be considered to have existed apart from the Act and without the rights of an adjoining owner?"

The Supreme Court — with McCawley J delivering the judgement — was keen to limit the scope of operation for Crown immunity so as to ensure that the respondent *could* secure a damages award against the Board. It did this by the somewhat artificial finding that the powers exercised by the Board — and specifically the powers to construct sewers and drainage systems in the streets — were *independent* powers and ones not exercised by the Board *as delegate of the Crown.* As the Court (with McCawley J rendering the judgement) held:

> Their powers to construct sewers in the streets are independent powers — they are not exercised by the Board as a delegate of the Crown. Nor are they exercised as licencees of the Crown or derived from the Crown's ownership of the soil.[121]

Accordingly, McCawley declared that:

> ...it is clear that the Board is in the position of a stranger or trespasser and liable as such, and not in the position of an adjoining owner.[122]

McCawley's judgements also evidenced a concern with protecting the rights of the accused. In *Smith v. Thompson; Ex parte Thompson,*[123] for example, McCawley CJ and Macnaughten J, as well as Lukin J, upheld an appeal by an accused and set aside an order — made under s 9 of the *Masters and Servants Act* — in which the defendant had been held liable by the Magistrates Court for failing to pay the balance of wages for work and labour done. One of the issues pertaining to the case was whether the order made by the Magistrate was one within the meaning of s 209 of the *Justices Act.* Reflecting his concern with due process, McCawley CJ, as well as Macnaughten J, found there to be no evidence on which the Magistrate could in fact reasonably find that the appellant was liable for failing to pay the balance of wages. McCawley CJ and MacNaughten J, in particular, were prepared to find that

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121 Ibid.

122 Ibid.

123 (1920) Qd.R. 288.

the order "was an order within the meaning of s 209 whether or not it was technically within the definition of breach of duty."[124]

An explicit concern for ensuring that the rights of the accused were adequately protected also underpinned McCawley's further judgement in *Bock v. Breen.*[125] This decision also evidenced McCawley's commitment to the "plain meaning" of statutory terms and his concern with ascertaining and implementing the wider purposes and objects of statutes. The case concerned s 89 of the *Liquor Act* which prohibited the undertaking of gambling activities on certain premises. McCawley CJ was keen to emphasise that this provision should not be given an unreasonable interpretation by being made to apply to simple bets upon the throw of a coin or dice. McCawley CJ (as well as Shand J) sought to articulate the underlying purposes of the Act which was to prevent significant gambling activities and operations — or lotteries — on premises. The purpose, in this respect, was to ensure that the Act did not have application to one-off bets on the throw of the dice. As McCawley CJ and Shand J declared:

> I have been unable to find any case where a simple bet upon the throw of a coin or dice...has been regarded as constituting a lottery...[126]

McCawley J's purposive approach and his commitment to ascertaining and identifying the underlying object of the statutory provisions were further reflected in *The King v. The Police Magistrate at Brisbane and Blocksidge and Fergurson Ltd; Ex parte Henry Norman Knott*[127] where he held that the word "person" in s 41 of the *Supreme Court Act* extended to companies as well as to bodies politic. To hold otherwise, according to McCawley, would be to defeat the underlying object of the Act which was to prohibit the drawing up or preparation of financial instruments/transactions by those individuals and companies not properly accredited or suitably qualified.

In this respect, McCawley CJ was keen to emphasise that the purpose of the Act — to ensure that financial instruments were, indeed, prepared by accredited professionals — would be undermined if it did not also apply to companies. As he declared:

> What is the object of s 41? It is to prevent the drawing and preparation of certain legal instruments for gain except by certain qualified or specified persons. Would that object be defeated if the section were construed as not applying to corporations? It would, because documents could be prepared by the servants of a corporation for the gain of the corporation...Section 41 of the *Supreme Court Act* is, I think, sufficiently avowed the object of preventing persons, other than those specified,

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124 (1920) Qd.R. 288 at 296.
125 (1924) QdR 27
126 (1924) QdR. 27 at 37.
127 ((1921) QdR 146.

> from meddling for purposes of gain directly or indirectly, with the drawing or preparation of legal documents...[128]

This essentially "purposive" approach — or ensuring that the underlying purpose of the statute was adhered to — was further evidenced in *Booney v. Hartmann*[129] which involved a contract to train a mare for racing purposes. The mare, however, subsequently developed permanent injuries to its feet thereafter becoming incapacitated. McCawley CJ focused on the underlying purposes/objects of the agreement — one that was to train the mare for racing purposes — and implied a term that the contract was to be terminated if the mare became unfit for training purposes. Without the implication of such a term, McCawley CJ held that the entire object of the contract would have been undermined:

> What will happen should the mare become temporarily unfit to be trained for racing purposes? The answer would, I think, have been "Of course, you need not train her." And if she becomes permanently unfit? It would be absurd to keep her for a purpose for which she is permanently unfit.[130]

McCawley's concern with equity and rights and with the need to ameliorate the strict application of the law was also evidenced in *Walker v. Bowry*[131] where he, along with the majority judges, sought to ensure that the Statute of Limitations was not rigidly applied to preclude the plaintiff bank from suing its debtors both jointly and severally. Similarly, in *Margetts v. Margetts* McCawley (who was then Chief Justice) was concerned to ensure that the operation of the Supreme Court Rules — and particularly where the parties were in contempt of court — would not apply in such a way as to undermine, or detract from, the existing legal rights and legal entitlements of the parties.[132]

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128 (1921) QdR 146 at 161.

129 (1923) QdR 346.

130 (1923) QdR 346 at 361. See also *Beaudesert Shire Council v. James Campbell (1925) QdR 18* which concerned the valuation of land. In accordance with s 218 of the *Local Authorities Act 1902-23* the valuation of the land depended upon the true value to which the land should be put. McCawley CJ held that the true value is the amount which a purchaser might be expected to give for the land with timber growing upon it, having regard to the use to which such land – including the timber growing upon it – might be reasonably expected to be put. In addition, McCawley's commitment to the "purposive" approach of statutory instruments was also reflected in the Queensland Supreme Court's interpretation of "order" for the purposes of Rule 145 of the Magistrate's Court Rules of 1922 in the further decision in *Jackson v. Marsh and Webster* (1924) Qd R 318. Rule 145 provided that "upon the ex parte application of the judgement creditor and upon affidavit that another person is indebted to the judgement debtor...the Court may order that all debts owing or accruing from the third person...to the judgement debtor shall be attached to answer the judgement."

131 (1924) QdR 142.

132 That case involved a matrimonial dispute between Lucy Margetts and her husband Thomas Margetts who was found to be guilty of contempt of Court for failing to comply with an Order of the Supreme Court. The Rule provides: "Nothing in this Order shall take away any right heretofore existing to enforce or give effect to any judgement or order in any manner or against any person or property whatsoever..."

Furthermore, in *Emmott v. Fawkes*[133] the judgements of McCawley CJ — with Lukin and Macnaughten JJ's — were reflective of a concern with ensuring due process and that the proper appellate processes of the court were observed. That decision involved an appeal under *The Auctioneers and Commission Agents Act of 1922.* While, on the one hand, McCawley CJ emphasised the fact that the trial judge had the opportunity to examine and gauge the credibility of witnesses at first hand, he also, on the other hand, emphasised the fact that appeals, which were indeed constituted under *The Auctioneers and Commission Agents Act of 1922,* were by way of complete rehearing in which the parties were entitled to have the independent decision of the Court substituted for the [134]

McCawley's concern with rights and due process were also evident in *Fearnley v. Berry North Queensland Racing Association* — a case which involved an action on the part of the Plaintiff in the Supreme Court seeking to have his disqualification overturned and his membership reinstated in an unincorporated voluntary association of racing. It was held that the Order was contrary to the requirements of O VI Rule 145 of the Magistrate Court Rules.

> The Rules of Court have prescribed no precedent for the issue of a Writ of Attachment for the disobedience of an Order to pay alimony to any person and have impliedly, it seems to me, negatived the issue of a writ of attachment in such cases.

McCawley's commitment to protecting the rights of the parties and ameliorating the strict application of the law was further evident in *Nagel v. Standard Rubber Works Pty Ltd*[135] — a case that involved an application to strike out an action or pleading on the alleged basis that it disclosed no cause of action. McCawley CJ (as a member of the majority) emphasised the fact that the Court should be reluctant to strike out the application unless it was clearly obvious that the pleading was drafted so poorly that it could not be rectified or corrected so as to disclose a legitimate cause of action. As McCawley declared:

> On an application to strike out a pleading on the ground that it discloses no reasonable cause of action, the applicant will not be granted merely because the pleading is demurrable unless it is so bad that no legitimate amendment can cure the pleading...[136]

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133 (1924) QdR 196. In that case Emmott claimed commission on the sale of certain property to Fawkes. It was held that he did not prove to the satisfaction of the Court that he was the effective cause of the action.

134 As McCawley CJ declared: "The appeal is by way of rehearing and the parties are entitled to have the independent decision of the Appeal Court on the facts...We must of course give due weight to the circumstances that the trial judge has had the advantage of seeing and hearing the witnesses and therefore had the opportunity which are denied to us of judging their credibility..." (1924) QdR 196 at 201.

135 (1924) QdR 1

136 (1924) QdR 1 at 9.

McCawley's concern with rights and due process and his influence on the determinations of the Supreme Court of Queensland were also evident in *South Australia Land Mortgage and Agency Co v. King*[137] — a case which involved the technical matter of whether the Land Appeal Court had the jurisdiction or power to undertake a complete (or *de novo*) rehearing of a decision made by the Land Court regarding a rental matter. The South Australian Land Mortgage and Agency Corporation charged rent in accordance with s 43 of the *Land Act* and this was subsequently challenged by King.

A decision was rendered by the Land Court and this was subsequently reviewed by the Land Appeal Court. This decision, in turn, was subject to further appeal to the Full Court of the Supreme Court in relation to the issue as to whether the Land Appeal Court had the power to undertake a complete *de novo* rehearing of the decision made at first instance by the Land Court.

The Supreme Court (with McCawley J as a member) was keen to emphasise the point that the Land Appeal Court had not only a power, but a duty or *obligation*, to rehear the matter and (re-)determine the rent in accordance with the principles of the *Land Act.* As the Supreme Court asked rhetorically:

> What is the nature of this appeal? An appeal being instituted and the parties are before the Court, the Land Appeal Court has not only a power, but a public duty, to rehear the matter and determine the rent, applying the principles laid down by the Legislature.[138]

The Full Court then subsequently found that the Land Appeal Court had fulfilled the obligation cast on it to determine the rent and therefore upheld the decision made by it in relation to the determination of the rent. As the Full Court held:

> The conduct of the parties with respect to the proceedings in the Court below cannot relieve the Land Appeal Court of its function or duty to determine the rent or effect the amount at which it is determined. The Land Appeal Court having here acting within its jurisdiction on appeals duly instituted determined the rent, the rent so determined becomes by the statute the rent payable.[139]

The significance of the case lies in the importance placed on the need for a complete re-examination of the hearing. As the Full Court declared:

> The determination must constitute an exercise by the Land Appeal Court of its own discretion in accordance with the evidence before it.[140]

McCawley's judgements further reflect a commitment to the ideals of social justice and equity and his appointment to the Supreme Court does evidence a discernible

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137 (1921) QdR 253.
138 (1921) QdR 253 at 261.
139 (1921) QdR 253 at 266.
140 (1921) QdR 253 at 266.

shift on its part to one that was (more) oriented to these ideals than previously. For example, in the decision in *Walter Reid v. Murphy*[141] — a case which concerned whether the respondent could claim wages as "ordinary time" for "waiting time" between his jobs as a stevedore under the federal award — McCawley CJ (as member of the majority) held that even though the respondent was not a party to the federal award he should still receive the benefit of the award. In reaching such a decision (and confirming the decision of the Magistrate), McCawley emphasised the need to decide the case according to the dictates of equity and good conscience:

> Notwithstanding that the appellant was not a party to the award, it was impossible to say that the Magistrate could not in equity and good conscience reasonably have come to the conclusion that the wages etc were determined by reference to the provisions of the award, that the accommodation was not proper and that the charge claimed at waiting time was therefore payable.[142]

There was no conclusive evidence adduced during the course of the proceedings as to whether the parties were to be governed by the federal award and whether the award rates were, indeed, to be the ruling rates. Yet, because the rules of evidence were not binding under proceedings involving the *Industrial Arbitration Act*, McCawley emphasised that it was open, indeed, to the judge to find that the parties *had* intended to be governed by the federal award:

> He was not bound by the strict rules of evidence. It seems to me impossible to say that he could not in equity and good conscience reasonably come to the conclusion that the accommodation was not proper and that the waiting time claimed was therefore payable.[143]

This commitment to the principles of equity and social justice were further evident in decisions rendered by the Supreme Court of Queensland during the period in which McCawley was a justice relating to the distribution of deceased estates. These decisions reflect a concern whilst McCawley was on the Court to find the creation of a trust and to *compel* the exercise of the obligations of trustees even where the provisions were worded in very wide and general terms and could be considered as a mere power rather than a trust power.

In the decision in *McWhirter*,[144] for example, the issue for determination was whether the power was in the nature of a mere discretionary power or whether it was in the nature of a trust power (and one which the trustees would compel the exercise of). Under the terms of the will, the testator directed his trustees to distribute his estate:

> Upon trust to apply the income and so much as the capital as my trustees from time to time consider necessary for the purpose in and towards the support of my wife and my children and the maintenance, education and advancement in life of my children

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141 (1924) QdR 1.
142 (1924) QdR 1 at 4.
143 (1924) QdR 1 at 4.
144 *Re McWhirter Deceased Estate* (1921) QdR 146.

> including the supplying to my wife and children medical attention, medicine and nursing in such shares and proportions as my trustees think fit...

McCawley J (in delivering the judgement of the majority) was prepared, indeed, to find the presence of a trust power despite the general nature of the wording of the power. He found that the trust extended to the entire estate and that the trustees had not fulfilled their duty in failing to distribute the (unapplied) surplus income of the estate to the wife and child:

> It would be clear on the authorities that the trust would be obligatory to the extent that the trustees must exercise their discretion by determining the shares and proportions of the wife and children with respect to their several ages and requirements...It seems to me that the trustees not only have a power, but a duty, to apply the unapplied surplus to the persons of the trust...I take the view that the trust extends to the whole fund and that it is the duty of the trustees to determine the shares and proportion in which it is to be applied....The class, as a whole, has a right to require the trustees to apply the whole income to the class and to determine their shares and proportions...If for any reason the trustees failed to exercise their discretion as to part of the income, the Court would exercise it for them... [145]

McCawley's decisions also reflected a concern with promoting (classical liberal) individual rights and freedoms. For example, in *Colonial Sugar Refining Co. v. Stevens; Ex parte the Colonial Sugar Refining Co*[146] — a decision which concerned s 3 of *The Regulation of Sugar Cane Prices Act* — as part of the majority's judgement, McCawley upheld the right of the respondent to sell his sugarcane, declaring that there was no express provision in the *Sugar Cane Prices Act* forbidding the sale or transfer (by the respondent) of the sugar cane crop.

Similarly, in *Murgon Shire Council v. Maudsley*[147] McCawley J also emphasised the need to preserve individual freedoms against state encroachment by construing the provisions of the *Local Authorities Act* restrictedly so as to ensure that the relevant local authority could only compel home-owners or occupiers to interfere with the property under very specific circumstances or conditions. The judgement in *Maudsley* evidenced a concern with protecting the inviolability of property rights — a traditionally classical liberal or libertarian emphasis.

There would, in this respect, appear to be a tension here between the social democratic emphasis on the need to afford governments (or local authorities) with as much scope as possible to regulate the private rights and entitlements of individuals and the corresponding emphasis on preserving an inviolable sphere of individual freedom so as to allow individuals to exercise their individual rights as freely as possible. In this respect, McCawley emphasised the fact that if the government did not conform strictly to the requirements of *The Local Authorities Act 1902*, then its power to enter on the land in order to extirpate/destroy weeds

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145 (1921) QdR 146 at 155.
146 (1921) QdR 126.
147 (1920) QdR 121.

would be invalidated. As he declared: "We, however, are of the opinion that the mode of proceeding laid down by s 154 is intended to be exclusive..."[148]

However, this was not always the case and on several occasions McCawley's judgements reflected a distinctively pro-state or government bias — one that sometimes had the consequence of trenching on individual rights and freedoms where this was consistent with the wider public interest. This was particularly illustrated in *Jowett v. Bell; Ex parte Bell*[149] where the respondent, Bell, was prosecuted for illegally branding seven cattle on essentially circumstantial — as opposed to direct — evidence. As part of the judgement, McCawley confirmed the conviction and his judgement demonstrated little concern with the fact that Bell had been convicted on the basis of circumstantial evidence or that there was a potential tension or conflict between his conviction (on the one hand) and the rules of evidence and his civil liberties (on the other).

The pro-state and anti-rights bias of McCawley's judgement was particularly exposed by Real J's dissenting judgement in which he dissented from the majority's decision and found that Bell's conviction should be overturned on the basis that it was unjust:

> Before a defendant is called upon to make a defence to a case which rests on circumstantial evidence only, the facts proved should not be inconsistent with the existence of a rational conclusion that the defendant was innocent.[150]

Nevertheless, this pro-state bias on the part of McCawley often gave rise to paradoxical consequences and this was particularly illustrated in the decision in *Duhig v. City of South Brisbane.*[151] In that decision the issue turned upon whether the school was a public school for the purposes of the payment of rates. The school would be exempted from the payment of rates if it was found that the land was used exclusively for the purposes of a public school. It was held that the school was a public school and therefore exempted from governmental rates.

Furthermore, in *In re Heiner; Ex parte Public Curator*[152] — a case which concerned s 22 of *The Insolvency Act* — McCawley, as part of the majority, found against the applicant in holding that there was no unconditional right to trial by jury — despite the criminal nature of the application. Section 23 of the (then) *Insolvency Act* provided that upon determining questions of fact the Court may direct such trials to be determined by the judge even in spite of the fact that this conflicts with The *Equity Procedure Act* which provided in that case that the applicant was entitled to jury by rights. But, as part of the majority, McCawley held that:

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148 (1920) QdR 121 at 125.
149 (1920) QdR 166.
150 (1920) QdR 166 at 172.
151 (1924) QdR 249.
152 (1921) QdR 192.

> ...but I do not think these sections apply here... [153]

McCawley continued that:

> I have come to the conclusion that when once the Court in its insolvency jurisdiction has, as in this case, properly exercised its discretion to entertain a claim by a trustee, whether or not claims by a title higher than that of the insolvent and the parties do not to the judge there desire that a question of fact be tried by a jury, the Judge has a discretion to decide whether the question shall be tried by jury, notwithstanding the Defendant would be entitled to trial by jury – the judge may desire otherwise, and that notwithstanding that if the matter were tried in the ordinary jurisdiction, the Defendant would be entitled to a jury, the Judge may decide not to grant a jury. The discretion is a true discretion... [154]

Similarly, in *R v. Hemes*[155] there was an appeal by the appellant for an extension of time to apply for leave to appeal on the ground of the failure at trial to call material witnesses. As part of the majority, McCawley held that the evidence proposed to be admitted could not have, in any case, afforded a defence to the charge on which the prisoner was convicted. Additionally, in *R v. King*, McCawley as part of the majority, found there to be no misdirection and upheld a conviction of attempted murder and doing grievous bodily harm.[156]

Another decision in which the judgement of McCawley CJ had the potential to produce unjust and inequitable consequences was the decision in *Saint v. Adams*[157] — a case which involved a lease and the issue as to whether the plaintiff had purported to exercise the option to purchase the property in the lease. The majority upheld the trial court's finding that the defendant had made a promise, indeed, to the plaintiff to hold the land for the remainder of the term in the plaintiff's favour declaring that:

> ...it is a good and subsisting lease and is binding on the defendant and the plaintiff has duly exercised the option to purchase the said lands contained in the said lease...The question, then, whether the appellant became bound by an option similar to that in the original lease is a question of fact....The jury found that the appellant when he procured the transferred farm, promised the respondent to hold the land for the remainder of the lease...with the option to purchase...I can find no evidence that the appellant agreed to hold the land until the date.... [158]

There were also other decisions that were contributed by McCawley which evinced a *disregard* with seeking to ascertain the underlying intention of the Act and with a commitment to following precedent and the prior authoritative decisions of the

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153 (1921) QdR 192 at 199.
154 (1921) QdR 192 at 201.
155 (1924) QdR 87.
156 (1921) QdR 95.
157 (1921) QdR 41.
158 (1921) Qd R 253.

courts. For example, in *The King v. Railway Appeal Board; Ex parte Parker*[159] — a decision which involved an appeal by members of the Queensland railway service against the appointment of a person to the position of Acting Locomotive Inspector — McCawley CJ (in delivering the judgement of Lukin J and Macnaughten J) did not seek to ascertain the underlying intention of the *Railway Act*, but to follow the doctrine of precedent and that of prior decisions:

> It is, under such circumstances, quite unnecessary to endeavour to ascertain the intention of Parliament from the patchwork of provisions contained in the *Railway Act* on this subject. The futility of the issue of the writ has been held by the High Court as a reason for refusing to issue a writ, even if the tribunal has misconstrued and misinterpreted the provisions of an Act in regard to their duty.[160]

In addition, McCawley (during his time on the Bench) evidenced a conservatism and a keen concern to maintain the status quo. This was particularly reflected in his approach to the hearing of appeals in which he demonstrated a reluctance to intervene and overturn decisions made at first instance and where there was *prima facie* evidence to support the decision. For example, on an appeal to the Full Court of the Supreme Court in 1921 involving the issue as to whether a lease of a farm also carried with it an option to purchase, McCawley dissented from the decision of the majority holding that because there was some evidence from which an inference could be drawn that the parties agreed not to include an option to purchase in the lease, the decision should not be over-turned:

> Although it was difficult to say what legal relations were in the circumstances created between the plaintiff and the defendant at the time of the transfer of the land to the defendant, and although from the evidence the proper inference may have been that the relation of mortgagor and mortgagee was created, yet it was open to the jury to find that the parties agreed that the plaintiff should become the defendant's tenant during the balance of the original term with an option of purchase within that period and that the finding should not be disturbed....[161]

Such a finding, however, was in tension with equitable principles applicable to the case in which there may have, indeed, been evidence to indicate that the appellant knew that the respondent was making improvements to the farm on the understanding that an option to purchase would be made available. McCawley did acknowledge this argument but proceeded to hold that there was no evidence to support such a contention. As he stated:

> The jury has found that the appellant, after making the promise referred to in the first finding, stood by and allowed the respondent, to the knowledge of the appellant, to improve the farm and expend money thereon....I must confess that I can find no evidence from which the promise found can be inferred....[162]

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159 (1924) Qd R 87.
160 (1924) QdR 87 at 101.
161 *Breach v. Kessel* (1921) QdR 257.
162 (1921) QdR 257 at 261.

Similarly, in *Muller v. Kennedy; Ex parte Kennedy*[163] the defendant was charged with "being found standing" on a footway in such a manner as to obstruct traffic and this was found to be inconsistent with a traffic regulation which provided that:

> No person shall stand or loiter upon any road or footway of any road in such a manner as to obstruct or hinder pedestrian or other traffic.

The majority in the Full Court of the Supreme Court — Cooper CJ, Real and Lukin JJ — overturned the decision of the trial court and found there to be no evidence of actual obstruction or hindrance:

> There is no evidence that any pedestrian traffic was obstructed. There is evidence that two persons passed by, but it is not alleged that they were obstructed or inconvenienced.[164]

In their dissenting judgement, however, McCawley and Chubb JJ held that there was sufficient evidence to warrant the police magistrate convicting the accused.

Similarly, in the decision in *Rodekirchen v. Rodekirchen; Ex parte Rodekirchen*[165] — a decision which involved a wife who left her husband without reasonable cause and who then successfully claimed child maintenance from him — McCawley together with the members of the majority upheld the decision of the Magistrates Court. He emphasised the fact that there was evidence on which the Magistrate could find that the wife had:

> ....done everything possible to return to her husband, and that is sufficient to distinguish the case from that relied upon by the appellant. We think there is evidence upon which the Magistrate could find that the husband has deserted his wife and that there was also evidence that he left her without means of support.[166]

The decision in *Strelnikoff v. Shepperson*[167] is a further example of the reluctance on the part of McCawley to overturn decisions at first instance. That decision involved an appeal by Strelnikoff from a judgement by the Magistrates Court awarding him only nominal damages for breach of an agreement on the part of the respondent to collect his timber.

Similarly, in the decision in *Dyson v. Dyson*,[168] Mr Dyson initiated an action for the dissolution of marriage on the basis that her wife had, indeed, committed adultery with another man at his residence. Whilst there was no direct evidence to find that Mrs Dyson had, indeed, committed adultery McCawley CJ was prepared to hold

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163 (1921) QdR 126.
164 (1921) QdR 126 at 128.
165 (1924) QdR 44.
166 (1924) QdR 44 at 45.
167 (1923) QdR 58.
168 (1924) QdR 156.

that the evidence, in its entirety, supported the trial judge's finding that the wife had committed adultery. McCawley CJ, in this respect, declared that:

> There is no direct evidence of adultery, or even of undue unfamiliarity. Is it open to the jury...to conclude there was adultery? No single act proved can be taken by itself as justifying the inference of adultery.[169]

McCawley found that:

> ...on the whole the evidence points to a relationship of a much closer nature...Looking at the whole of the evidence, I am unable to say that the jury's finding is unreasonable...[170]

In delivering the judgement of the Court, McCawley further emphasised that the Magistrate's judgement evidenced care and attention and that there was sufficient evidence to indicate that no damage had been sustained by the:

> The Magistrate has found that he has not established that he suffered any damage through the default, if default there was. I think the Magistrate was justified in coming to this conclusion on the evidence. The Magistrate has shown great care in an involved case, and it may be taken, would not have allowed this amount unless a claim for it had been substantiated...[171]

In those decisions where McCawley was presiding, the Supreme Court also demonstrated a preparedness to invalidate restrictions given in wills or bequests which operate unfairly against beneficiaries. For example, in the decision in *Grayson v. Grayson*,[172] the testator specifically devised land to his son on condition that they would not sell the property during his lifetime to anyone other than his three brothers was clearly a condition. As the Court declared (with McCawley reading the judgement):

> I am of the opinion that the conditions imposed by the wife involve such a substantial restriction of the power of alienation that they cannot be regarded as within the recognised exceptions to the rule against such restrictions are therefore void.[173]

According to McCawley:

> The power to alienate must be regarded as restricted within limits so narrow as to constitute a substantial taking away, not of the whole power of alienation, but a valuable portion of it, subjecting to fetters which inevitably, by limiting the market, diminish the ordinary selling value of the land... I therefore adjudge and declare that

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169 (1924) QdR 156 at 158.
170 (1924) QdR 156 at 158.
171 (1924) QdR 156 at 158.
172 (1922) QdR 155.
173 (1922) QdR 155 at 157.

> the plaintiff is entitled to an absolute interest in fee simply in the land specifically devised to him[174].

A similar decision was rendered in *In re Robertson, Deceased Queensland Trustees Ltd and Another v. Robertson and Others.*[175] There, the testator bequeathed his estate upon trust for sale to pay the residuary to his three children in equal shares. One child died and the issue concerned whether the dispositions to the remaining children were invalid. It was held that there was no intestacy and that the trustee should distribute the residue.

The Supreme Court also reflected whilst McCawely was a member a greater orientation to fairness and to ensure that the rights of parties were not prejudiced by inadmissible evidence. For example, in *Bailey v. Bailey*[176] the plaintiff brought an action for the dissolution of his marriage with the defendant and alleged in his petition adultery with A. However, before filing his petition, the plaintiff knew of other acts with B and C and tendered evidence of those acts during court proceedings. The Supreme Court held (with McCawley as a member of the majority) that this evidence was inadmissible and could not be considered since if the plaintiff had intended to rely upon the evidence of adultery with B and C it should have been set out in the petition. To rely upon this without providing notice to the defendant was essentially unfair. As the Court declared:

> Permitting a party to follow the procedure adopted in the case would place the Court's action on an undesirable practice and enable a party unfairly to bring home to the minds of the jury evidence not admissible on the pleadings as they stand...[177]

The decisions on which McCawley participated as a judge of the Supreme Court also reflected a concern to give efficacy to the terms of the Act. For example, in *Thomas v. McEather*[178] the respondent was charged with being in breach of one of the by-laws by using travelling stock and by failing to notify the Council. The Court found that the by-laws were clearly within the ambit of the power to make by-laws with respect to "regulating the driving of animals upon any land under the control of the Local Authorities."[179] As McCawley declared:

> Where the language of an Act is not so plain as to leave no room for doubt, the Court may bear in mind the avowed purpose of the Act and consider whether a particular construction will render the Act effective or ineffective for that purpose...It is indubitable that the effectiveness of this by-law would be seriously impaired and a wide door would be open for evading the giving of notice, if we were to hold that the person in charge could excuse his omission merely by proving that he relied upon

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174 (1922) QdR 155 at 158.
175 (1920) QdR 238.
176 (1923) QdR 171.
177 (1923) QdR 171 at 178.
178 (1920) QdR 166.
179 (1920) QdR 166 at 189.

> some other person giving notice for him and believed that such person had given the notice.[180]

As he continued:

> I am of the opinion that the cumulative effect of all these considerations is to render irresistible the conclusion that the Local Authority in enacting this by-law intended that the duty of giving notice should be so far absolute; that the existence of a state of mind such as that provided by the defendant in the case was not to be an excuse for failure to give the notice...The imposition of a penalty is really only a summary mode of enforcing reparation to the Local Authority for the failure to comply with the conditions imposed upon the travelling of stock and for the harm ensuring or which might ensure from such failure...

Finally, in the decision in *Harris v. Farrell*[181] — a decision which involved the issue as to whether a second and new promise had been made on the part of the defendant to marry the plaintiff — McCawley, in a dissenting judgement, upheld the initial decision of the Magistrate in finding that no (new) promise had been made. As he declared:

> Each incident is colourless and as consistent with a promise not having been made as with it having been made. The cumulative effect of these colourless incidents is no greater than the effect of any one of them, yet looked at in connection with other facts in the case they may be highly significant...It seems to me that all the evidence of subsequent events — other than the plaintiff's evidence — are consistent with no fresh promise having been made either by the defendant to the plaintiff or the plaintiff to the defendant, even when those events are viewed in conjunction with the whole preceding relationship of the parties, and that a jury could not regard those events as supporting the inference that a new promise had been made...[182]

CONCLUSION

In conclusion, in this paper we have sought to examine the philosophical and political orientation of Thomas McCawley through the prism of his academic writings and judgements whilst on the Queensland Supreme Court and Industrial Court.

McCawley's appointment to the Queensland Supreme Court was certainly considered a controversial "political" one precisely because of his labourist and social democratic political and philosophical orientation. In this paper we have sought to draw attention to his social democratic beliefs which explains, to some extent, *why* he was appointed by the then Labor Government to the Supreme Court and Industrial Court. McCawley's social democratic political orientation is most evident in his political writings – particularly in his account, *Industrial Arbitration.*

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180 (1920) QdR 166 at 189.
181 (1924) QdR 27.
182 (1924) QdR 27 at 29.

They are also clearly evident in his judgements on the Industrial Court of Queensland where he sought to promote industrial justice for Queensland workers. His political leanings are somewhat less evident in his judgements whilst a member of the Supreme Court. Yet as a member of the Court he still did seek to promote (for example) the rights of the accused and was still committed to the principles of due process, equity and social justice. His judgements also evidenced a progressive commitment to promoting the underlying purposes of the law and to avoiding a strict legalism and mechanistic approach to statutory interpretation. From this methodological standpoint, McCawley was certainly progressive and social democratic in orientation. It is hoped in this survey of McCawley's decisions and academic writings that a better understanding and awareness of McCawley's political and philosophical orientation is achieved.