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The Federal Conciliation and Arbitration Power: from Cradle to the Grave?



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The Federal Conciliation and Arbitration Power: from Cradle to the Grave?

The Vision in Hindsight: Parliament and the Constitution: Paper No. 14

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution is a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. A number of essays have been commissioned and will be published, as IRS Research Papers, of which this paper is the fourteenth.

Eleven of these papers were selected for inclusion in the final volume, *Parliament: The Vision in Hindsight*, G. Lindell and R. Bennett, eds, Federation Press, Sydney 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assisted DPL with the management of the project.



Centenary of Federation 1901-2001

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Major Issues

The Commonwealth Parliament's industrial power contained in section 51(xxxv) of the Constitution was the result of a compromise which limited Parliament to legislating for the settlement of industrial disputes using the methods of conciliation and arbitration, and then only in interstate disputes. This measure gained acceptance at the Federation Conventions because it defused political controversy by relying on an adjudicative model of dispute resolution which would operate subject to legislation framed by a democratic parliament.

The constitutional framers did not have a clear idea of how the industrial power was to be exercised, although there was wide consensus that it would involve the resolution by an independent tribunal of disputes which were national in concern. A clear vision was only reached during the passage of the Conciliation and Arbitration Act in 1903–04. It was here that the judicial model was firmly adopted. Since the system was primarily concerned with dispute resolution (rather than a legislative function of industrial regulation), an approach based on adjudicative arbitration was thought to be a natural one.

While federal arbitration was originally intended only to apply to the resolution of major disputes in national industries, the demands of government economic policy and the interests of the parties soon created an impetus towards a more extensive, regulatory approach to industrial arbitration. However restrictions placed on the Arbitration Court by the High Court's interpretation of the industrial power limited the scope for a move away from an adjudicative form of arbitration.

In response, between 1911 and 1926 several federal governments of various persuasions sought extension of the industrial power by referendum to overcome these constitutional limitations. The amendments also addressed the complexities caused by industrial matters being shared between federal and State jurisdictions. The referendum proposals aimed to supplement the adjudicative model of arbitration, and its focus on dispute resolution, with a wider regulatory function, including non-arbitral methods and the direct setting of industrial standards by legislation if necessary. All these referendum attempts failed after facing strong opposition from State-based political forces from a variety of quarters. Likewise, many plans to convince the States to transfer their powers over employment matters have proved fruitless (apart from the recent example of Victoria in 1996, which the current Victorian Government is seeking to reverse).

In all, referenda to expand the Commonwealth's power on industrial relations have been put forward—and failed—on seven occasions: in 1911, 1913, 1919, 1926, 1944, 1946 and

(in relation to incomes) 1973. In view of this record, since the 1950s extra-constitutional solutions have been preferred for achieving change, relying on greater co-operation between Federal and State legislatures and tribunals.

The parliamentary record of legislation to implement the industrial power under section 51(xxxv) has been one of frequent and contested change. The arbitration system itself has been a matter of legislative focus in three key periods:

- during the 1920s attempts were made to reduce the Arbitration Court's formalism and judicial approach in favour of 'round table' conciliation. At this time, the political contest over the enforcement of Federal awards and the demarcation between Federal and State industrial systems cast into doubt the continued existence of Federal arbitration. The arbitration system was popularly endorsed at the 1929 election, while further legislative attempts to move away from an adjudicative approach in 1930–31 were unsuccessful
- the period after the Second World War saw greater expectations on the federal arbitration system to implement economic planning and regulation. Between 1947 and 1956, the inefficiency and legalism of judicial arbitration was countered by legislation which introduced a more informal administrative approach to arbitration, together with the promotion of conciliation and bargaining. However the constitutional interpretation of the industrial power placed limits on such developments. The High Court's decision in the *Boilermaker's Case* required that the arbitral and judicial elements be separated, causing conflicts between these two arms over the imposition of sanctions for industrial action. The O'Shea affair in 1969 was a direct outcome of this division, and led to further demands for a shift away from judicial institutions and an adjudicative approach to arbitration, and
- most recently, changes in the 1990s have resulted in a transformation of the arbitration system and a reduced reliance on the Constitution's industrial power. Many of the previous constitutional limitations were removed by the High Court's *Social Welfare Union* decision in 1983. The Hancock Report reaffirmed the value of an independent institution while emphasising its policy and regulatory role. The report was largely implemented in the *Industrial Relations Act 1988* which adopted a more administrative approach to arbitration. Around this time, however, came demands for reduction or abolition of the arbitration system and its replacement by enterprise-based bargaining. The ALP's amendments of 1992–3 brought a more accommodative approach to arbitration, with a greater focus on facilitation of bargaining while largely retaining the independence of the Commission. The Liberal-National changes under the *Workplace Relations Act 1996* continue along this path. An independent regulatory role for the Commission was retained as the result of amendments insisted on by the Australian Democrats.

Despite its restrictions, the Commonwealth Parliament has continued to rely extensively on the industrial power, making limited use of other constitutional powers. The original vision of the constitutional founders, of just determination of disputes and their underlying grievances by an impartial umpire, has been adapted and extended across the domain of

industrial legislation. Even when other powers have been used, the tendency has been to adopt a system based on independent arbitration of industrial claims. The direct regulation of key industries during the Second World War was dismantled in the 1950s and indirect regulation through the arbitration system has until recently remained the norm. Adherence to the arbitral model provided a high degree of institutional and procedural stability but with restricted flexibility.

Only in recent years have attempts been made to replace this approach with potentially more direct forms of legislative regulation using the external affairs and corporations powers. The use of such powers indicates a decline in confidence by governments in the value of the arbitration tribunal's autonomy and expertise.

The trend of federal legislation in industrial relations shows an increasing tendency of governments to influence arbitral decision-making through procedural checks and by requiring the consideration of public policy issues such as the state of the economy. In recent years Federal legislation and government policy in industrial relations have become more direct and interventionist in the pursuit of accommodative arbitration and deregulated bargaining. These developments have led to serious concerns being expressed over the federal arbitration tribunal's loss of independence and authority.

The history of federal industrial legislation contains a common thread consistent with the original vision of the constitutional founders, although the approach and functions of the arbitration system have been adapted in response to the changing industrial relations environment. Attempts to engineer fundamental change to the system have been of limited success because of the constitutional and political restraints of a complex federal system. It is likely, therefore, that the industrial power will continue to form a significant basis of Commonwealth legislation in the future, although other constitutional powers will be relied on to overcome its limitations.

Introduction

Section 51(xxxv) gives the Federal Parliament power to make laws with respect to:

conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

Throughout the history of the Commonwealth, this power has remained one of the most contentious and litigated clauses in the Constitution. Because of the constitutional limits on the manner in which national legislative power can be exercised in this area, the institutions and processes of the Federal system of conciliation and arbitration have remained a consistent focus of public debate. It is timely to review the legislative history of the industrial power because the principles and processes underlying the Federal arbitration system have been seriously questioned in recent years. Since 1904 national industrial relations policy has relied on implementation of the industrial power through a permanent and independent arbitration tribunal (from 1904 to 1956 the Commonwealth Court of Conciliation and Arbitration; between 1956 and 1988 the Commonwealth Conciliation and Arbitration Commission; and since 1988 the Australian Industrial Relations Commission). Over the last decade an institution considered one of the more enduring features of Australia's federated history has been challenged by demands for reduction of industrial regulation in the interest of efficiency and competitiveness.

This Paper¹ examines key phases in the history of implementation and reform of the Commonwealth Parliament's industrial power, using the parliamentary debates and papers, legislation and court cases as the main sources. The industrial power is unusual in not giving Parliament direct power to legislate outcomes; rather it requires use of a particular method (conciliation and arbitration) and then only in certain circumstances (interstate industrial disputes). Hence any examination of this topic involves studying the complex triangular relationship between the High Court (as interpreter of the Constitution), the Parliament (as legislator and site of political debate) and the Commonwealth arbitration tribunal (as the institution responsible for exercising the constitutional power, and as itself the site of industrial and political contest). The federal arbitration tribunal has the unenviable task of operating according to Parliament's legislated policy while observing the High Court's decisions on how the Constitution limits not only the legislation but the tribunal's own character and processes.

In exploring these relationships, four key themes form the focus for this study:

- the effects which High Court decisions on section 51(xxxv) have produced on the character and operations of the tribunal
- the tendency by Parliament to distance itself from direct regulation of industrial matters, using the tribunal as an independent expert body
- the tension between the tribunal's role as an independent quasi-judicial body and its development as an instrument of policy, and
- the extent to which Parliament has continued to rely on section 51(xxxv) as the source of its legislative power in industrial relations, or has resorted to other constitutional heads of power in order to avoid the limitations of the industrial power.

In describing the general trends in this triangular relationship, it is useful to distinguish three types or models of arbitration.² The first type, adjudicative arbitration, is focused on dispute resolution and is judicial in function. It tends to be passive or receptive in outlook, formal in procedure, involving public hearings before an independent tribunal such as a court, uses hearings and evidence, reaches decisions by weighing the rights and interests of the parties, with outcomes decided according to precedents and principles of justice. By contrast, administrative arbitration is focused on regulation and is legislative in function. It tends to be active or interventionist in outlook, formal in procedure, involving a public and interested body such as an inquiry, uses independent reports and data, reaches decisions by achieving stated objectives, with outcomes decided according to the public interest and ideals of equity or fairness. A third type, accommodative arbitration, tends to be conciliatory in outlook, informal in procedure, using mediation and negotiation in private meetings, reaches decisions based on the relative power of the parties by finding a workable solution in the immediate circumstances, with outcomes decided according to compromise and the bargaining positions of the parties.

The history of the implementation of the industrial power under the Constitution shows an oft-remarked trend away from adjudicative arbitration and the use of judicial processes, as the focus of the federal arbitral tribunal has moved from dispute resolution to regulation. The impetus for this change has come from successive governments keen to direct the outcome of the process towards economic and industrial policy goals; but it has also come from the industrial relations parties themselves, particularly unions, which have tended to desire comprehensive regulation of working conditions. At the same time, however, reactions to the judicial model have come in the form of demands for more accommodative arbitration with less centralised regulation by the tribunal. The co-existence of these contrary tendencies helps to explain the relative stability of the arbitration system despite the high level of legislative activity throughout the period.³

Part 1: The Founders and their Vision

Nineteen Fateful Words: The Federation Debates

When the first Federation Convention assembled in Sydney in March 1891, the colonies of Australasia had recently experienced the most bitter and disruptive strike in their history. The Maritime strike, which simultaneously involved the key wool and shipping industries, shook away the complacent view that Australia had left behind the class enmity and industrial strife of the old world. Coming at the end of a long boom of prosperity in the late nineteenth century, it heralded nearly a decade of industrial struggle between the newly-formed mass unions, which campaigned for recognition as legitimate bargaining partners in the setting of industrial conditions, and employers demanding the unilateral right of 'freedom of contract' to determine terms of employment on an individual basis. The strike highlighted the economic interdependence of the colonies: apart from the inevitable effects of disruption in the shipping industry, stoppages by coalminers in New South Wales made for a scarcity of coal and gas in Melbourne, causing factories to shut down and families to eat their dinners cold. Even as the delegates to the first Constitutional Convention in Sydney began their work in March 1891, the next major contest—the Queensland pastoral strike—was already escalating into armed hostility, with military forces despatched to break up the shearers' camps.

It was in this context that the South Australian politician Charles Cameron Kingston proposed to the first Convention that the Federal Parliament should be given legislative power for 'the establishment of courts of conciliation and arbitration, having jurisdiction throughout the commonwealth, for the settlement of industrial disputes.'⁴ Kingston had only a few months before presented a Bill to create such courts in his home colony. He put forward his novel ideas for encouraging collective agreements, backed by enforceable arbitration of industrial grievances, to the New South Wales Royal Commission on Strikes which had been convened to find solutions for major industrial disturbances.⁵ Kingston claimed that his proposal for Federal tribunals would not interfere with the powers held by the colonial parliaments; but the recent strikes showed that widespread industrial disturbances could only be addressed by a national body. At this stage he would not have foreseen any problems in sharing powers between Federal and State legislatures; he had, after all, envisaged both levels of government co-operating closely, and even advocated allowing persons to be simultaneously a member of both State and Federal Parliament.⁶

Kingston consented to leave the matter until the discussion on the federal judiciary, when he argued for power to allow the federal legislature to call tribunals into existence as the need arose. The motion was solidly opposed by conservatives like Sir Samuel Griffith, Premier of Queensland, as an interference with property and civil rights—matters which were decidedly the preserve of the States. Kingston attempted to circumvent such hostility by arguing that the terms of the legislation should be entrusted to the good sense and discretion of the Federal Parliament. The proposal was defeated by 25 votes to 12. During the short debate, delegates were not entirely clear whether the draft Constitution should

allow Parliament to dictate directly the actual terms of settlement, or whether the power would only extend to the establishment of machinery for hearing disputes.⁷

The matter was raised again at the Adelaide Convention in 1897, by which time things had changed radically. There was by now an active conciliation and arbitration system in New Zealand, one which by most accounts was operating successfully. Kingston had succeeded in getting a compromise system enacted in South Australia. In New South Wales the newly-formed Labor party had initiated a long debate over the merits of various schemes for making arbitration effective, while in Victoria wages boards had been established by legislation in 1896 to set minimum wage rates for the most exploitive ('sweated') trades.⁸ As Quick and Garran put it, by the time of the Adelaide Convention, 'political thought had developed and public sentiment had ripened' in favour of state-sanctioned industrial arbitration originally advocated by Kingston.⁹

This time it was the Victorian liberal Henry Bournes Higgins who pursued the issue, proposing the inclusion of 'industrial disputes extending beyond the limits of any one State' to the Federal Parliament's list of legislative powers. Like Kingston before him, he noted that this proposal was facilitative and did not actually require Parliament to establish a court for the purpose; nor did he wish to prescribe the method which might be used to resolve such disputes.¹⁰ Then Kingston rose to speak in support, announcing that his preferred amendment would read 'conciliation and arbitration for the prevention and settlement of industrial disputes.' His approach was not to limit the federal jurisdiction to interstate disputes: a national court would have cognisance of all the wider issues and would command greater respect, while being able also to assist local efforts at industrial peace. The official responsible for administering any federal legislation could be trusted to determine whether a particular dispute was better dealt with at the Federal or State level. Hence he did not see the need for the federal legislative power to be limited to only those disputes which extended beyond a single State.¹¹

While Kingston saw no problems with overlapping jurisdictions, since Federal and State measures would complement rather than conflict with each other, Higgins' solution was to avoid potential inconsistency by limiting Federal jurisdiction to interstate disputes, which were inherently beyond the domain of any State. He subsequently admitted that he had inserted the interstateness qualification in order to calm fears that the Federal tribunal would intervene in purely local disputes.¹² Another Victorian liberal, Alfred Deakin, gave support to the idea of arbitration in principle, but thought that Higgins' approach was no answer to the jurisdictional difficulties, since it would never be clear precisely at what point a dispute had passed from State to Federal control. He was joined by Bernhard Wise of New South Wales, who thought that local bodies were more competent to deal with industrial matters, and was wary lest a central authority might set uniform wages across the country irrespective of local conditions.¹³ Higgins' proposal lost by 22 votes to 12, having failed to gain support even from some liberals who, like Deakin and Wise, sympathised with state intervention to promote industrial conciliation.

Higgins continued to push the amendment at the Melbourne Convention the following year. This time it was a compromise motion that was put forward, embracing the reference to conciliation and arbitration urged by Kingston together with the interstateness limitation adopted by Higgins. The same arguments were recited from both sides of the debate with the key proponents urging that, as framers of an enduring Constitution, the delegates would be derelict in their duty if they did not provide the Federal Parliament with the ability to exercise such a power if it were needed, and that the contours and limits of the power could safely be left to the elected legislators of the new Commonwealth.¹⁴ The proposal's most trenchant critic was Josiah Symons of South Australia, who was convinced that labour disputes lay within the inherent domain of the States. He could not see that any labour disturbance could become a Federal concern, as it would always remain located in one or more specific States. The inclusion of limitations on the Federal power would not clarify the matter:

To insert this amendment as it stands seems to me to be simply the insertion of a series of words; and stripped of these idle words the amendment simply means that the Federal authority is to exercise complete power over all industrial matters. Is that the wish of this Convention? Is it the desire of the representatives of any State that their industrial affairs shall be placed under the control of the Federal authority?

The inclusion of the amendment would simply generate dissension:

We shall have a sufficiently fine crop of difficulties without overloading the Federal Parliament, and without introducing matters of this kind, about which, undoubtedly, passion will rage in the most intense degree.¹⁵

The New South Wales Premier, George Reid, envisaged that allowing federal jurisdiction over interstate disputes would provide a strong incentive for disputants to 'extend the mischief and evil into another State ... in order to shift the venue of the tribunal which will try the dispute.'¹⁶ Deakin thought that the power was 'not likely to be exercised by the Federal Parliament for many years to come,' but that it should be included to provide 'in advance for all conceivable federal contingencies.' But, as Higgins warned in his concluding address, the federation of labour across the country was likely to bring ever more disputes within the national domain.¹⁷ When it came to a vote, Higgins' motion passed narrowly by 22 votes to 19. Compared with the defeat the previous year, the proposal gained approval largely because it attracted the support of the Western Australian delegation led by the Premier, John Forrest. While Forrest was no radical, he saw a need for government to intervene in industrial disruptions and thought that the power would be exercised more carefully and moderately by a Federal Parliament than by local legislatures which might be subject to sectional interests (he no doubt had the labour movement in mind).¹⁸

At the time of its insertion into the Constitution, nearly all the major problems that would emerge in with the operation of the industrial power had been foreseen: the difficulties in demarcating the domains of Federal and State authority, the right of States to control local

matters; the appropriateness of a judicial model; the occupations and industries to be covered; the extension to State government employees; the difficulties of enforcement; the intrusion on business and property; the accommodation of regional differences. Many of these are the inevitable result of maintaining the concurrent jurisdiction of central and provincial government in a strong federal system; others stem from the fact of state intervention in industrial (and consequently wider economic) affairs. Some issues derive from prescribing the methods of conciliation and arbitration for resolving disputes, and are compounded by the interpretation that this requires an adversarial court-like system which does not however exercise judicial power. Some of the more intractable problems emanating from the industrial power have arisen from friction between these elements as the system has developed, such as the use of an autonomous tribunal to frame and implement national economic policy.

There never was a single vision of the industrial power among the framers of the Constitution. The measure was unusually hard-fought: as Deakin later recalled, no other proposal had been debated three times.¹⁹ Eventually a majority of votes was gained on the basis of an independent judicial tribunal with power to settle disputes which affected the whole nation. To the extent that the proposal gained widespread acceptance, it was due to three main factors: the built-in limitations introduced by Higgins' and Kingston's compromise (especially interstate-ness); the assurance that any scheme would be framed by a legislature subject to the popular will (moderated by an upper house with equal representation by the States); and the confidence reposed in a judicial tribunal which would most likely be headed by a judge. The industrial power gained acceptance because of its restrictions and qualifications, not despite them.

The Vision Established: The Conciliation and Arbitration Act

Demands began early to implement a national system of industrial conciliation and arbitration: at Kingston's insistence the Protectionist party promised such legislation at the first Federal election, although the party leader, Edmund Barton, expected that the occasion for its use would seldom arise.²⁰ A Bill was foreshadowed, but like many other important measures it was not reached during the first session. A revised version was prepared by Kingston, but he resigned only weeks before he was due to present it to Parliament, ostensibly because the Cabinet refused to support his proposal to have the Bill extend to crews on foreign ships operating on the Australian coastal trade (Barton argued, probably correctly, that such a measure would be unconstitutional).²¹ So it fell to Alfred Deakin (Protectionist, Ballarat, Vic.) to introduce the legislation in July 1903. He stressed that the Bill was 'federal in all its characteristics,' not only because it was confined to interstate disputes, but because it allowed the Commonwealth Court of Conciliation and Arbitration to co-operate with similar State bodies by referring matters to them. State industrial tribunals could also refer specific matters to the Commonwealth Arbitration Court for determination.²²

Like earlier measures adopted in the States, the legislation was designed first of all to promote the making of enforceable collective agreements. If disputant parties failed to settle their differences in this way the state, in the form of an independent tribunal, could be called to assist, firstly to encourage amicable agreement by conciliation, and if this were not possible, by hearing both sides and making an equitable and enforceable award. In return for this legal avenue of redress, and to protect the public interest, strikes and lockouts would be prohibited. Deakin was aware that the scheme involved a transformation in industrial affairs, one which the legislature itself could not hope to produce and only a separate tribunal could accomplish:

It must be at once clear that however much Parliament might desire to take into its own hands the immediate regulation of industrial affairs, and to provide for the suppression of their vendettas, it would be incompetent to do so, notwithstanding all its authority, by reason of the immense complexity of the task cast upon it... . We are touching some of the springs upon which the working of society depends. We are seeking to control them without interfering with what may be broadly described as legitimate business methods. We realize nowadays that society is a living organism in every sense of the term... . The rigid provisions of legislation, therefore, must necessarily be ineffective in dealing with a living society. The only way to cope with the ever-changing, ever developing needs and forms of unfoldment in society and its industries is to create some authority of independent minds, able to follow its workings so far as their knowledge and ability permit, and to assist its progress by adapting forces to foster growth, not once, but from time to time.²³

The great significance of this approach was that it would extend the reign of law and justice into the industrial arena by an impartial method for settling disputes. Parliament was not to intervene by setting the terms of the Court's inquiries. The Court was given no other remit than to determine disputes according to equity, good conscience and the merits of the case; although in time it was expected that precedents would develop to guide the results of future cases: 'No attempt is made to enforce any theory or doctrine. The court is asked to do justice, and no more than justice.'²⁴ Hence the adoption of the method of adjudicative arbitration was a rejection of direct and comprehensive regulation by the legislature.

The Bill was destined to falter over coverage of State railway employees. The Irvine Government in Victoria had recently insisted that its railway workers should disaffiliate with the local Trades Hall; when the workers went on strike in protest, the Government passed legislation making such strikes illegal. The Australian Labor Party (ALP) members thus insisted that employees of State Government railways should have access to the federal arbitration system; Deakin strongly demurred, arguing that such a step was not only unconstitutional but violated the federal balance by overriding the States' powers of self-government. When the amendment passed in the House, the Government abandoned the Bill.²⁵

At the election in 1903 all parties supported Federal arbitration in some measure. The election resulted in a House split between the three parties. Deakin's liberals retained

office, and the Parliament assembled in the new year with the Bill as one of the Government's first priorities. When an ALP amendment to extend coverage to all government employees succeeded against Deakin's entreaties, he treated the vote as a confidence motion and the Protectionist ministry resigned to great surprise.²⁶ They were replaced by the short-lived Watson Labor Government which resigned after four months when it failed to gain sufficient support to continue passage of the Bill. Both the opposition parties wanted to restrict the Arbitration Court's ability to order that preference in employment be given to unionists; the Labor Government insisted on leaving the Court with a large discretion over when to award it.²⁷ Eventually a coalition ministry led by George Reid was formed and succeeded in putting the Bill through all stages by December 1904 despite a stand-off between the Houses over the preference issue: the Labor-controlled Senate eventually backed down and agreed to greater restrictions.²⁸

The legislation which finally passed was the product of a range of political opinion. Underpinning the debate was an acceptance that the Bill had gained popular support at the election. Although there were a few strident critics of the very notion of compulsory arbitration,²⁹ they were in the distinct minority and there was widespread (if sometimes reluctant) agreement on most of the general principles. Reid, for example, had reservations at the incursions which the Bill made on individual rights and liberties, but justified them as necessary to prevent greater harm.³⁰ Others were concerned that the legislation did not define which disputes were interstate but relied on the vague words of the Constitution and the Arbitration Court's interpretation, thus allowing uncertainty and potential erosion of the States' domain.³¹ Much of the voting in Parliament was tactical, based on political manoeuvre and point-scoring rather than philosophical conviction. The main points of disagreement concerned the Court's power to give preference to unionists, and exclusion of certain occupations from the Act's coverage. The preference issue in particular was a litmus test of the principles underlying the legislation: while the Labor party supported preference generally as a means of preventing anti-union victimisation and encouraging unions to resort to arbitration, Reid opposed it as an unwarranted extension of privilege but was willing to accept it in some measure if objections to preference could be heard in particular cases.³²

The federal arbitration system was slow to develop, with only six awards being made in its first five years of operation. The Act required the President of the Commonwealth Court of Conciliation and Arbitration to be a judge of the High Court, and it was anticipated that the position would be a part-time one which would only be activated when pressing disputes arose. The first President, from 1905 to 1907, was Justice O'Connor, who played little role in the development of federal arbitration. It was Justice Higgins who, as second President from 1907 to 1920, gave real substance to the jurisdiction. Higgins occupied the unusual position of constitutional founder, legislative drafter (briefly, as Attorney-General in the Watson Labor Government), and eventually the judicial administrator of the federal industrial jurisdiction. It was his vision of an independently-minded judicial tribunal, deciding disputes using ordinary legal procedures but according to general principles of

fairness and equity, which so heavily influenced the operations of the Court over its first two decades.

At first, the system resembled the aims of the founders: it was mainly unions in the key interstate maritime, waterside and shearing industries which approached the Court. Other unions registered under the Commonwealth Act but remained largely State-based organisations pursuing their demands in the State systems. The new Act soon faced a concerted campaign of resistance by employers, who organised in order to bring a succession of constitutional challenges before the High Court and met with a strong measure of success.³³ Applications for Federal awards increased once the High Court began taking an expansive attitude to the Federal arbitration jurisdiction between 1913 and 1926.

Part 2: Attempts to Expand the Industrial Power

First Moves

While the federation conventions had established the extent of the federal industrial power as extending only to truly national disputes, attempts to expand this domain began almost as soon as the new Commonwealth Parliament began to operate. Once a policy of uniform tariff protection for local manufacturing had been adopted, with such protection linked to favourable wages and conditions for Australian workers, the scope of legitimate industrial regulation was considerably widened. In the first private member's motion in the House of Representatives, H. B. Higgins called on the Commonwealth Parliament to acquire, with the consent of the States, 'full power to make laws for Australia as to wages and hours and conditions of labour'. The motion gained widespread support from Labor and liberal members; the recent introduction of a Federal tariff was enough to change the minds of even some former federation delegates, who now accepted that employment conditions and wages were matters of national significance. While Higgins' motion was adopted, no State government was found sufficiently willing to divest itself of its plenary industrial power and the matter was not pursued.³⁴

The Deakin Protectionist Government, with Labor party support, introduced the policy of New Protection, which rested on the linkage of beneficial wages and conditions to protective tariffs and immigration restriction. A key mechanism of this policy was the *Excise Tariff (Agricultural Machinery) Act 1906*, under which local manufacturers could gain exemption from excise duty if the wages they paid were in accordance with a Federal award, or were declared 'fair and reasonable' by resolution of both Houses of Parliament or by decision of the President of the Commonwealth Court of Conciliation and Arbitration. It was under this Act that Justice Higgins, now President of the Court, determined in November 1907 the basis for a living wage in what became known as the Harvester judgment.³⁵ Yet, only seven months later, the Act under which Higgins made his landmark decision was deemed constitutionally invalid by the High Court because the legislation was essentially concerned with the regulation of employment conditions, a power not held

by the Commonwealth Parliament and not capable of being supported by the excise power.³⁶ Other key aspects of the New Protection policy—the registration of the 'union label' as a trade mark certifying that goods were made by union members working under beneficial conditions, and the outlawing of (principally foreign-owned) monopolies—were also declared unconstitutional by the High Court.³⁷ While the *Harvester case* itself was closely followed by members of Parliament, the decision's wider significance was not appreciated until Higgins continued to rely on the needs-based approach to set basic wage rates in subsequent cases under the Arbitration Act.³⁸

In response to these setbacks, Deakin privately suggested a constitutional amendment which would allow for uniform Commonwealth regulation of employment in industries which were protected by customs duties. This system would be operated by the Inter-State Commission, a body of mixed judicial and administrative powers envisaged under section 101 of the Constitution; though Deakin's plan would require a constitutional amendment allowing the Federal Parliament to devolve quasi-legislative responsibility for uniform industrial conditions onto the Commission.³⁹ A modified version of this idea was floated at the 1909 Premiers' Conference, where the States agreed to introduce legislation referring State powers on industrial conditions to the Commonwealth, using the Inter-State Commission as a national standard-setting body.⁴⁰ Like many similar plans, it was never carried out.

Hughes and Industrial Nationalism

While the policy of liberals like Deakin gravitated towards expansion of Federal powers over industrial conditions, an enhanced Federal industrial power had been an early aspect of Labor's policy: the party's national conference adopted 'uniform industrial legislation' as a plank in 1902, although the item was rejected by the NSW party at its annual conference.⁴¹ By 1908 the Labor party at the national level was confirmed in its centralist approach to industrial regulation and convinced that its policies could only be carried out by constitutional change, since the High Court had shown a restrictive attitude to the powers of the Commonwealth Arbitration Court in a succession of cases. The most contentious of these was *Whybrow's case*, where a majority of the High Court engaged in a narrow reading of the meaning of 'arbitration' in section 51(xxxv), thus finding that the Arbitration Court was constitutionally debarred from declaring any of its awards as a common rule for a whole industry. This meant that unions (and employers) who wanted award conditions to apply uniformly across an industry had to ensure that every employer in an industry became a party to the dispute by being served with a separate notice of demand and log of claims. This requirement extended the delay and cost of proceedings in the Federal jurisdiction immeasurably. The conviction developed in Labor circles that a conservative judiciary was determined to block the popular will, a view amplified by Higgins' exasperated statement from the Arbitration Court bench that, as a result of constitutional interpretations, 'the approach to the Court is through a veritable Serbonian bog of technicalities; and the bog is extending.'⁴²

Such a view was the basis of changes which were introduced by Labor's Attorney-General, the Hon. W. M. Hughes, as soon as the party gained power federally in 1910. To overcome some of the restrictive judicial interpretations, Hughes introduced several amendments to the Conciliation and Arbitration Act, including one which expanded the definition of 'industrial dispute' to include 'any threatened impending or probable dispute'.⁴³ By such measures Hughes hoped to allow for greater use of the prevention power in section 51(xxxv) and to reduce legal formality. In the long-term, though, Hughes was convinced that the party's platform could only be achieved by taking control of social legislation out of the hands of the courts.⁴⁴ The industrial power would be changed to include 'the wages and conditions of labour and employment in any trade, industry or calling' as well as general power for 'the prevention and settlement of industrial disputes'.⁴⁵ This expansion of power would avoid most of the legal restrictions of the existing provision, while additionally allowing for the direct statutory regulation of employment conditions if necessary.

Against Hughes and his national vision, the Opposition argued that the referendum proposals disturbed the delicate balance of federalism by erasing the exclusive legislative domain of the States and abolishing the limitations on central power which were 'a fundamental and organic part of the Federal scheme'.⁴⁶ In Deakin's view, Labor's solution was out of all proportion to the legal deficiencies in section 51(xxxv) that had been revealed by the High Court:

Wages, hour, terms and conditions are alike to be brought under this Parliament. Every trifling industry in every part of the continent will have the right, and may be compelled, to appeal to this House for legislation to meet its ends. The whole of the industrial powers of the States are to be transferred without limitation to the Commonwealth. The minutiae of every occupation throughout Australia will be the concern of the National Legislature.⁴⁷

Deakin was joined in opposition to the amendments by members of the New South Wales Labor Government, led by Premier W. A. Holman who countered that the constitutional amendments would inevitably lead to the accretion of Federal power because inconsistent State legislation would gradually become invalidated through the operation of section 109 of the Constitution. Even if this were not the case, State governments would scarcely bother to legislate if they could never be sure that the powers they now shared with the Federal Parliament in Melbourne were not about to be overruled. He proposed instead that the States should voluntarily cede their powers to the Commonwealth.⁴⁸

The referenda were lost, though by a narrow margin. Undeterred, Hughes immediately began planning another attempt at constitutional reform. In 1912 he presented five separate amendments, including a more detailed proposal on industrial matters which contemplated giving the Federal Parliament power to make laws with respect to:

Labour, employment, and unemployment, including—

- (a) the terms and conditions of labour and employment in any trade, industry or calling
- (b) the rights and obligations of employers and employees
- (c) strikes and lock-outs
- (d) the maintenance of industrial peace, and
- (e) the settlement of industrial disputes.⁴⁹

While extensive, the powers sought were, according to Hughes, no greater than those presented at the earlier referendum. In Parliament he argued that a 'broad national power' was needed to preserve industrial peace; the existing words of the Constitution had proved wholly inadequate in giving the Arbitration Court scope to prevent disputes from escalating.⁵⁰ What was being sought, was no more than had been intended by the original framers of the Constitution and the Arbitration Act.⁵¹ The Government continued to deny that the proposed power would be used to legislate directly on employment conditions; the power would naturally be delegated to the Arbitration Court.⁵² One of the founders of the modern union movement, W. G. Spence (Labor, Darling, NSW), showed his frustration at the maze of legal decisions confronting the Arbitration Court when he said that:

it is because of interpretations, different from those which we laymen had been led by the many lawyers in the House to believe would be given, that we are now asking for amendments of the Constitution. We are asking to have restored to us that which was supposed to be given to the Commonwealth Parliament by the framers of the Constitution ... I admit that, in some respects, we are going further, and asking for more than the original framers of the Constitution provided. We are led to do so because it has been found that the Constitution really does not carry out what was the aim of its framers.⁵³

All the proposals again failed to gain popular approval, though with a smaller minority than two years earlier: the industrial matters question failed by just 1.3 per cent of the total formal vote.

The referendum debates reveal a change in Hughes' thinking about the appropriate form of federal legislative regulation of labour disputes. Hughes had long taken the view that the Federal Parliament's power under section 51(xxxv) to prevent industrial disputes was ineffective, and could not support legislation designed to promote industrial peace by collective bargaining and joint regulation—an approach which his union-organising days had convinced him was the only effective method of preventing strikes. The amendments sponsored by Hughes in 1910 had included a provision which allowed the Arbitration Court to appoint a board of reference—typically, a panel of experts, not unlike a wages board, with responsibility for determining local or specialist issues arising out the application of an award. But in 1913 the High Court held, as a matter of statutory interpretation, that such a board could not be assigned general powers but could only

exercise the functions specifically enumerated in an award. This decision was taken by Hughes as proof that the Federal system was incapable of accommodating a less formal approach to the settlement of disputes, such as conciliation committees.⁵⁴ While the decision did not go that far, it is true that at the time the High Court saw arbitration as inescapably adversarial in nature and would never have contemplated allowing binding decisions to be made in a round-table fashion where the parties and the issues were not completely clear-cut.

The Labor party refused to let go of the constitutional reforms, even when out of power. In 1914 a Labor-controlled Senate passed several referendum Bills along the lines of the 1913 proposals, including industrial powers, but they were not passed by the House and the Governor-General declined to submit them to the people.⁵⁵ Labor regained power later that year after a double dissolution election fought over attempts to wind back the Act. The outbreak of war prompted the Labor Government to renew its campaign for expanded Commonwealth constitutional powers. Hughes admitted that federal control over industrial matters could be enlarged by using the defence power, but argued that explicit constitutional provision was far preferable to a kind of 'military despotism' imposed through the uncertain interpretation of the defence power, which would elevate the High Court 'to the position of a supreme legislative chamber.' The Opposition demurred, arguing that the war situation was too grave for a potentially divisive referendum. They finally withdrew it from the House when the Speaker refused to accept their amendment on the grounds that it raised the more general issue of the Government's handling of the war.⁵⁶ After a meeting with the Premiers it was agreed that instead the States would refer a range of powers to the Commonwealth for the duration of the war, so the referendum process was suspended. In the event only New South Wales passed the necessary legislation.⁵⁷ The issue was temporarily circumvented by the High Court's decision upholding the expanded use of the defence power for control over domestic matters during wartime,⁵⁸ while the split within the Labor party over the conscription issue prevented a further referendum on Federal powers.

The conclusion of the war was greeted with a wave of industrial unrest prompted by high inflation. For Hughes, who now led the non-Labor Nationalist Government, post-war reconstruction could only be achieved with uniform national powers over industrial relations. In September 1919 Hughes gained some acceptance by the Premiers for a referral of State powers to the Commonwealth for a period of three years pending further constitutional amendments. The proposals for extension of the Commonwealth's powers in relation to industrial matters, as well as trade, corporations, trusts and monopolies, were again put to the people, though now only on an urgent and temporary basis until a mooted convention on the Constitution had put forward recommendations on the whole issue of the division of legislative powers.⁵⁹ Again the proposals were rejected by the electorate, so the voluntary referral of State industrial powers never took place.

While he remained in office, Hughes continued to seek an expansion of Federal powers, putting forward his plan for a wide-ranging review of the Constitution, and bemoaning

that the national Parliament still could not address the conflict of labour and capital—'the great question of the time'—by making a uniform national law.⁶⁰ In the meantime, as a compromise, he presented a further proposal to the Premiers' Conference in 1921. Now his idea was for the States to refer their industrial powers to the Commonwealth, which would legislate for a federal arbitration system with jurisdiction over 'Federal industries' (primarily the waterfront and shipping), together with the basic wage and standard hours. The Commonwealth would also establish an Industrial Court of Appeal to rationalise competing awards in different States; but all other industries and matters would be reserved to the exclusive jurisdiction of State industrial tribunals. The Premiers' initial approval soon turned to hostility as it was realised that the proposal would result in the gradual accretion of federal power, as ever more industries became national in character, while uniform industrial conditions would be imposed across the country through the appeal process.⁶¹ Doubtless this was no mistake.

By this time, though, many of the constitutional obstacles to the expansion of the federal domain in industrial relations had been overcome to some extent by a series of constitutional cases which recognised evolving industrial relations practices. The original judges of the High Court, who had also contributed to the drafting of the Constitution, took the view that the federal industrial power was inherently limited by the proper sphere of activity of the state, by the idea of industrial arbitration as a quasi-judicial method of settling discrete disputes between particular identified parties, and by the inviolable domain of the former constituent Colonies, now States. According to this view, section 51(xxxv) of the Commonwealth Constitution allowed 'a new power conferred upon a legislature of limited jurisdiction, which as a general rule has no authority to interfere with the domestic trade or industry of a State.'⁶²

This approach to the Constitution was fundamentally changed by new appointees to the Court, beginning with Higgins and Isaacs in 1906, but gaining dominance with the elevation of Gavan Duffy, Powers and Rich in 1913. These new judges were much more receptive to industrial arbitration as a legitimate area of state intervention, and more willing to allow the expansion of the Commonwealth arbitration system by a reading of the Constitution which was not restricted by an idea that federal power was inherently limited by the pre-eminent rights of the States.⁶³ By 1914 the new judges on the High Court had succeeded in replacing the original implied limitations approach with an expanded 'realist' one. Their approach allowed the creation of 'paper disputes' by unions serving the same log of demands on employers in different States.⁶⁴ While such a practice has often been criticised as artificial, the alternative would have been to require the parties to demonstrate their seriousness by protracted strikes or lock-outs. The Federal jurisdiction was enlarged in this way because it rested on an independent tribunal: the judges made it clear that the ultimate check of the expansion of Federal power reposed in the discretion and good judgment of the Arbitration Court judges. It is doubtful that such tolerance and realism would have been accorded to the direct exercise of legislative power by the Parliament.

The 1926 Referendum

From the early 1920s the dual system of Federal and State industrial tribunals had come to be perceived as an increasing problem as the expansion of the Federal system resulted in many workplaces being regulated by overlapping and conflicting awards. The problem was mooted by Nationalist Prime Minister, the Right Hon. Stanley Melbourne Bruce, when announcing his Government's program soon after he took over power from Hughes. To Bruce the problem was one of national efficiency. He hoped initially that some agreement with the Premiers might be able to demarcate industries as objects of regulation by either Federal or State authorities.⁶⁵ While not by nature a centralist, it soon seemed to Bruce that the neatest and most efficient solution was one which involved either the exercise of joint Federal and State powers by a composite tribunal, or else giving the Federal body supreme authority. It soon became apparent that the use of joint power was impracticable: the States had consistently refused to cede their industrial powers, and any attempt to divide industries into State and Federal jurisdictions was impossible.⁶⁶

A proposal to amend the Constitution was outlined by the Attorney-General, John Latham, to a joint meeting of Nationalist and Country parties in May 1926, apparently without prior consultation.⁶⁷ It was introduced into the House by Bruce three days later. The Government proposal involved removing the requirement for an interstate dispute from section 51(xxxv) and adding two additional clauses giving Parliament the power to make laws with respect to:

(xl) Establishing authorities with such powers as the Parliament confers on them with respect to the regulation and determination of terms and conditions of industrial employment and of rights and duties of employers and employees with respect to industrial matters and things;

(xli) Investing State authorities with any powers which the Parliament, by virtue of paragraph (xxxv) or paragraph (xl) of this section, has vested or has power to vest in any authority established by the Commonwealth.⁶⁸

The need for expansion of federal power was justified as the inevitable result of growth in national industries. The amendment was designed to overcome difficulties with the existing clause which had been revealed by High Court decisions, and to recognise the expanded meaning which that court had given it. Latham noted that the amendment would allow for other forms of industrial regulation to be established, such as wages boards and conciliation committees.⁶⁹ Speaking in Parliament, Bruce and Latham stressed that unlike previous referendum proposals, this one did not involve giving the legislature direct power to make laws on industrial matters, but required that the power be exercised by authorities independent of Parliament.⁷⁰ At the same time the Government proposed a related constitutional amendment to give the Federal Parliament legislative power over essential services, a change prompted by recent strikes in the coal and transport industries.

The proposal met with a mostly hostile reception. Notably, the parliamentary debate made little reference to the intentions of the Constitution's founders: rather, discussion was focused squarely on making the arbitration system more efficient and in tune with modern industrial conditions. Federal ALP politicians initially supported the proposal as being in the Labor party's tradition of seeking united national power over industrial relations, but thought that the referendum should be deferred until it could be considered in the review of the Constitution which had already been mooted by Bruce. The Leader of the Opposition, Matthew Charlton, favoured giving full and direct legislative power over industrial matters to the Federal Parliament, as earlier Labor-sponsored referendum proposals had envisaged. Many State-based unions and Labor politicians were wary of the amendment's ability to undermine the advances gained through State legislation and industrial awards. With bitter division emerging across the labour movement, the Federal Parliamentary Labor party eventually decided not to take a fixed position on the referendum.⁷¹ Added to this, the proposal directly conflicted with State-rights sentiments, thereby provoking opposition from conservatives. With such a division of opinion, and with several key groups actively campaigning against amendment, it is not surprising that the proposal failed to win popular support at the referendum in September.

Undeterred by the result, Bruce included the industrial power among the wide-ranging terms of reference given to the Royal Commission on the Constitution which was appointed in August 1927. At the time the New States movement was prominent, and the Commission was presented with several proposals for a fundamental changes to the federal political system, including a unitarist model. However a majority of the seven-member Commission opted for retention of federalism, and recommended that the States should be given exclusive power to legislate with respect to industrial matters. The Commission saw industrial legislation as inherently local rather than national in nature, being a matter of general public order while closely allied to such employment-related local issues as health, commerce, public works and development. The Commission further recommended that the Commonwealth's existing power should be deleted, as experience showed not only that conciliation and arbitration should not be divorced from the regulation of industrial matters generally, but that it was extremely difficult to isolate genuine disputes from attempts to secure awards.⁷² By contrast, the minority report led by the two ALP members recommended that industrial matters be reserved to the Federal Parliament, in line with Labor's preference for the Commonwealth having plenary legislative powers over matters of national significance.⁷³ By the time the Report was presented in late 1929, the Bruce-Page Government had already been defeated over its proposals to abolish the Federal arbitration system along lines similar to those recommended by the majority of the Committee. This episode is discussed in Part 3 of the paper.

Other Proposals for Constitutional Reform

The Australian people have been asked to change the Constitution on 19 occasions; seven of these times have included requests to increase the Federal power in relation to industrial

matters, employment or incomes. The table below summarises these proposals. Voters were asked specific questions dealing with industrial or employment issues in four referendums; at other times, industrial powers were included with a number of other proposals in the same question (although the industrial power was a major issue in all except the 1944 vote). On three occasions—in 1913, 1919 and 1946—the proposals came close to approval. The closest any of the referendums came to success was in 1946 when a majority of formal votes favoured expansion of the federal power, although the proposal did not obtain approval in a majority of States. Of the States, only Western Australia has consistently voted in favour of expansion of Federal power, while Queensland also approved federal expansion in three of the early referendums up to 1926.

Commonwealth Industrial Powers Referendums

Year	Proposal	Total % in favour	States in favour
1911	Labour & Employment (multi-power qn)	39.42	WA
1913	Industrial Matters (of 5 qns)	49.33	Qld, SA, WA
1919	Industrial Matters (multi-power qn)	49.65	Vic, Qld, WA
1926	Industry & Commerce (of 2 qns)	43.50	NSW, Qld
1944	Post-war Reconstruction (multi-power qn)	45.99	SA, WA
1946	Industrial Employment (of 3 qns)	50.30	NSW, Vic, WA
1973	Incomes (of 2 qns)	34.42	Nil

Source: House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901–1997*, Canberra, 1997, pp. 61–97.

After the failure of 1926–29, the last attempts to change the industrial power itself arose in the context of the Curtin and Chifley Labor Governments' wartime legislation, when special Commonwealth agencies had amassed control over most aspects of employment. Although the Federal Government assumed greatly enlarged powers of industrial regulation under the defence power, it was still thought desirable for the Commonwealth's responsibilities in the area to be regularised. In order to avoid a referendum during wartime, a draft Bill was presented to the Premiers in 1942 providing for the referral of State legislative powers to the Federal Parliament. As with previous schemes, this proposal failed to gain support from the State Governments.⁷⁴ Somewhat different in intent was the 1944 referendum on Commonwealth powers. Designed to assist post-war reconstruction, it included 'employment and unemployment' in its 14 specified matters which were proposed for transferral to the Federal Parliament for five years. It failed, with only 45 per cent of voters approving the measure. Two years later a proposal to alter section 51(xxxv) by giving the Commonwealth power to make laws on 'terms and conditions of employment in industry' was again put forward—and failed by a similar margin.⁷⁵

The Joint Committee on Constitutional Review, appointed by the Menzies Government in 1956, recommended that the Federal Parliament's existing legislative power be supplemented by the power to make laws with respect to 'terms and conditions of industrial employment.' In the view of the Committee it was time to end the inconsistencies which arose from leaving primary responsibility for regulation of industrial relations to the States. Noting that the Federal system now covered as many workers as the State systems (around 44 per cent of the national workforce), and that the economic role of the Commonwealth had expanded rapidly since the war, the Committee considered it would be a retrograde and impracticable step to abolish the federal system and leave industrial law to the States, as the 1929 Royal Commission on the Constitution had proposed.⁷⁶ The existing constitutional provision, which effectively required a dispute (real or manufactured) to be in existence before the Federal arbitration tribunal could exercise jurisdiction to resolve it, was considered to provoke rather than ameliorate industrial disputation. At the same time, the Committee was not convinced that conciliation and arbitration were the most effective processes of industrial regulation, and pointed to the success of wages boards and mediated collective bargaining.

The Committee's report was permeated by the view that government's role now lay, not in the resolution of disputes which threatened to harm the public interest, but in the integrated and efficient management of factors affecting economic stability. As an aspect of economic policy, the regulation of wages and conditions could no longer be left to the unco-ordinated ministrations of extra-governmental bodies; ones, moreover, influenced by the arguments of 'interested parties'. This shift in attitude broke with a tradition stretching back to the Federation debates—that state intervention was most safely left in the hands of an independent judicial body deciding according to principles of justice:

The regulation of industrial relations is a matter of government which affects the welfare of the entire Australian community and the Committee's view is that it is inconsistent with responsible democratic government that independent tribunals without responsibility either to parliament or the people should be accorded, by the Constitution, the role of supreme legislators. Whilst the Committee believes that independent statutory bodies should continue to determine terms and conditions of employment in Australian industry, it considers that the Parliament of the Commonwealth, which is elected by the people to whom it is responsible, and not the tribunals themselves, should be the final repository of industrial responsibility. The answerability of governments to the electors is a safeguard against unwise action in the industrial field.⁷⁷

A further consideration was that, unless overall power over industrial conditions was vested in the Federal realm, Australia could not discharge its international treaty obligations to implement International Labour Organisation (ILO) Conventions which it had signed. Several reasons were given for increasing compliance with international labour standards: it would 'enhance Australia's reputation as a socially advanced country' and increase the country's influence in the international arena. Ratification by Australia would promote wider acceptance of the labour standards by other countries and would also open up new markets for Australian trade.⁷⁸ The Committee also foresaw that increasing

technological innovation, resulting in automation and demand for new skills, would produce important industrial issues which needed to be resolved on a national level.

The Committee did not, however, propose direct regulation by Parliament: it contemplated that Federal legislation would give governmental agencies the power to determine general principles which would then be applied by industrial tribunals. The Federal Parliament would acquire legislative competence over all aspects of industrial regulation, including factories, apprenticeships and industrial safety. Existing State tribunals would also be delegated power to set local conditions.⁷⁹ These recommendations would have removed most of the constitutional impediments to expansion of the Federal legislative domain, but would still not have avoided the legal difficulties which have surrounded the interpretation of the word 'industrial' in High Court decisions since the 1920s, and which were reaffirmed in the *Professional Engineers case* shortly after the Joint Committee had concluded its deliberations.⁸⁰

Recognising the difficulty of expanding the Commonwealth's legislative power by constitutional alteration, opinion since the 1959 Review has tended to favour other paths: either the reference of State powers to the Commonwealth under section 51(xxxvii) of the Constitution, or more informal solutions involving greater co-operation between the State and Federal tribunal systems. During the 1970s, discussion focused on the mutual interchange of powers between the Commonwealth and the States, although wider constitutional problems associated with this approach prevented any specific proposals being put to referendum.⁸¹ Between 1979 and 1982 a review by Commonwealth and State labour ministers examined ways of making the various systems more complementary without resorting to constitutional alteration. The 1982 Premiers' Conference unanimously agreed to a scheme of complementary legislation designed to promote co-operation between tribunals through such means as joint hearings and the referral of federal matters to State bodies.⁸² A precedent of sorts for this approach had already been set after a long-running jurisdictional dispute in the New South Wales oil refining industry was addressed by complementary legislation in 1980 which conferred exclusive jurisdiction on the State tribunal while allowing a member of the federal body to participate in hearings.⁸³ In 1983 the High Court confirmed the validity of this type of approach when it held that the Coal Industry Tribunal could exercise powers derived from complementary Federal and State legislation.⁸⁴

Such a co-operative approach, involving joint appointments and combined sittings by State and Federal tribunals, was the short-term solution favoured by the Committee of Review into Australian Industrial Relations Law and Systems (the Hancock Committee), which is discussed in more detail in Part 3 of this paper (see page 16). This approach was implemented in the *Industrial Relations Act 1988*⁸⁵ with limited success. The Hancock Report's long-term approach favoured a united effort to create a national system, either through a combination of Federal and State legislative powers or by the States referring their powers to the Commonwealth.⁸⁶ The Committee did not recommend that the Commonwealth Parliament draw on a wider range of constitutional heads of power:

expansion of federal power in this way would be divisive and most likely be opposed by pro-State interests; its constitutional effectiveness was uncertain, and there would be gaps in coverage as not all matters and relationships would be covered by at least one of the alternative powers, which it described as 'exotic.'⁸⁷

After decades of fruitless discussion, a reference of State powers was finally accomplished in 1996 when the Victorian Parliament made an extensive donation of its legislative powers on industrial relations to the Commonwealth. This allowed the Federal Commission to determine minimum terms and conditions for most employees in the State, as well as settling purely intrastate disputes.⁸⁸

Proposals for changing the Constitution itself were raised at the Adelaide session of the Australian Constitutional Convention in 1983, where a sub-committee was established to consider whether 'a more appropriate distribution of responsibility' could be achieved between the Commonwealth and the States.⁸⁹ The matter was further noted at the subsequent Brisbane session of the Convention in 1985. Later in the decade, the Constitutional Commission returned to the option of expanding the Commonwealth's legislative power by referendum: its advisory committee on the distribution of powers recommended that the industrial power be widened to include 'industrial relations and employment matters' but that it remain concurrent with the States.⁹⁰ The final report of the Commission in 1988 endorsed the use of mechanisms for closer Federal-State co-operation, but thought that such changes 'would still not deal with some fundamental issues relating to Parliamentary democracy and to the responsibility of the Federal Parliament for national economic management.'⁹¹ In particular, the final report argued that the existing constitutional provisions impeded the Federal Government's ability to carry out national employment and incomes policy; indeed, the Government was often forced to argue its policy before the Federal Arbitration Commission, whose decisions often led it to be seen as 'in reality an economic legislator.'⁹² Congruent with its proposal to give the Federal sphere responsibility for economic policy (including all aspects of both intrastate and interstate trade and commerce), the Commission recommended that the Commonwealth Parliament's legislative power be widened to cover 'industrial relations.' While such a change would remove nearly all fetters on the Federal legislature's ability to mould industrial policy, the Commission was confident that, in view of its long history of adoption in this country, industrial arbitration would continue to remain a central feature.

During its long history, the industrial arbitration system has managed to find adaptive mechanisms to circumvent many of the problems of overlapping jurisdictions. From an early stage, the primacy of the federal tribunal was recognised by State tribunals, which tended to follow its lead in setting standard wages and conditions. Both State and Federal tribunals have tended to recognise each other's priority and expertise in some industries, refraining from intervening in areas traditionally regulated by the other.⁹³ In practice a pattern of industry coverage between State and Federal systems gradually emerged, based on whether the industry was national in orientation.⁹⁴ The High Court set further boundaries by determining that the constitutional requirement of an 'industrial dispute'

restricted the Federal system to occupations in distinct 'industries' and not trades or professions.

As the result of High Court decisions which expanded the reach of the Federal tribunal, the division of occupations between State and Federal systems has changed radically in the last half-century. In the *Professional Engineers case* the High Court held that professional and clerical employees could obtain access to the Federal system provided their employer operated in an area which could be described as 'industry'.⁹⁵ Then, in the *Social Welfare Union Case* of 1983, the arcane structure of constitutional decisions on the meaning of the term 'industrial dispute' was completely swept away in favour of an approach based on the ordinary meaning of the words of the Constitution.⁹⁶ Since then a much wider range of employees have been able to obtain a federal award, although conflicts between State and Federal jurisdictions do not seem to have increased. Problems with federalism still arise over the regulation of State Government employees, with the High Court maintaining that the federal system cannot hamper the capacity of the States to function as independent entities by dictating the number and identity of employees engaged in 'the administrative services of the States' through federal dismissal and redundancy provisions.⁹⁷

Part 3: The Parliamentary Record: Legislating on Industrial Disputes

Throughout the history of the Federal Parliament, industrial relations has been a constant issue for debate and enactment. During its operation from 1904 to 1988 the Conciliation and Arbitration Act was amended 87 times, including 60 changes of more than an administrative nature. Just as governments have sought to make wider use of the industrial power, they have frequently been curbed by decisions of the High Court, resulting in further amendments to deal with constitutional objections or to preserve the existing system. Despite major restrictions imposed by the High Court, the Act remained reasonably stable during its first twenty years. The Labor Government introduced amendments in 1910 designed to overcome some of the legal obstacles, but ultimately sought a solution by constitutional reform.

In the legislative history of the federal industrial power, three periods stand out for the ways in which the constitutional vision was adapted. First, the 1920s saw successive governments searching for ways to resolve the division of powers between the Commonwealth and the States. The prevailing interpretation of the Constitution had also produced a system which was highly legalistic and formalised, leading to conflict over the Commonwealth Arbitration Court's authority and questioning of its continued existence. Next, the period after the Second World War was one where governments strengthened the economic policy role of the arbitration system while simultaneously promoting flexibility in dispute resolution by moving away from an adjudicative model of arbitration to a more accommodative approach. However, the retention of a separate judicial institution, again influenced by constitutional constraints, resulted in further conflicts over the system's authority. Most recently, the 1990s have seen a transformation of the arbitration system and a reduced reliance on the Constitution's industrial power. Demands

for direct bargaining to replace state intervention have produced a fundamental challenge to conciliation and arbitration.

Challenge: The 1920s

The 1920s saw the federal arbitration system grow in importance under the influence of a developing national trade union movement and an expansive interpretation of the Constitution by the High Court. Whereas in 1921 only 22 per cent of all wage changes in Australia were made under the Federal arbitration system, by 1929 this proportion had grown to 61 per cent. By that stage, about half of all trade unionists (406 000 members) were employed under federal awards.⁹⁸ The decade also saw the development of a truly national economy and the growth of manufacturing industry. The economic, industrial and legal changes brought new demands from the Federal Government, unions and employers for the federal arbitration system to act as a national economic regulator. The growth of the federal system resulted in friction with the State industrial systems, while the demand for a new regulatory role conflicted with the Court's adjudicative style of arbitration which it had inherited from Higgins and the framers of the Constitution.

The Industrial Peace Act

The First World War had already placed great strains on the arbitration system, as soaring prices fuelled industrial unrest. The Labor Government, led by the Right Hon. W. M. Hughes, responded by seeking to resolve disputes in the interest of prosecuting the war effort. Beginning in 1916, both Federal and State governments increasingly resorted to ad hoc inquiries and tribunals to deal with disputes in key industries. As President of the Commonwealth Arbitration Court, Justice Higgins was opposed to the use of temporary and private tribunals, which he regarded as tending to sacrifice the public interest for the sake of a solution convenient to the immediate parties. Apart from doubts over their constitutional validity, Higgins viewed such interventions by government as detracting from the principled and judicial approach to the settlement of industrial disputes. He criticised Hughes' intervention in the coalminers' strike of October 1916 under the *War Precautions Act 1914*, as well as the Government's punitive approach to the 1917 general strike in New South Wales using the same legislation. Such actions Higgins viewed as an invasion of his judicial independence.⁹⁹ For his part, Hughes had come to believe that informal industry-wide conciliation and bargaining was preferable to the legalistic system of arbitration which the federal jurisdiction had become. In November 1917 the Prime Minister and the judge clashed publicly over a tribunal constituted under the War Precautions Act to settle a coal mining dispute. Higgins refused to sit as the tribunal because it would only have limited powers. He also claimed that Hughes tried to dictate the issues to be arbitrated and the outcome to be decided, a claim which Hughes denied.¹⁰⁰

Towards the end of the war, Hughes fixed on a new scheme for industrial regulation, using the defence power to control key industries through a series of industrial boards with powers to set awards, and incorporating the Arbitration Court as a central appellate

tribunal. A Bill had been drafted in 1917 and was discussed with Higgins, who supported the existing system supplemented by the State industrial courts.¹⁰¹ It was revived in 1920 following a lengthy mining strike and the failure of Hughes' plans to extend Commonwealth powers by referendum or with the agreement of the States. Relying on an expansive reading of the industrial power, the *Industrial Peace Act 1920* allowed for special tribunals to be appointed by the Government, with the Attorney-General having power to refer specific disputes to them for compulsory conference or arbitration.¹⁰² The Act also created a network of district and national industrial councils for 'round table' conciliation.

Although Hughes presented the special tribunals as adjuncts to the existing arbitration system and tried to ensure that there would be no overlap between the two systems, the legislation was seen by the Labor Opposition as an unprecedented intrusion by the executive into industrial matters, and an erosion of the status of the Arbitration Court.¹⁰³ In fact, Hughes increased the powers of the Arbitration Court under separate amending legislation.¹⁰⁴ Higgins regarded the special legislation as an affront to his judicial probity and impartiality: under the Act his awards would no longer be final but could be overridden by a special body appointed by the Government. Considering that 'the public usefulness of the Court has been fatally injured,' he announced his resignation on the next sitting day after the legislation was passed, gravely declaring that 'a tribunal of reason cannot do its work side by side with executive tribunals of panic.'¹⁰⁵ The Industrial Peace Act itself was an anti-climax: its reputation as an example of exceptional political intervention remained and, apart from being used to create four special tribunals for the coalfields in the early 1920s, it remained dormant until it was expunged from the statute books in 1950.

The Bruce-Page Amendments

Hughes' successor, Stanley Melbourne Bruce, signalled his intention early in his tenure of adopting a policy of non-intervention in industrial disputes. To him, direct government involvement was not only an improper admixing of political and industrial issues, but an inefficient way of proceeding when there was already machinery for the settlement of disputes—especially when politically-brokered solutions tended to produce economically unsound results.¹⁰⁶ After the defeat in 1926 of his referendum to expand the federal industrial power, Bruce became convinced that the States should instead be given primary responsibility for industrial matters. His Government's approach was heavily influenced by a confidential report on the effects of government regulation which concluded that the existence of dual jurisdictions for labour regulation was a major impediment to industrial efficiency. Though potentially more effective, a single national regime was simply beyond the capacity of the Commonwealth Parliament: the sheer volume of detailed regulation required (safety and sanitation in factories, apprenticeships, workers compensation, etc.) would swamp the legislature. The advisory committee thus recommended that the Commonwealth should restrict its reach to truly national industries, leaving most of the

detail of industrial regulation to the States.¹⁰⁷ Similar conclusions were reached by the Royal Commission on the Constitution which reported at the end of 1929.

By the mid-1920s the problems of Federal–State dualism had gained a new dimension. Under the accepted interpretation of section 109 of the Constitution, any inconsistency between Federal and State awards was resolved in favour of the Federal award. The High Court had originally adopted a narrow 'direct collision' test of inconsistency which preserved Federal and State awards unless they could not both be obeyed at the same time. This approach minimised the risk of conflict: because awards set minimum conditions, employers could simultaneously abide by Federal and State awards by observing the more generous conditions of each.¹⁰⁸ A change in the personnel and outlook of the High Court from the early 1920s was marked by an increased tendency to regard the pursuit of the national interest by the Federal Parliament as overriding the local concerns of the States, and Federal awards as therefore pre-eminent.¹⁰⁹ In 1925 the New South Wales Government had introduced a standard working week of forty-four hours, although the standard week under Federal awards remained at forty-eight.¹¹⁰ The High Court held in *Clyde Engineering Co Ltd v Cowburn*¹¹¹ that the federal award prevailed as it was designed to cover the whole field of working hours. The dominance of the federal award was viewed as necessary to preserve the integrity and utility of the Federal arbitration system.¹¹² The power of the Commonwealth Arbitration Court to restrain State industrial authorities from dealing with similar matters was also upheld at this time.¹¹³ Thus industries previously governed by State systems were now open to Federal regulation.

From the mid-1920s the Commonwealth Arbitration Court began taking on a stronger economic planning role, imposing stringencies on wages and conditions in response to declining economic performance and rising unemployment.¹¹⁴ A series of strikes then erupted in outrage at the Court's awards. The Government reacted by treating the unrest as a crisis in the Arbitration Court's legitimacy, prompting Bruce and the Attorney-General, John Latham, to introduce increasingly punitive measures. The High Court had ruled in *Alexander's case* in 1918 that the Arbitration Court did not exercise Commonwealth judicial power under the Constitution because its judges were not appointed for life, and so they could not impose a penalty for the breach of a Federal award.¹¹⁵ This was seen as a major limitation on the authority as well as the practical operation of the Court. Amendments introduced in 1926 addressed this problem by giving the judges life tenure, and also provided for conciliation commissioners to assist the parties to settle disputes by agreement. These changes were presented as strengthening law and order under arbitration, while simultaneously making the system more flexible.¹¹⁶

Further amendments were presented late in 1927 by the Attorney-General, Mr Latham. He admitted it was not possible for the Federal Parliament to address the whole problem of industrial regulation, but while the Commonwealth Arbitration Court remained in place it should be adapted and strengthened. Demands had been made on the Government to abolish the Court, but this would not mean an end to regulation since the State systems would remain. It was necessary 'to face the realities of the situation,' when a large number

of unionists were working under Federal awards. But if those who submitted to the Commonwealth Court were not prepared to abide by its awards, 'the Government will have to re-consider whether it is desirable to maintain the system.'¹¹⁷

The 1928 amendments were the Government's last-ditch attempt to strengthen the Federal arbitration system, with its heavily judicial approach. As a means of circumventing the duality problem, the Commonwealth Arbitration Court was now required to determine whether it was preferable to deal with a dispute itself or leave the matter to a State tribunal. Provision was also made for joint conferences of Federal and State arbitral authorities. The Court's power to impose penalties for strikes and lockouts was strengthened, and employers were empowered to lock out employees if the Court declared that they were engaging in a strike. The amendments gave the Court for the first time power to regulate internal union affairs, including the ability to order a secret ballot of members in cases of industrial action. The Court was also given power to punish for contempts made against it.¹¹⁸ A new section required the Court to 'take into consideration the probable economic effect of the agreement or award in relation to the community in general and ... upon the industry or industries concerned.'¹¹⁹ The sanctions against strikes and the controls over unions led the legislation to be denounced by the ALP as provocative, one-sided and 'a declaration of war against the organised workers of Australia'. The obligation placed on the Court to consider economic effects was denounced as interfering with agreements reached by conciliation, while the measure as a whole was viewed as so unfair as to be an abrogation of the principle of conciliation and arbitration. Labor instead proposed a system of conciliation boards along the lines of the Industrial Peace Act. Bruce and Latham defended the legislation against claims of class bias, and chided labour leaders for questioning the arbitration judges' independence.¹²⁰

A series of strikes on the waterfront and aboard ships in 1928 led the Government to introduce the Transport Workers Act, using the commerce power to impose a licensing system for workers by means of delegated legislation.¹²¹ The Act ingeniously allowed particular workers to be excluded from the industry if they failed to obtain a licence or were refused one: because of this requirement and its coercive effects the Act was dubbed the 'dog-collar Act' by waterside workers. Bruce defended the Government's decision not to conciliate the strike by saying that if they had done that 'it would have taken the first step towards the repeal of the Conciliation and Arbitration Act, and the destruction of the Arbitration Court.'¹²² He warned that if the Court were not obeyed it might as well be abolished.

Early in 1929 timber workers began a well-supported strike in response to a federal award by Judge Lukin which imposed longer hours and lower pay for many employees in the industry. The new legislation was invoked to order a secret ballot, and when this was boycotted the Government began prosecuting strikers. A national industrial peace conference was called, but failed to reach any policy consensus. The Government considered the timber workers' strike an outbreak of industrial lawlessness, and support for the strikers as an indication of lack of support for the principle of arbitration. Bruce

increasingly believed that the Federal Government lacked sufficient power to uphold the arbitration system by prosecuting disobedient workers. If the system was not being enforced it was better to abolish it and leave industrial regulation to the States, which Bruce believed had better prospects of imposing order and enforcing decisions. Responding to a censure motion accusing his Government of introducing 'class legislation and partisan administration,' Bruce declared:

We are rapidly coming to the point where we must determine whether our system of arbitration is to be continued or whether we shall replace it. If it is to be continued, we must recognise that awards must be obeyed, and the prestige and position of the judiciary maintained. It is necessary to provide in our legislation, powers that will enable the executive government to take action when those who are not prepared to obey the awards of the Court are defying the laws of the country, because it is impossible to have upon the statute-book legislation which any section of the community may be permitted to defy.¹²³

In May 1929, Bruce issued an ultimatum to the State Premiers: unless they agreed to refer the States' industrial powers to the Commonwealth, he would repeal the Conciliation and Arbitration Act and leave the field to the States, apart from interstate shipping.¹²⁴ The Premiers' refusal was then used as the basis for introducing the Maritime Industries Bill, which attempted to carry out his threat. Bruce intended abandoning use of the industrial power altogether. His Bill involved creating several Government-appointed committees 'empowered to deal with the regulation of industry in every respect,' though only in connection with terms of employment in the international and interstate transport industries because the Commonwealth's legislative powers over trade and commerce did not extend any further. The Commonwealth Court of Conciliation and Arbitration would be abolished and its members transferred to a new Maritime Industries Court which would act as a judicial board of review for the committees as well as imposing penalties.¹²⁵ All other industries would become the exclusive preserve of the State industrial authorities. Such a drastic change was justified by Bruce because industrial disruption had not diminished despite the amendments introduced the previous year.

The proposal contradicted the Nationalist party policy which still favoured expansion of Federal powers. Former Prime Minister W. M. Hughes saw the proposal as contrary to the natural tendency of national progress:

This measure is without parallel in the legislation of the Commonwealth. For a quarter of a century the National Parliament has been building up, stretching out, and consolidating its powers. The passing years have seen successive governments vieing with each other in an endeavour to exercise more effectively the powers granted to them under the Constitution. ... The leaders of all parties, though not always agreeing as to the form of the amendments desired, have declared quite definitely that there was a need for wider powers to be vested in the Parliament. But while they have regretted the limitations of the Constitution, they have not halted nor stumbled in their onward march. They have endeavoured to exercise to the utmost all existing power. It has remained to this

Government to sound the trumpet for a general and shameful retreat from a difficult but vitally important strategic position.¹²⁶

At the heart of Hughes' critique was the view that the national system of arbitration was a key component of the federal compact. Bruce's proposal 'is without parallel in our history; it is contrary to the intentions of the framers of the Constitution; it deprives the National Parliament of all power to deal with the greatest problem of the age ...'.¹²⁷

Hughes insisted that as there was no popular mandate for such a drastic change, the Bill should be placed before the people by referendum or ballot. Bruce's scheme was sufficiently drastic to rouse opposition from among his own ranks. His Government suffered defeat on the floor of the House when Hughes' motion was supported by five other rebels from the Government benches. Bruce advised the Governor-General to dissolve the Parliament and call an election. The campaign was largely fought over industrial arbitration. Bruce defended his move to abolish the federal system as a final attempt to make industrial control simpler and more effective, while Scullin claimed that the Government had made the federal system excessively legalistic and punitive. Although a wide and confusing range of views was advanced, the campaign was commonly seen as a plebiscite on the continuation of the federal arbitration system. The election produced a landslide for Labor. Although the actual voting swing was moderate (about 4 per cent), the Government's large number of marginal seats meant that Labor won fifteen additional places in the 75 member House. Bruce and four other Ministers were defeated in their own electorates.¹²⁸ The outcome has been interpreted as the result of a gigantic political blunder by Bruce, and a resounding popular vote in support not only of federal arbitration but the method of industrial arbitration generally. While other factors were at play, there can be little doubt that the result showed widespread support for the existing system.

The incoming Scullin Government thus had good reason to claim a popular mandate for retention of federal arbitration, and proceeded to put forward amendments to make the system less adversarial and legalistic. Labor admitted that its reforms were hampered by 'the self-imposed straight-jacket' placed by the Constitution on the legislative power; consequently the Parliament was restricted in its ability to express the people's will and pursue the national interest.¹²⁹ The Government aimed to promote co-operation by creating a series of conciliation committees chaired by commissioners attached to the Court. The proposal departed from the judicial model of arbitration in several respects. Like wages boards, members of the conciliation committees would be appointed by the Government to represent employers and employees generally. The committees could apply across a whole industry, binding parties who had not appeared before them. In addition, the commissioners could exercise arbitral powers on their own behalf without being subject to an appeal to the Court.¹³⁰ Because of these changes the Bill was blocked by the Opposition-controlled Senate. A rare conference was held between the managers of both Houses, resulting in several amendments which diluted the novelty of the changes. The Government's original plan to prevent appeals from the committees or the commissioners to the Arbitration Court was changed at the insistence of the Senate if the case involved an

issue of general importance.¹³¹ The commissioners were also given statutory appointments and could only be suspended from office after a review by both Houses of Parliament.

The High Court immediately held that the legislation went beyond the industrial power because the committees' deliberations were not limited to settlement of an industrial dispute and did not involve any hearing or determination between disputing parties.¹³² The decision effectively meant that binding decisions resulting from industry-based conciliation and 'round table' negotiation could not be implemented under the industrial power, which was limited to judicial-style hearings for the making of compulsory awards and orders. In 1931 the ALP Government attempted to overcome the High Court's objections, introducing legislation which extended the arbitral power to conciliation committees, but this move was blocked in the Senate as an erosion of the Court's functions.¹³³

Most of the innovations introduced by the 1930 amendments were designed to shift the system from a judicial style of arbitration to an accommodative one, but were for this reason negated by the High Court or the Senate. Labor's reforms did, however, result in some reduction of legalism (allowing lawyers to appear in court only by consent of all parties) and a greater use of conciliation. The 1930 legislation also repealed or amended the penal provisions of the Act, many of which had been added only two years before. Although participation in a strike was no longer an offence, the legislation now prohibited union officials from inciting or encouraging the breach of an award. These changes were supported by the Leader of the Opposition, Mr Latham, who opposed the criminalisation of non-violent industrial action as ineffective, and claimed he had 'always been doubtful of the principle which they embody.'¹³⁴ Some of the detailed requirements which the former Government had placed on registered organisations were also removed. By the 1930s the intersection of popular, parliamentary and judicial forces had tempered the more radical changes sought by both sides of politics, confirming the Commonwealth Arbitration Court's status as a key component of the Australian system of government.

Reconstruction: 1947–56

The Second World War, with the threat of invasion and the need for total mobilisation of the nation's resources in order to achieve victory, led to unprecedented demands on the organisation of industry. In 1940 regulations made under the *National Security Act 1939* expanded the Commonwealth Arbitration Court's jurisdiction immensely, using the defence power under the Constitution to circumvent the restrictions contained in the industrial power. The Court was given responsibility for resolving all actual or potential disputes, including those within a single State, and empowered to make a common rule for the whole industry or to include in its award issues not raised in the original dispute.¹³⁵ From 1942 the Labor Government introduced an extensive system of direct planning and regulation of key industrial sectors, using the defence power to set up special administrative authorities for the waterfront, maritime and coalmining industries. Besides directing production, these bodies were also responsible for settling industrial grievances

and determining employment conditions. In protected occupations, the freedom to change work or engage in industrial disputes was drastically curtailed. General regulations were also made which pegged wages and set working hours.¹³⁶

The 1947 Changes

During the period of post-war reconstruction the Chifley Government sought to continue the wartime system of direct industry regulation in key industries. It also tried to move away from the ornate edifice which the Arbitration Court had become towards a more informal mixed system of boards and court which operated in some of the States, and which the Scullin Government had attempted to emulate in 1930 before that scheme ran foul of the High Court. However the changes were not as radical as those attempted in 1930 and did not seek to deregulate the system by abolishing the Court in favour of conciliation committees as the union movement wanted. The 1947 amendments were designed to increase the role of conciliation and collective bargaining, while reducing delay and legalism, but they retained centralised regulation by the Court as a crucial element in post-war economic planning through its determination of wages and hours.¹³⁷

The Attorney-General, Dr H. V. Evatt, (Labor, Barton, NSW) introduced the Bill as 'a new chapter in the history of industrial relations in Australia;' one which departed from the formalism and technical complexity of the existing system by emphasising the prevention of disputes through conciliation.¹³⁸ Whereas conciliation commissioners had played only a minor role before the war, now they were to handle most day-to-day functions of resolving disputes and making awards. It was expected that they would operate as administrative bodies rather than legal tribunals, exercising their powers with discretion to prevent impending disputes before they arose, rather than depending on the formal notification of a dispute by the parties. Procedures would be simplified 'to enable commissioners to intervene long before differences between parties become irrevocably defined.'¹³⁹ The reforms marked a much greater reliance on the hitherto little-used prevention power under section 51(xxxv). The definition of industrial dispute was widened to include 'a situation which is likely to give rise to a dispute as to industrial matters.'¹⁴⁰ In keeping with the reduction in legalism, the Court was confined in its role to the hearing of purely legal issues and the setting of standards of national importance. The avenue for appeals to the Full Court was therefore removed and the commissioners became completely independent. The Court was largely restricted to operating as a bench of three judges, and confined to the setting of standard hours, the male basic wage, annual leave and minimum pay rates for women.¹⁴¹

Evatt justified the changes by claiming that the Bill embodied 'the true spirit of the constitutional power of the National Parliament,' which did not require legalism and technicality. But, as the Leader of the Opposition, Mr Menzies, (Liberal, Kooyong, Vic.) noted, the legal issues which constrained the operation of the Federal arbitration system were largely the result of constitutional interpretation by the High Court: for good or ill, they could not be touched by parliamentary action.¹⁴² The Opposition was most concerned

at the unfettered discretion given to the commissioners, preferring the traditional judicial system of arbitration as productive of consistency and respect.

The new system showed its shortcomings almost immediately. The changes were criticised, especially by employers, for reproducing the problems that they had been designed to eliminate: the system divided responsibilities irrationally, was unduly inflexible, and lacked a mechanism for consistency between awards of the commissioners.¹⁴³ The division of functions between the Court and the conciliation commissioners was especially difficult to determine in practice, leading to lengthy delays and court challenges. In one case, the High Court held that a conciliation commissioner was not permitted to insert provision for a tea break into an award because this constituted a variation to standard hours under the Act.¹⁴⁴ In wage-fixing cases, it was sometimes difficult to determine whether a claim involved a simple variation, which was the province of the commissioners, or was an alteration of the basic wage principles, which could only be handled by the Court.¹⁴⁵ The Menzies Government introduced amendments in 1952 which restored appeals from the commissioners and allowed cases of special significance to be removed to the Full Court. Apart from these problems of co-ordination (which also reflected real differences on the bench regarding wage-fixing principles), the historian of the period, Tom Sheridan, has concluded that the 1947 legislation had little effect on the actual operations of the Commonwealth Arbitration Court.¹⁴⁶

The Boilermakers' Case and the 1956 Amendments

The rise in industrial militancy after the war led to demands for greater enforcement of sanctions, with enforceable penalties for breach of awards or for taking industrial action. While the prohibition on strikes had been removed in 1930, the Arbitration Court continued to have the power to make an order requiring the observance of any term of an award, and to punish breaches of such a term.¹⁴⁷ The 1947 amendments, which expanded this power while at the same time enhancing the Court's power to punish for contempt of court, were widely regarded as reimposing by other means the 'penal powers' for strikes.

The issue was tested during conflict over the 1950 Basic Wage Inquiry when metal trades unions imposed a ban on the working of overtime contrary to an express provision in the award. When the power to enforce this clause was overturned by the High Court, a new provision was inserted into the Act by the Menzies Government in 1951 expressly allowing the Arbitration Court to make an order requiring an organisation to observe award provisions, and providing that failure to observe such an order could be treated as a contempt of court, punishable by a heavy fine.¹⁴⁸ A bans clause was inserted into the Metal Trades Award in 1952 and when the Boilermakers' Society refused to obey an order from the Arbitration Court to observe the clause by ceasing a strike, Justice Richard Kirby of the Court fined the union for contempt. The union then appealed to the High Court to have the penal power declared invalid.

By a narrow majority the High Court held that the Arbitration Court did not possess the necessary judicial power under the Constitution to impose penalties. This decision was

later confirmed by the Privy Council. The new Chief Justice of the High Court, Sir Owen Dixon, in common with many members of the judiciary, had the view that industrial tribunals should not be clothed as courts of law since their curial appearance tended to undermine public respect for the legal system.¹⁴⁹ The decision echoed previous decisions dating back to 1918 which declared that only a properly constituted court could exercise the judicial power of the Commonwealth under the Constitution. But it went significantly further than this in holding that any such court whose primary function was to administer arbitral or legislative powers could not also exercise the Commonwealth's judicial power. Hence the Commonwealth Arbitration Court could engage in conciliation and arbitration, but it could not also enforce its own decisions by imposing penalties, for this was a judicial function which must remain institutionally separate.¹⁵⁰ It perplexed the appellate judges that such an obvious defect had been allowed to stand for so long; but until the penal powers began to be used so vigorously, neither the unions nor employers had sufficient motivation to mount a challenge to the entire system with consequences that could not be predicted.

In establishing a demarcation between judicial and other powers, the decision set clear limits on the manner in which Parliament could exercise its power to legislate with respect to conciliation and arbitration. The Parliament could easily have relied on the existing Federal and State court system to discharge the judicial function, as most other federal legislation did at the time. Instead, the Government decided to create a new court, the Industrial Court, to discharge the legal functions of the system especially the imposition of penalties and the regulation of industrial organisations.

In fact it seems that the Government had already decided to overhaul the arbitration system before the *Boilermakers'* case was decided. By the early 1950s there was widespread dissatisfaction with the formalism of the Commonwealth Arbitration Court. The Government is reputed to have blamed the legalism and inflexibility on the Chief Judge, Sir Raymond Kelly. Appeals from the conciliation commissioners had already been legislated in 1952, integrating the system but making the Court even more important. The Government was worried by the nation's unfavourable balance of payments and rising inflation; its solution was to increase productivity while cutting purchasing power.¹⁵¹ These measures would most likely increase industrial unrest. A review of the system was raised during the December 1955 election, and at the opening of Parliament the following February the Government announced its intention to pursue changes to make the Court more efficient, weeks before the High Court's decision was handed down. The Minister for Labour, the Hon. Harold Holt (Liberal, Higgins, Vic.), preferred a more informal approach and raised reform of the Act with the newly-created Labour Advisory Council around this time.¹⁵² Holt apparently sounded out Judge Kirby as a possible successor to head a less formal body as early as 1954.¹⁵³ The *Boilermakers'* decision made more pressing the need for overhaul of a system which was already showing strain.¹⁵⁴

The 1956 amendments continued the trajectory of the 1947 changes in seeking a reduction in legalism and the encouragement of agreements. The existing system would be retained

not only because it was well-established and accepted, but because an independent tribunal was needed to protect the public interest.¹⁵⁵ The new Conciliation and Arbitration Commission was designed to make the handling of disputes more 'streamlined' and flexible. The former conciliation commissioners, now called simply commissioners, would be able to bring their expertise to full benches in important matters, joining the judges (now designated as presidential members) for the first time. They were supplemented by specialist lay conciliators who could also arbitrate on matters in dispute if the parties consented.¹⁵⁶ The Minister hoped that the atmosphere of the Commission would be less formal and that its judges would dispense with wigs and gowns (which they did). The Bill was criticised by the Opposition because it did not go far enough: it retained the system of appeals, which the Labor party saw as the main cause of delay, and allowed the Commission to overturn collective agreements on economic grounds which were beyond the control of both government and the tribunal. In his reply the Leader of the Opposition, Dr Evatt, declared that an effective conciliation and arbitration system could only be achieved if Parliament were vested with powers over all industrial matters, as well as prices and profits.¹⁵⁷

Coming at a time of intense industrial unrest and rapidly changing conditions (the 40 hours case, the 1949 coal strike, inflation and the struggle over margins in the metals industry), the statutory changes by both Labor and Liberal governments in the immediate post-war period cemented the federal arbitration tribunal's role as a maker of economic policy, rather than an arbiter of individual disputes. Both measures involved consultation with unions and employers before the proposals were presented to Parliament. Under the 1947 amendments the Court's statutory responsibility for basic wage and standard hours inquiries confirmed it as an expert body. The Menzies amendments of 1952 and 1956 enhanced this role for the Full Bench by providing it with general co-ordinating jurisdiction. The tribunal began relying more on statistical data and expert submissions rather than sworn evidence given by individual witnesses. Its policy role was taken up enthusiastically in the highly controversial 1953 Basic Wage Case, which abandoned automatic wage increases linked to the cost of living and replaced the needs-based Harvester principle with a series of economic indicators designed to determine industry's capacity to pay.

The post-war amendments represented the most fundamental alteration yet to the structure of the federal arbitration system, but even these changes were in keeping with the traditional independent judicial model of arbitration which had emerged from interpretation of the Constitution, while allowing the Commission to adopt a more accommodative role towards disputant parties.¹⁵⁸ The High Court declared the new approach as falling within the Parliament's industrial power: provided the federal tribunal was acting in settlement of a constitutional industrial dispute, 'it would be absurd to suppose that it was to proceed blindly in its work of industrial arbitration and ignore the industrial social and economic consequences of what it was invited to do.'¹⁵⁹

Consequences of the Reconstructed System

The Boilermakers' Case and the 1956 amendments resulted in a bifurcated system, with conciliation and arbitration being handled by the Commission, while the new Industrial Court determined legal matters of award interpretation and enforcement. The chief defect of this system, as it soon emerged, was the lack of co-ordination between the arbitral and judicial arms. The Industrial Court operated purely as a court of law without any consideration either of the activities of the Commission or the wider consequences of its own decisions. This problem came to a head as the result of employers' increasing use of penal sanctions during the 1960s. After the criminal penalty for engaging in a strike was abolished by the Scullin Government in 1930, employers began turning to bans clauses as an alternative method of enforcement. The High Court had already endorsed the legality of bans clauses in 1936, with the majority declaring this to be a matter within the arbitration tribunal's discretion (even though, as the minority pointed out, the legislature had made clear its intention by removing the statutory prohibitions against industrial action in its 1930 amendments).¹⁶⁰ However the use of bans clauses did not become common until after the 1951 amendments which made breach of an Arbitration Court order a contempt of court. After the 1956 amendments the power to punish for contempt was transferred to the new Industrial Court.

By inserting a bans clause, the tribunal could prohibit any ban or restriction which impeded the performance of work in accordance with the award, thus making any industrial action a breach of the award. But rather than seek a penalty for breach of the award, employers could instead obtain an injunction from the Industrial Court ordering observance of the award or restraining any future breach. Any disobedience of such an order was treated as a contempt of the Court and punished by a heavy fine. The total burden of such proceedings was compounded by the ability of successful parties to recover their legal costs in Industrial Court actions. Unlike the Arbitration Court which it replaced, the Industrial Court proved to be highly receptive to such enforcement procedures, and fines for breach of bans clauses became common after 1956 as employers began resorting to the Court rather than arbitration.¹⁶¹ Most of these fines were imposed during the 'absorption battles' of the 1960s in the metals industry. In December 1967 the Commission had granted an award increase in the industry but allowed employers to absorb the increase in existing over-award payments. When the metals unions began a campaign of industrial action demanding payment of the full increase, employer organisations retaliated by enforcing the bans clause with the aim of bankrupting the unions. By May 1968 the metals and engineering unions resolved to refuse to pay any further fines. This policy was endorsed by the annual congress of the Australian Council of Trade Unions (ACTU).¹⁶²

This explosive situation was touched off by a continuing dispute over restructuring of the Melbourne transport system, in what became known as the 'one-man bus' dispute. The union tried to have the matter resolved in the Commission, but twice the High Court held that there was no jurisdiction to hear the dispute as it did not fall within the meaning of the industrial power in the Constitution. On the third occasion the Commission's power was

upheld.¹⁶³ Besides highlighting the semantic pedantry to which judicial interpretation of the industrial power had by this stage descended, the cases exhausted the union's patience with the legal system. A series of fines had already been imposed for breach of injunctions by the Industrial Court during the 'one-man bus' dispute; the union refused to pay them as it considered it had been vindicated by the eventual award. By the time a further penalty was imposed in 1969, the union executive resolved not to pay any further fines and withdrew its funds to protect them from being confiscated by the Court.

The matter became a focus of the union movement's campaign to abolish the 'penal powers' when the union secretary, Clarrie O'Shea, was summonsed for contempt of the Court. When he finally attended the Court on 15 May, he refused to be sworn or answer questions about the union's finances. Judge Kerr thereupon committed O'Shea to prison until he purged his contempt.¹⁶⁴ As the first gaoling of a union official for 18 years, the sentence was treated as a threat to the whole union movement by a court which was widely perceived as having an anti-labour bias. Widespread stoppages followed within days, but talks to defuse the spreading dispute reached a stalemate when the Government insisted that the fines must be paid. The crisis was resolved only when the fines were paid by an anonymous individual, thus allowing both the Government and the unions to withdraw without backing down. The donor was later revealed to be one Dudley MacDougall, who used his recent Opera House lottery winnings in a gesture of public beneficence. The episode was widely regarded as providing a lesson that punitive sanctions for industrial action were unworkable, since the ultimate sanction of gaoling was excessive and a negation of any freedom to take industrial action.

This was a clear occasion when the Parliament served as the focus for debate on a matter of vital public concern. Lacking a majority in the Senate, the Government faced intense questioning at the height of the crisis when an urgency motion sponsored by the Labor Opposition gained the support of the Democratic Labor Party. The Senate Opposition Leader, Senator Lionel Murphy (Labor, NSW), attributed the cause of the conflict to the division of functions between the Commission and the Court. While the Commission was charged with preventing and resolving disputes, the Court refused to consider the industrial merits of the enforcement cases before it. As Senator Murphy noted, in the previous decade the industrial relations system had moved towards one of collective bargaining, yet the widespread availability of bans clauses prevented unions from taking any industrial action to force negotiation on above-award claims. He criticised the Government for failing to provide workers with the right to strike which was necessary to ensure fairness in a bargaining regime.¹⁶⁵ A similar debate was allowed in the House of Representatives two days later. Opposition members repeatedly pointed to the one-sidedness of the penal sanctions, and the Industrial Court's refusal to examine the rights or wrongs of industrial action before imposing a penalty.

While the Government continued to assert that effective sanctions were an essential feature of the arbitration system, it resumed negotiations with the union movement on modifications to the enforcement provisions.¹⁶⁶ An agreement was also reached with the

ACTU and employers' associations on the use of dispute resolution procedures. With the growth of informal collective bargaining, the power of the Parliament and the Commission to control the industrial relations climate were increasingly being eclipsed.

The following year the Government introduced amendments designed to make the use of sanctions a last resort, admitting that the existing process was 'no longer appropriate or desirable' and that where possible disputes should be resolved without recourse to penalties. In future a bans clause could only be inserted into an award by a presidential member of the Commission. The Industrial Court's power to issue orders for compliance of an award was abolished, leaving it with only the power to exact a lesser penalty for breach of an award. In order to allow an opportunity for settlement by arbitration, such a penalty could be imposed by the Court only after a presidential member of the Commission had attempted to settle the matter.¹⁶⁷ Recognising the shortcomings of a purely legal tribunal in dealing with industrial disputes, the amendments clearly reasserted the primacy of conciliation and arbitration. The trend towards facilitation of dispute resolution was continued in the McMahon Government's major revision of the Act in 1972. By appointing commissioners, whose main role was to mediate agreements, the Government hoped to encourage resort to the Commission in informal collective bargaining. The attempt to separate the conciliation function from arbitration lasted until the following year, when it became apparent that the separation only led to delays; as a result, the processes of conciliation and arbitration were again combined.¹⁶⁸

The accession of the Whitlam Labor Government in December 1972 gave the ALP its first opportunity at reform of industrial relations legislation since 1947. The Minister for Labour, Mr Clyde Cameron (Labor, Hindmarsh, SA), introduced a Bill in April 1973, which he described as 'the first stage of a radical transformation of industrial relations in Australia.'¹⁶⁹ A major aim of the changes was to shift the system away from court proceedings and penalties in favour of bargaining and conciliation. As a consequence of the penal powers controversy four years earlier, the Bill recognised a right to strike by protecting unions from civil liability for industrial torts under the common law and removing the remaining power to impose bans clauses or issue penalties for strikes. As a means of promoting and legitimating collective bargaining, greater powers were also proposed for single commissioners to approve industrial agreements, while appeals against the certification of agreements would be abolished. The Minister noted that in the longer term the Government aimed to implement the Labor party's commitment to constitutional reform by seeking an expansion of the Federal legislative domain:

It is the task of the national Parliament to create labour relations which meet and match the needs of the community and which will anticipate and overcome obstacles to justice and common sense in industrial relations.¹⁷⁰

While the Government presented the amendments as a way of saving the arbitration system by accommodating it to change, the Opposition saw these moves as destroying the authority of the Commission and the effectiveness of the legislative framework under which it operated.¹⁷¹ The proposal to abolish penalties for industrial action (replacing them

with other sanctions) was identified as particularly destructive of the arbitration system on the basis that any legal system ultimately rested on the threat of penalties for its operation. The Federal Parliament's ability to limit the operation of the industrial torts was also doubted in an academic paper which argued that the provision could not be supported by the Constitution's industrial power.¹⁷² When the Bill reached the Senate, the Opposition and Democratic Labor Party members combined to prevent detailed consideration beyond the second reading stage. Some of the changes to the machinery of the Commission and Court were, however, passed later that year.¹⁷³ Faced with a hostile Senate, Labor was unable to proceed with its more extensive proposals. Attempts to gain expanded legislative power through constitutional change also proved abortive in the 1973 referendum which failed to gain approval for Federal control over prices and incomes when the ACTU, fearful that it would be used to freeze wages, campaigned against the proposal.

Transformation: 1985–96

The period of Liberal-National Party Government from 1976–83 saw a strengthened role for the Arbitration Commission. Industrial relations became more centralised and award regulation gained greater prominence as national wage cases took on a major role in the Government's attempts to contain inflation by limiting wage increases. The Commission acquiesced in this role by adopting the mechanism of partial wage indexation which passed on only part of the rising cost of living in award increases. A key part of the Government's strategy was the containment of industrial action through strengthened legal sanctions and enforcement mechanisms.¹⁷⁴ Additional sanctions for industrial action were introduced (notably the prohibition of secondary boycotts under the 1977 amendments to the *Trade Practices Act 1974*), with the Government stating that 'it is impossible to maintain the authority of the Act unless there are consequences which are appropriate to the particular breaches of the rules.'¹⁷⁵ This period was also marked by an increase in direct intervention by government in industrial relations as legislation was passed which either limited the discretion of the Commission or gave new legal powers to employers.¹⁷⁶ A further proposal made in 1982 would have allowed employers to stand-down employees as a result of industrial action without having to obtain the approval of the Commission as had previously been required. The Commission would not have any power to limit this new right. The clause was criticised by the Labor Opposition as 'an imposition from outside the system.' When it came before the Senate, the change was opposed by the Australian Democrats in conjunction with the ALP; after being referred to a select committee the Bill eventually lapsed.¹⁷⁷

By contrast the ALP took power in March 1983 with a strategy heavily reliant on its Accord on economic policy which it had concluded with the ACTU. This was premised on a centralised system of wage fixation under the Arbitration Commission, and its implementation depended on the adoption of its principles by the Commission in national wage cases. The High Court's approach in the *Social Welfare Union case* (June 1983) and subsequent decisions allowed this to occur. By treating the meaning of the words 'industrial dispute' in section 51(xxxv) of the Constitution as largely a question of fact and

ordinary meaning, the Court allowed the Commission unprecedented discretion to determine which matters it could include in an award, while also expanding the range of workers who could be covered by the federal arbitration system.¹⁷⁸

The Hancock Report and the Industrial Relations Act

The original Accord contained a commitment to the establishment of an inquiry 'to conduct a total review of Federal industrial legislation.'¹⁷⁹ In July 1983 the establishment of such a committee of review was announced. It was tripartite in nature, consisting of Professor Keith Hancock (an academic economist) as chairman, together with Mr Charlie Fitzgibbon (former Senior Vice-President of the ACTU) and Mr George Polites (former Director-General of the Confederation of Australian Industry, the peak employer association). The Committee's terms of reference had a distinct legal and constitutional focus, requiring it to examine 'all aspects of Commonwealth law relating to the prevention and settlement of industrial disputes,' the recognition and operation of industrial organisations, and 'the extent to which and the manner in which the Federal and State industrial relations institutional and legislative arrangements might better inter-relate.'¹⁸⁰ The report was handed down in April 1985 after the Committee had received substantial submissions from all major representatives of employers, unions and government.

The Committee took the essentially conservative approach that, since it was difficult to achieve change across an industrial relations system, reform 'should only be attempted if there is reasonable ground for the expectation that present problems will thereby be overcome and that different and worse problems will not be created.'¹⁸¹ It noted that no submissions had advocated radical changes to the existing system, although some preferred a more decentralised and inclusive approach by the Commission, or greater availability of bargaining.¹⁸² In the end, the Committee was not persuaded that 'definite and decisive advantages' would flow from any major change. The proponents of fundamental deregulation had assumed rather than demonstrated its claimed benefits, while the existing system had proved itself to be sufficiently adaptable to accommodate new policies and practices. A system of conciliation and arbitration was the one most capable of developing and implementing a centralised wage policy in the national interest.¹⁸³ Considering the long history of the present system, the widespread public support which it had engendered, and the complexities of changing an overall system which was spread across federal and State domains, any major change would face difficulties and uncertainty.¹⁸⁴ However a recommendation was made to allow for a collective bargaining stream which could be utilised by mutual agreement between the relevant parties to regulate their relationship to the exclusion of the Commission.¹⁸⁵

Special emphasis was placed on the Commission's status as an independent and expert body which proceeded by public argument and deliberation: these characteristics gave it the flexibility to adapt its principles and processes to a changing economic and industrial climate, to maintain public confidence, and to accommodate the needs of the parties.¹⁸⁶ While it accepted that the Commission should take account of the public interest and the

economic consequences of its decisions,¹⁸⁷ the Hancock Committee was opposed to any closer direction by Parliament, especially:

measures which would involve intrusion by the legislature directly on the Commission in exercising its dispute-settling function. To do so, would, we believe, cast doubts upon the independence of the Commission. The tribunal's independence is essential for it to operate effectively and with the continued confidence of the community and the parties who rely upon it for the resolution of disputes.¹⁸⁸

The history of the Commonwealth legislation showed that the functions of conciliation and arbitration should not be separated since they tended to become merged in the course of resolving particular disputes. While it was desirable to promote the use of conciliation by the parties, this was best achieved, not by making arbitration less accessible, but by providing for more flexible use of conciliation (for example, by creating industry consultative councils and requiring dispute processes to be included in awards).¹⁸⁹

The Report's main recommendations concerned the restructuring of the federal institutions. The Committee emphasised the continuing central role for an arbitral tribunal, but thought its name should be changed to the Australian Industrial Relations Commission to reflect its broader role 'in consultative processes, in the consideration of the public interest, and in the promotion of industrial harmony.'¹⁹⁰ To improve consistency and equity, the specialist tribunals should be abolished and incorporated into this single tribunal.¹⁹¹ A separate Australian Labour Court should also be created, the members of which would hold concurrent office as presidential members of the Commission. The integration of arbitral and judicial functions by the sharing of personnel would result in 'a more practical and streamlined' system while avoiding the restrictions imposed by the *Boilermakers' Case*.¹⁹² Giving the federal judicial functions to a specialist court whose members were 'actively involved in conciliation and arbitration' would effectively allow the same personnel to make, interpret and enforce their own awards. The Committee did not seem to see any dangers in combining functions in this way.

The Committee thought that penal sanctions such as fines and imprisonment could never be a major part of a system based on conciliation and arbitration, and recommended that such penalties for industrial action should not be included in legislation. Rather, it proposed the development of more extensive 'internal' sanctions within the arbitration system itself, such as cancellation of awards or deregistration of organisations. Making the benefits of conciliation and arbitration dependent on conformity to its processes would promote commitment to the overall system.¹⁹³ However no agreement could be reached on the place for the common law industrial torts or the prohibitions on secondary boycotts under the Trade Practices Act. The Committee divided over whether registered organisations should be given immunity from such 'external' legal sanctions, leaving disputes to the processes of conciliation and arbitration rather than the general law.¹⁹⁴

While largely based on the Hancock Report, the Industrial Relations Bill introduced in May 1987 made some significant departures from its recommendations. In the words of

the Minister for Industrial Relations, the Hon. Ralph Willis, the Bill represented an 'evolutionary development' of the existing system, one which retained the centrality of conciliation and arbitration 'based on a clear understanding of the social, historical and structural characteristics of our industrial relations system as it has evolved over the past 80 years.'¹⁹⁵ The Commonwealth Government had been unable to secure the States' commitment to setting up a unified system, so the Bill was confined to providing for joint appointments to State and federal tribunals. The Government also disagreed with the Report's proposal for a scheme of collective agreements enabling parties to 'opt out' of the arbitration system; instead, the Commission would be able to certify non-variable fixed term agreements which could be enforced before the Labour Court.

It was in the sanctions provided against industrial action that the Bill contained its most significant innovation. The Government believed that all remedies and penalties for industrial action should be located in the specialised labour law system, rather than derived from a variety of common law and statutory sources. The Bill proposed that the new Labour Court would have primary responsibility for orders to cease industrial action, including the statutory remedies for secondary boycotts under the Trade Practices Act as well as new powers to issue injunctions and impose fines for non-observance of Commission orders. However the jurisdiction of the State courts to award compensation for breach of the industrial torts and other common law actions was retained.¹⁹⁶ These provisions drew such strong objections from employer organisations as to lead to the Bill's demise. When the Government decided to call a snap election for July 1987, the Bill was delayed and the enforcement provisions dropped in order to neutralise a threat by business groups to campaign against the changes. Government members claimed that the amendments had been misrepresented, especially those concerning sanctions, and that the community needed more time to understand them.¹⁹⁷

When the Parliament resumed after Labor's re-election, the Government announced that, as the result of extensive consultations, its reforms would be reintroduced 'without changing existing sanction provisions.'¹⁹⁸ Because the proposal to limit the availability of other remedies was so strongly opposed by employer groups, the Government decided to abandon its related amendments for more effective sanctions administered by the Commission. Hence the sanctions under the new Act substantially reproduced the complicated and largely inoperative provisions which had developed after 1970. The Government also decided not to go ahead with the establishment of a specialist Labour Court, since it was no longer needed to administer sanctions.¹⁹⁹ The revised Bill was pushed through the House on 23 May, passing through all stages with minimal scrutiny.²⁰⁰ When it reached the Senate, the Opposition criticised the Bill for maintaining the 'heavily controlled, centralised and essentially bureaucratic procedures' of the existing system. It put forward an extensive series of amendments based on the Coalition's recently adopted policy favouring 'single enterprise bargaining units' designed to enable employers and employees 'to resolve their differences by direct agreement.'²⁰¹ For the first time since the 1929–31 proposals there was fundamental disagreement between the major parties concerning the form and processes of the federal industrial relations system. The

Opposition also proposed additional strike sanctions, effectively reviving the pre-1970 powers by allowing the Federal Court to issue an injunction enforcing the Commission's order to cease industrial action. In response, the Government argued that such an approach would reproduce the problems highlighted by the 1960s controversy over the enforcement of bans clauses, culminating in the O'Shea case.²⁰² After extensive debate the Government's scheme prevailed with the support of the Australian Democrats.²⁰³

The Industrial Relations Act which resulted was therefore little more than a reordering of the existing system.²⁰⁴ The most significant change in the long-term was the recognition which the Act gave to collective bargaining in the form of certified agreements. While the Hancock Report had envisaged the Commission continuing to play a strong central role in the implementation of economic policy, the climate had changed by the late 1980s. From 1986, under a renegotiated Accord between the Federal Government and the ACTU, centralised regulation began to be replaced by a decentralised approach as the focus of change shifted towards the workplace.²⁰⁵ Unions and employers were responsible for enhancing productivity by negotiating and implementing change at the workplace level. However the Commission continued to determine the parameters of wage increases based on productivity changes, and to operate a fully centralised approach to the award of base-level wage increases linked to the cost of living. Union leaders became increasingly dissatisfied with the results of the Accord process, and sought to circumvent the Commission's central power by resort to collective bargaining.²⁰⁶

Change in the 1990s

The later years of the Labor Government, from 1991–96, have been described as a period of 'co-ordinated flexibility' in industrial relations, when a shift towards enterprise-based collective bargaining was achieved within the framework of the award system.²⁰⁷ Pressure from the ACTU and employers for greater autonomy was initially resisted by the Commission in April 1991. Concerned that deregulated bargaining would lead to excessive claims and disputes, the Commission declared that the parties still needed to develop 'maturity' so that some consensus could be reached on the nature of the new bargaining system.²⁰⁸ When the Federal Government announced that it would introduce amendments designed to facilitate a shift towards enterprise bargaining,²⁰⁹ the Commission was forced to accept greater deregulation. In its October 1991 wage decision it announced that in future the Commission would endorse enterprise agreements provided they implemented its principles for improving efficiency. As part of its new supervisory role, the Commission declared that from now on it would refrain from using arbitral powers to resolve disputes over the conduct of bargaining, leaving such issues to conciliation or to negotiation between the parties.²¹⁰

The legislative changes introduced in 1992 and 1993 were designed to formalise this shift to a system based on enterprise-focused bargaining. While the Commission continued to oversee the process, its independent discretion was diminished. In the majority of cases (where only a single enterprise was involved), it could no longer refuse to certify an agreement on the ground that it was 'contrary to the public interest.' However the

Commission still retained an important role in the approval process: an agreement could only be certified if the Commission was satisfied that its overall terms did not disadvantage employees by comparison with the award.²¹¹ A Full Bench could also terminate an agreement (or agree to its variation) if its continued operation was found to be unfair to employees covered by it.²¹² Under the amendments introduced by the *Industrial Relations Reform Act 1993*, a separate Bargaining Division of the Commission was established, with power to oversee the bargaining process, although the Commission held that its power was only facilitative and could not be used to enforce bargaining in good faith.²¹³ The Commission also had limited power to scrutinise the fairness of agreements.²¹⁴

Under the Reform Act, the Commission was also subjected to greater direction when making awards, which by now had completely lost (other than in purely formal terms) their original function as the settlement of an industrial dispute. Awards were now to 'act as a safety net of minimum wages and conditions of employment underpinning direct bargaining,' rather than a prescription of actual entitlements.²¹⁵ When deciding whether to certify an agreement, the Commission was now required to use an overall comparison between its award and the agreement to determine whether the agreement satisfied a 'no disadvantage' test. It was also required to review awards on a regular basis to ensure that they provided for 'secure, relevant and consistent' wages and conditions, and did not contain any 'unnecessary detail.'²¹⁶ While the Commission retained a central position as an arbiter of general standards and a gateway for approving particular agreements, it is clear that these changes significantly displaced its traditional role as an independent judicial tribunal resolving disputes.²¹⁷ The validity of this focus on bargaining was confirmed in 1996 when the High Court held that legislation allowing parties involved in an industrial dispute to settle their differences by making an agreement was an exercise of the incidental aspect of the industrial power under section 51(xxxv) of the Constitution.²¹⁸

The Reform Act was also constitutionally significant in its reliance on alternative heads powers, such as the corporations and external affairs powers (discussed in Part 4 of this paper). One of the terms of the renegotiated Accord in 1992 between the ACTU and the ALP Government, implemented in the 1993 Reform Act, was the introduction of a range of minimum employment standards. So that the standards would apply to all employees in Australia (including employees in Victoria, which had recently abolished its industrial arbitration system), they were enacted using the external affairs power rather than leaving it to the Commission to devise principles through the award process. In this respect the legislation was the most dramatic example of direct regulation by the Federal Parliament in the field of industrial relations since Federation. Yet the Commission retained significant responsibilities for determining the details and application of the minimum standards: it was required to set minimum wages for employees not covered by a federal or State arbitration system, make orders implementing equal remuneration between men and women, devise recommendations for carers' leave, and adjudicate on the dismissal of individual employees. The Reform Act also achieved Labor's long-held ambition for a specialist labour court, establishing the Industrial Relations Court of Australia with

primary responsibility for interpreting and enforcing the Act.²¹⁹ Thus, in the early 1990s, the ALP in government had moved towards a more deregulated system, using a variety of constitutional powers while retaining a role for the Commission in adjudicating claims and implementing policy.

By contrast its political opponents had moved away from third-party intervention altogether. Beginning in 1984, Liberal Party policy abandoned the traditional conservative faith in a strong arbitration system in favour of deregulated bargaining, and increasingly advocated 'opting out' of the award system. By the time of its 1992 industrial relations policy 'Jobsback,' the Coalition was advocating the abolition of compulsory arbitration, proposing an 'opting in' system in which the Commission's awards would only be binding if mutually agreed by the parties. The policy also endorsed the use of private arbitration to replace the Commission in dispute resolution. By this stage the vocal employer groups which had captured the initiative in the industrial relations debate were pressing a completely deregulated individual bargaining system. The Coalition's policy progressively followed this approach.²²⁰

The Liberal-National Coalition Government introduced its reforms less than three months after gaining power at the March 1996 election. The Workplace Relations and Other Legislation Amendment Bill made fundamental changes to the existing legislation, including a change of its name to the Workplace Relations Act. This and other amendments were indicative of a complete transformation, one which minimised the Commission's role in third-party dispute resolution and limited its regulatory function. The Minister for Workplace Relations, the Hon. Peter Reith (Liberal, Flinders, Vic), described the Bill as a break with the conflict and paternalism of the existing system of industrial relations by shifting the focus to employers and employees at the workplace level.²²¹ Many of the key features of the Bill had already been presented in the Coalition's critique of the 1988 Act: enterprise-based bargaining with minimal involvement of the Commission, restricted intervention by unions in the direct bargaining process, freedom of association notably the right of non-membership, and more effective sanctions for industrial action including court injunctions.

Under these changes, the role of the Commission was changed dramatically. The Commission's arbitral powers were now to be exercised 'as a last resort' rather than 'where necessary,' and would normally be limited to a list of specified 'allowable award matters' which would provide a 'safety net' of core standards underpinning more comprehensive regulation by agreement. Beyond this, the Commission was prevented from making binding determinations unless bargaining had broken down and threatened to cause harm to the economy or the community. However it could continue to exercise conciliation functions to facilitate bargaining, and could engage in voluntary arbitration with the agreement of the parties. The power of the Federal Commission was also limited if a matter was already being addressed by a State tribunal.²²² In addition, the Industrial Relations Court would be abolished and its functions returned back to the Federal Court.

One of the Coalition's objectives was the creation of greater choice over the type of agreement which the parties could make. Hence if the parties decided to be bound by a State-based industrial agreement, the traditional predominance of the federal award was displaced and the State agreement took precedence.²²³ The Bill introduced Australian Workplace Agreements (AWAs), a new form of industrial instrument concluded on an individual basis between an employer and an employee. The Commission would have no jurisdiction over AWAs, which would come into force simply by being lodged with the Employment Advocate. This was a new statutory office subject to ministerial direction, responsible for encouraging bargaining and protecting the rights of parties but not originally having the task of vetting AWAs. It was originally envisaged that all kinds of agreements would be expected to satisfy a series of minimum conditions prescribed directly by the legislation, instead of the 'no disadvantage' test by which the Commission compared the total terms of prospective agreements to those prevailing under existing awards. The statutory minima proposed under the Bill included well-accepted leave entitlements, and relied on wage rates set under relevant awards of either the Australian Industrial Relations Commission or a State industrial authority.²²⁴

The Australian Democrats had already indicated their reservations over several aspects of the Bill, which was referred to the Economics References Committee as soon as it reached the Senate. With the major parties implacably divided, the supplementary report by Democrats Senator Andrew Murray proved decisive. According to this report, the Democrats' key principles included 'support for a strong Industrial Relations Commission with responsibilities for overseeing and maximising employment justice, while delivering the best possible economic outcomes.' The Democrats also believed that employees should have access to the Commission as an 'independent umpire.' Where parties could not agree on the form of regulation to apply, employees should have 'the protection of an adequate award, buttressed by compulsory arbitration.'²²⁵ The Democrats insisted that the Commission should retain the power to arbitrate and make an award beyond the allowable award matters 'where agreement cannot be reached and resolution of the matter by arbitration would be in the public interest.'²²⁶ It was also recommended that agreements be judged using a no disadvantage test by comparison with award entitlements, rather than the proposed list of statutory minimum conditions.

After protracted negotiations between the Minister, Mr Reith, and the leader of the Australian Democrats, Senator Cheryl Kernot (Qld), an agreement was reached on amendments acceptable to both parties which would allow the Bill to pass.²²⁷ While the Minister claimed that the changes retained the 'basic integrity' of his proposals, the amended Bill made significant concessions towards retention of the Commission's role in a reduced form. Provision was made for the Commission to include award terms beyond the allowable matters in exceptional circumstances. Certified agreements would be subject to a global no disadvantage test supervised by the Commission. The Employment Advocate was given responsibility for approving AWAs after ascertaining that the employee was not disadvantaged by its overall terms and had genuinely consented to them. The Democrats insisted that the Employment Advocate's new approval function

would be independent of direction by the Minister. In doubtful cases, the Employment Advocate was also required to refer an agreement to the Commission for a final decision on whether to approve it. To prevent erosion of employees' conditions by resort to deregulated State systems, federal awards and agreements could only be displaced by State agreements which had been subject to an approval process by an industrial authority (such as an arbitration tribunal) using a no disadvantage test. Significantly the compromise was reached outside the normal parliamentary process and the jointly-sponsored amendments passed through the Senate without further changes. In the process the Commission's role was retained though recast: henceforth it would determine reasonable minimum conditions, facilitate agreements and judge their fairness, but would be called on to fully arbitrate disputes only in exceptional or intractable situations. Further attempted amendments introduced in 1999 were aimed largely at abolishing many of the compromises made during the passage of the Workplace Relations Act. These proposals were not proceeded with after they were rejected by the Democrats on the grounds that the recent legislative changes had not been shown to be defective and that further change should be evolutionary in nature.²²⁸

Part 4: Other Constitutional Powers

While the Federal Parliament has mainly relied on its industrial power to make laws in the field of labour relations and employment, from time to time use has been made of other constitutional sources of legislative power. The national statutory system of occupational superannuation was introduced in 1992 by use of the taxation power after the Commission declined to extend existing award superannuation provisions.²²⁹ The defence power was used during both world wars, and formed the basis for extensive co-ordination of all kinds of employment-related matters by the executive by means of regulations made under the *National Security Act 1939*.²³⁰ Legislation was also passed to place coal production under the control of a special Commissioner, while the defence power was also used to expand the employment of women in occupations usually performed by men 'for the purpose of aiding the prosecution of the present war'.²³¹

Extensive war-time regulation of the coal industry continued beyond the cessation of hostilities when a government inquiry under Justice Davidson recommended a national system to revitalise the industry. As the judge saw it, the constitutional impediments to Federal control could only be overcome through voluntary co-operation by the coalmine owners, with incentives in the form of bounties.²³² This approach was rejected by Treasury officials as an unstable basis for government intervention; a partial solution, applicable only to the New South Wales coalfields, was reached instead, using the unusual means of joint legislation passed by the Labor-dominated Commonwealth and New South Wales Parliaments. While other aspects of the industry were subjected to direct executive control by the Joint Coal Board, industrial matters were placed in the hands of an independent tribunal working by the traditional methods of conciliation and arbitration.²³³ The powers of the Coal Industry Tribunal derived mainly from State plenary powers together with the

federal industrial power.²³⁴ Use of other powers and approaches in the industrial arena was apparently deemed inappropriate or unnecessary.

Public Service

The Commonwealth public service was at first regulated directly by the Public Service Commissioner using the Parliament's power to legislate for government departments under section 52. However in 1911 the Labor Government used the same constitutional power to transfer the setting of employment conditions in the public service to a special arbitration scheme administered by the Commonwealth Arbitration Court. This scheme followed agitation by unions who found themselves shut out of normal access to arbitration because public servants did not constitute an 'industry' as the term was interpreted by the High Court.²³⁵ This resort to arbitration had the virtue of absolving the Government from responsibility for dealing with dissatisfaction with the Commissioner's decisions.²³⁶ The constitutionality of the measure was questioned by the Opposition which doubted that Parliament could hand over its legislative power and responsibility for the public service in this way. In formal terms, though, the arbitrator's determinations remained mere recommendations subject to disallowance by Parliament. The latter requirement preserving the ideals of a politically independent public service and the parliamentary supervision of fiscal expenditure.²³⁷ Even though a royal commission was critical of the Arbitration Court's 'interference' in the administration of the service and urged that the Public Service Commissioner should be the final arbiter of disputes and grievances, the Hughes Government persisted with employees' right of access to the independent scrutiny of an external umpire, and in 1920 established a separate office of Public Service Arbitrator who would be expert in administrative matters.²³⁸

This policy was reversed by the Bruce-Page Government which planned to replace the Public Service Arbitrator with *ad hoc* arbitration committees based in part on the Victorian system of wages boards. Although the Government stressed that it was retaining the right of appeal to an independent tribunal, the proposed committees would be limited to setting wage rates while all other matters (including the equally contentious issues of functions and classifications) would be left to the expert prerogative of the Public Service Board. This scheme prompted the public service unions to take the unusual step of entering into political controversy, criticising the proposal as an erosion of the tradition of independent arbitration and an unprecedented limitation on the powers of the arbitrator. The defeat of the Government at the 1929 elections, when the right of public servants to access an independent arbitrator became a major campaign issue, led the incoming Scullin Labor Government to reaffirm the supremacy of the arbitrator over decisions of the public service commissioners affecting employment conditions.²³⁹ The arbitrator retained complete independence until 1952, when the Menzies Government introduced an avenue of appeal to the Full Bench of the Arbitration Court. This was opposed by the ALP on the grounds that there was no constitutional need to do so and 'the appellate court in such cases is the Parliament itself.'²⁴⁰ The separate position of Public Service Arbitrator was

finally abolished in 1984 when its functions were absorbed into the Conciliation and Arbitration Commission.²⁴¹

Trade and Commerce

Of all the other possible heads of federal legislative power, the trade and commerce power has received the greatest use in industrial relations. Even so, because the industrial power is regarded as the natural source of federal labour law, its use has not been common. Also, like the industrial power, the trade and commerce power is limited to interstate matters, although it does not require the use of a particular method (such as conciliation and arbitration) or depend on the existence of an industrial dispute. At the beginning judicial opinion was that the trade and commerce power could not be relied on to regulate employment conditions generally unless the employment was closely and substantially related to interstate trade.²⁴² This requirement has most easily been established in the shipping industry, where Federal power was undisputed (although assumed not to extend to the distinct coastal or intrastate shipping business).

The Bruce-Page Government used the trade and commerce power to support the inclusion of sections 30J and 30K of the Crimes Act in 1926. These provisions allow for criminal prosecution of strikes or boycotts which threaten to disrupt trade and commerce with other countries or among the States. The power was also used by the same Government to enact the Transport Workers Act in 1928, which was upheld as a valid exercise of the federal commerce power because the definition of 'transport worker' in the Act embraced only workers engaged in connection with international or interstate trade or commerce.²⁴³ On both these occasions the provisions were criticised for overriding normal industrial rights and processes, and just as vigorously defended as an exceptional exercise of federal legislative power to meet a national emergency. The 1928 Act was frequently evoked by the Lyons Government when it threatened to intervene in maritime disputes during the 1930s. Bruce's abortive attempt to withdraw the Commonwealth from the field of industrial relations, except in the maritime industry, was also based on the use of the trade and commerce power. This attempt to repeal the Conciliation and Arbitration Act and thus deactivate section 51(xxxv) of the Constitution was, as we have seen, decisively rebuffed.

Most uses of the commerce power in industrial relations have continued to be concentrated in the transport sector. In 1947, arguing the need for greater efficiency and industrial peace, the Chifley Government decided to continue the Stevedoring Industry Commission, which had initially been set up under wartime regulations using the defence power. As well as taking over functions of the Arbitration Court in relation to interstate industrial disputes, the Commission was authorised to deal with all industrial matters relating to international or interstate trade and commerce. Local employment committees were also established under the commerce power.²⁴⁴ Because the head of the Commission needed to possess both independence and industrial expertise, the legislation required that the position be filled by a judge of the Arbitration Court or a conciliation commissioner. However it was thought most appropriate to create a new body separate from the Court

because there were other functions, such as running employment bureaux, which were not appropriate for the Arbitration Court to exercise. The Stevedoring Industry Commission was equally criticised by the Opposition for the admixture of powers which were conferred on it, and for its departure from a judicial model as exemplified by the Arbitration Court.²⁴⁵

Two years later, this 'bold legislative experiment' was abandoned when the Waterside Workers Federation representatives refused to co-operate with the Commission. The arbitral functions of the Commission were transferred to the Commonwealth Arbitration Court as 'the most appropriate tribunal for this industry.'²⁴⁶ By acquiring use of the commerce power, combined with the incidental power, the Court could then regulate industrial matters in the stevedoring industry which did not form part of an interstate industrial dispute, provided that they were at least incidental to interstate trade and commerce.²⁴⁷ The application of the commerce power in this fashion was subsequently held to constitute a valid exercise of the Federal Parliament's legislative capacity.²⁴⁸ Problems of co-ordination between administrative and arbitral functions remained, and the Tait Committee appointed by the Menzies Government to review the industry recommended that the controlling statutory agency be again vested with arbitral functions. This approach was rejected as contrary to the beliefs of the Liberal-Country Government that the same arbitration tribunal should supervise all industries, and that hybrid agencies should be avoided.²⁴⁹

The commerce power was also used in 1967 in a similar way to enhance the reach of the Flight Crew Officers' Industrial Tribunal, after the withdrawal of the airline pilots' union from the arbitration system, the failure of collective bargaining, and pressure by airlines for special legislation to cover the industry.²⁵⁰ The use of this power was largely a safeguard, as the tribunal's powers and processes conformed to the model of conciliation and arbitration; although it relieved the tribunal of the need to find the existence of an actual or probable industrial dispute, while also ensuring jurisdiction over purely intrastate matters.

The various uses of the commerce power in relation to the waterside, maritime and airline industries were consolidated when the special tribunals in these areas were amalgamated into the newly-created Australian Industrial Relations Commission in 1988 following the recommendation of the Hancock Committee. The current Act thus relies on the commerce power for additional operation as a safeguard in case the legislation and decisions made under it are not supported by the industrial power.²⁵¹

The commerce power was also used as the basis of the boycott provisions contained in section 45D of the Trade Practices Act, first enacted in 1977 and more recently restored and expanded in 1996. In 1976 the Swanson Committee was established by the incoming Coalition Government to advise the Minister for Business and Consumer Affairs on changes to the Trade Practices Act; its terms of reference included considering whether the Act should be extended to 'anti-competitive conduct by employees, and employee or employer organisations.' The Committee recommended that the Act should allow for

recourse by businesses against secondary boycotts by employees and unions: because such tactics did not involve an industrial dispute, but were aimed at an employer indirectly by placing pressure on the employer's customers or suppliers, they were constitutionally barred from being dealt with by the arbitration system.²⁵² The Government was initially open-minded as to whether the provisions should be included in trade practices or industrial legislation, but ultimately decided that industrial action involving boycotts should not be distinguished from boycotts by business competitors.²⁵³

Constitutional issues were not canvassed directly during the parliamentary debate, though they were implicit in the Opposition's criticisms that it was inappropriate to use competition law to regulate industrial action. The introduction of section 45D was also declaimed as a direct attack on unions, particularly as the legislation prohibited primary industrial boycotts if they hindered interstate or overseas trade, while also making unions primarily liable for the acts of their members.²⁵⁴ The High Court confirmed the validity of section 45D to the extent that it prohibited industrial action hindering interstate or overseas trade. The Court saw no reason why employment matters should be excluded from regulation under the trade and commerce power provided the constitutional requirements for the use of that power were met. As Justice Mason said, 'a law with respect to overseas trade and commerce is a valid law and it does not cease to be valid because it can also be characterised as a law with respect to employment.'²⁵⁵

External Affairs

It was not until 1936 that the High Court confirmed that the external affairs power could be used as a source of domestic legislative power in order to implement international treaties entered into by the Commonwealth. While opinion was divided on the extent to which the power could be used to support domestic legislation, two judges, Evatt and McTiernan JJ, went so far as to suggest that Conventions passed by the International Labour Organisation (ILO) could be used to legislate nationally on such subjects as standard hours of work.²⁵⁶ However, until recently the Commonwealth was unwilling to explore the use of this head of power in the industrial arena. In 1945 the ACTU Congress called on the Federal Labor Government to introduce a national 40-hour week once hostilities had ceased, using the external affairs power to implement an ILO Convention by legislation. The Government refused, claiming it lacked the constitutional power, although it was also concerned not to hamper business profitability. Eventually in March 1946 an agreement was reached between the Government and the unions to refer the matter to the Arbitration Court. Regulations were passed allowing the Court to hear claims for variation to both standard hours and the basic wage.²⁵⁷ While the Government's resort to the Court rather than direct legislation managed to distance itself from responsibility for the outcome, at the same time the Court was the obvious body to undertake such an investigation.

Federal governments have traditionally been wary of using the external affairs power to support domestic legislation in case the federal balance of power was disturbed. The

Industrial Relations Reform Act of 1993 marked a significant departure from this stance. Decisions of the High Court in the 1980s had already confirmed that the external affairs power could support a broad range of legislative initiatives.²⁵⁸ In line with a shift away from a centralised award system towards enterprise bargaining, the Reform Act drew on ILO Conventions for the minimum standards underpinning the new bargaining regime. International labour standards formed the basis for major legislative innovations in the areas of minimum wages, equal remuneration, parental leave, unfair dismissal and protection for industrial action during bargaining negotiations. In general terms, the Act now had the object of 'providing the means for ensuring that labour standards meet Australia's international obligations.'²⁵⁹ The use of the external affairs power in this way was condemned by the Opposition as undermining the constitutional balance, presumably since it allowed the Federal Parliament to legislate on employment matters often previously considered the preserve of the States.²⁶⁰ Despite the novelty of federal intervention in many areas, the High Court did not consider this to be a constitutional impediment to the validity of the Reform Act. Most of the Act's controversial provisions were held to be supported by the external affairs power since they could reasonably be considered appropriate and adapted to the implementation of international conventions.²⁶¹

So significant was the Reform Act's reliance on international labour standards that it has been described as ushering in 'the internationalisation of Australian industrial law.'²⁶² Since that legislation, labour law in Australia has, like never before, been evaluated in terms with its compliance with ILO standards, and new legislation has regularly been referred to the ILO's complaints machinery. This increased concern with international compliance meant, for example, that among the terms of reference for the Senate Economics References Committee's inquiry into the Workplace Relations Bill (which abolished most of the Reform Act's use of international standards) was whether the measure 'will fulfil Australia's international obligations' and 'will affect Australia's international relations.' The Opposition-led majority of the Committee expressed concerns that the Bill failed to ensure compliance with Australia's obligations under ILO Conventions, although it must be admitted that similar concerns could have been made of previous legislation as well.²⁶³

Corporations

Early interpretations of the corporations power assumed that it only extended to the activities of foreign, trading and financial corporations as such, and could not therefore be used to regulate matters properly characterised in some other manner, such as employment or industrial relations.²⁶⁴ This view was abandoned when the High Court finally adopted an expansive approach to the corporations power in the *Concrete Pipes case* in 1971.²⁶⁵ The corporations power has, however, remained of infrequent resort in industrial relations. In 1977 it was used to support the secondary boycott provisions under section 45D of the Trade Practices Act, a provision which was upheld because the legislation was directed at the effects of such boycotts on the business of trading corporations (although a provision making unions automatically liable for the actions of their members was found to exceed

this constitutional basis because it was substantially a law about trade unions).²⁶⁶ The corporations power was also relied on when the Industrial Relations Commission was given authority in 1992 to determine whether a contract involving an independent contractor was unfair.²⁶⁷ This provision was also found constitutionally valid, though only to the extent that the contract involved a corporation as a party; the mere fact that the contract related to the business of a corporation was not sufficient.²⁶⁸

The enterprise bargaining provisions of the Industrial Relations Reform Act were also partly underpinned by the corporations power. While the main bargaining avenue relied on the industrial power, requiring certified agreements to be made between parties to an industrial dispute, the amendments additionally allowed for enterprise flexibility agreements between a corporation and individual employees. The aim of using the corporations power was to avoid the constitutional restrictions imposed by the industrial power, allowing non-unionists to participate in enterprise bargaining by allowing agreements to be made directly between an incorporated employer and its employees.²⁶⁹ While the scope for bargaining was thus expanded by the Reform Act, it still remained integrated within the existing industrial relations system: both types of agreement had to be certified by the Commission, satisfying a 'no disadvantage' test when compared with an existing Federal award. Thus only employees already covered by a federal award could become parties to an enterprise flexibility agreement; a requirement which was also justified by the Minister for Industrial Relations, the Hon. L. J. Brereton (Labor, Kingsford-Smith, NSW), in order 'to avoid intrusion into the State jurisdictions.'²⁷⁰ Nor were unions altogether excluded from enterprise flexibility agreements: relevant unions were entitled to appear at Commission certification hearings, and could also agree to be bound by such agreements.²⁷¹ While in force, enterprise flexibility agreements could override an inconsistent award, but were subordinate to an existing Federal certified agreement.²⁷² They remained little-used, at least partly because of the strict statutory requirements for their certification.²⁷³

Because these recent usages of the corporations power have been found constitutionally valid, the possibility has emerged that the limitations of the industrial power could be avoided by extensive resort to this power. Various proposals have been made for using the corporations power as the basis for bargaining regimes, as either a supplement or an alternative to arbitration.²⁷⁴ While such legislation would not extend to unincorporated employers, the majority of work relationships could be touched in this way. Most recently, the former Minister for Workplace Relations, the Hon. Peter Reith, flagged a proposal to replace the use of the industrial power with a widespread reliance on the corporations power. At an address to the National Press Club in March 1999, he described the corporations power as being able to discard 'in one legislative act the complexity and cost created by paper disputes, ambit logs of claim, dispute findings, notional interstate-ness, competing award responsiveness and dual registration.'²⁷⁵ The use of the corporations power would not limit federal legislation in the processes used; conciliation and arbitration might still be available but would not be a mandatory aspect of the system. The appeal of the

corporations power was more than a matter of convenience: it carried a message that the system would no longer focus on unions and state-created tribunals.

Part 5: The Vision in Hindsight

H. V. Evatt remarked in 1939 that 'in Australia, the intervention of the legislature in labour relations and industrial disputes has long been accepted as a postulate of political life.'²⁷⁶ By international standards, the level of government legislative action on industrial relations in the past century has been exceptionally high. Nearly all this activity at the national level has been indirect in nature, founded on the industrial power under section 51(xxxv) of the Constitution, despite the potential for other heads of power to be used. This focus on conciliation and arbitration has been due not to inertia but to the vision contained in the industrial power itself. As Justice Michael Kirby has put it, the advent of arbitration:

was in part, out of conviction that the court analogy could provide a just solution to the disputes between employer and employee which had plagued earlier colonial times. It was in part, out of the perceived incapacity of the other heads of power to provide a more direct means for Federal regulation. It was in part, the result of the view that here was a provision specifically enacted as the charter for Federal legislation in industrial relations—not by direct legislative control but through a tribunal intermediary set up to discharge the functions of conciliation and arbitration.²⁷⁷

Throughout nearly the whole past century, industrial relations policy has been measured and marked by a persistent adherence by governments to an ideal of compulsory conciliation and arbitration, a scheme seen as embodied in the Constitution and taken to be embedded deeply in the national sentiment as a 'fair go.' In the popular phrase, this ideal has been regarded as the right of employees, especially the most needy and powerless, to have ready access to an independent umpire for the settlement of their claims and grievances. That umpire, moreover, would decide the issues in a spirit of judicious fairness and generosity according to generalised notions of equity and the merits of the case, as represented in such diffuse concepts as industrial justice and a 'fair and reasonable' living wage.

This is not to say that industrial relations policy has been bipartisan throughout the period, or that the elements of section 51(xxxv) have been met with unswerving adherence. In fact, the boundaries and many of the constituent elements of compulsory arbitration have remained the subject of political controversy ever since its establishment. Attitudes to proposals for legislative change have tended to divide predictably along party lines, which has limited the degree of success of reforms. A recent study by Fox and Pittard has shown that of the 95 industrial relations Bills introduced into the Commonwealth Parliament since 1956, one-third have failed to pass into law. While most proposals have met with strong political disagreement, there has been common support for retaining an independent arbitration tribunal. Just over half the proposed amendments have dealt with arbitration, awards and the tribunal structure.²⁷⁸

Industrial relations policy has tended to be seen as a political rather than a technical matter, with frequent debate focused in Parliament. Instead of relying on independent commissions of inquiry, governments have usually resorted to informal consultation with peak organisations representing unions and employers, as well as the Commission itself, or through more formal tripartite mechanisms such as the National Labour Consultative Council.²⁷⁹ Official inquiries were used particularly during the restructuring of industrial relations in the coal and maritime industries during 1947–56, and in the review by the Hancock Committee in the 1980s. More often, changes to federal industrial legislation have been the result of formulated party policy. Even when inquiries have been used, they have not tended to question the fundamental basis for state regulation but have been limited to finding more rational and efficient mechanisms for achieving such regulation, and for dealing with the division between Federal and State powers.

This picture changed in the 1990s when most industrial relations legislation was referred to Senate committees for scrutiny. Largely due to the more prominent position of minor parties (combined with the more contentious nature of the changes proposed), there were seven such referrals to Senate committees during the 1990s, compared with only one in the 1980s and none in the 1970s. Since 1996 the use of Senate committees to analyse the impact of legislative changes has become routine.²⁸⁰ Such committees are able to draw on expert submissions and evidence, as well as gaining the opinions of unions and employer associations. They have thus provided a more open substitute for the tripartite consultative mechanisms which were abolished by the Liberal-National Government.

All sides of Parliament have routinely stressed the need to ensure that industrial tribunals maintain independence from government. Of particular concern has been the risk that tribunal members might be placed under financial pressure; hence remuneration of tribunal members, like that of judges, has generally been placed beyond control by the executive. For this reason, the protection which judges of the Arbitration Court enjoyed against arbitrary removal from office was continued after 1956 when the Court was replaced by a Commission, and similar protections have been extended to members of specialist industrial tribunals, even those appointed for limited terms. One exception was the Flight Crew Officers' Industrial Tribunal which was created in 1967. The Labor Opposition strongly objected to the proposal not to give the presiding member tenure as a member of the Arbitration Commission and to allow the salary to be set without parliamentary scrutiny. The Government was forced to accept an amendment to bring the terms of appointment into conformity with other positions.²⁸¹

Concern over independence of the Commission was again sparked by the Howard Government's 1999 legislative proposals, which included provision for the appointment of members for limited terms as well as acting Commissioners. These proposals were criticised by several groups as threatening the Commission's independence. Similar ideas had been rejected by the Hancock Committee in 1985 for just this reason. While disagreeing with the criticisms, the majority of the Senate Committee reviewing the

proposals accepted 'that it is of vital importance to maintain public confidence in the impartiality and independence of the Commission.'²⁸²

Governments of all persuasions have still sought to influence outcomes by procedural changes, either by providing restrictions on who could make decisions on certain matters, or by requiring the tribunal to take certain matters into account. After Justice Higgins had awarded a 44-hour working week to timber workers and announced his intention to review the whole issue of reducing hours across industry, the Commonwealth Parliament passed legislation which specifically prescribed that the alteration of the standard week could only be considered by a majority among at least three judges of the Arbitration Court. It was widely accepted that this move was designed to prevent Higgins' views from prevailing.²⁸³ This approach has continued to be used by governments, apparently in the belief that a three-person Full Bench would tend to produce more economically responsible and conservative decisions as well as promote consistency.

Other indirect controls have involved creating avenues of appeal to promote consistency and economic 'responsibility.' When conciliation commissioners were given the power to make awards under the 1930 amendments, the Opposition insisted that their decisions be made appealable to the Full Court in any matter which affected wages, hours or the public interest, although awards of a single judge remained unreviewable. While the original scheme of the 1947 changes was to give greater independence to conciliation commissioners and their decisions were not subject to appeal, in 1952 this was expanded to allow important matters to be referred to a Full Bench on appeal if the Chief Judge considered it to be in the public interest.²⁸⁴ Changes introduced in 1976 allowed the Government, through the relevant minister, to seek a Full Bench review of a single commissioner's decision if the minister thought it to be contrary to the public interest.²⁸⁵

Further legislative intervention has allowed direct government participation in hearings. In 1926 the Attorney-General was given standing to intervene in matters involving standard hours or the basic wage; in 1952 this was changed to allow intervention in any type of matter.²⁸⁶ Government attitudes before the tribunal have ranged from impartiality to that of an interested party, but traditionally the arbitrators were keen to show their independence while recognising the Government's views as statements of popular will and indicators of public policy.²⁸⁷

There have been more obvious attempts by governments to influence arbitration outcomes through legislative direction. The Bruce-Page Government's inclusion of a requirement that the Commonwealth Arbitration Court must take into account the economic effects of its decisions was introduced in the wake of the Court's move towards a standard 44-hour week. It was repealed by the Scullin Government in 1930 on the ground that the Court should not be instructed by the legislature and that the Government alone, as 'trustee for the people,' should be responsible for public policy. Disquiet in the Opposition-controlled Senate was assuaged by a statement from the President of the Arbitration Court, Chief Justice Dethridge, that the Court had always taken such considerations into account and

would continue to do so.²⁸⁸ Thenceforth, consideration of public interest issues was expected but not mandatory.

From the beginning the Court could dismiss any matter if it appeared to it that further proceedings were 'not necessary or desirable in the public interest.'²⁸⁹ The definition of 'industrial matters' was changed as early as 1910 to include 'questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole.' This formula was used by the Court in 1944 in determining whether a five-day working week should be introduced.²⁹⁰ In 1972 a new amendment was inserted stating that when sitting as a Full Bench:

The Commission shall, in considering the public interest, have regard, in particular, to the state of the national economy and the likely effects on that economy of any award that might be made in the proceedings.²⁹¹

Amendments in 1976 added that the Commission should take specific account of inflation and unemployment; this change was described as not only unnecessary (since the Commission already did so) but an 'attempt to intimidate the Commission' especially as a national wage case was then in progress.²⁹² On the recommendation of the Hancock Committee, under the 1988 legislation the requirement to consider economic effects was extended to all matters before the Commission and the instruction to take account of the public interest made more prominent. However the Committee was not prepared to recommend anything which would 'involve intrusion by the legislature directly on the Commission' and might result in erosion of the Commission's independence, on which its public confidence depended.²⁹³

In recent years many commentators have perceived a considerable decline in the autonomy of the Commission. By the late 1980s a number of changes to the personnel, structure and remuneration of the Commission led to concerns that its independence was being compromised. The issue of greatest symbolic significance was the Government's decision not to reappoint Justice Staples to the new Industrial Relations Commission when it replaced the Conciliation and Arbitration Commission in 1989.²⁹⁴ The passage of the Industrial Relations Act 1988 signified a greater willingness by government to direct the Commission's decision-making, by requiring attention to anti-discrimination principles as well as State apprenticeship and safety laws, while providing for uniformity of employment conditions within an industry.²⁹⁵ Such provisions still recognised the Commission's independence by stopping short of prescribing the actual outcome of decisions. In the early 1990s the Federal Labor Government's attempts to hasten the spread of enterprise bargaining saw a series of amendments which progressively limited the discretion of the Commission to refuse certification of agreements on public interest grounds.²⁹⁶

Most recently, under the Workplace Relations Act the Parliament has instructed the Commission to give primacy to bargaining rather than conciliation and arbitration.²⁹⁷ More importantly in terms of parliamentary interference, the discretion of the Commission

has been circumscribed by limiting the range of issues which can normally be addressed in the arbitration of an industrial dispute to a list of allowable award matters.²⁹⁸ This is the first time that Parliament has sought to affect the outcome of Commission decisions through legislation by restricting the actual content of awards. It is for this reason that Justice Kirby has described the High Court's validation of this amendment as one which 'breaks nearly a century of previously unbroken constitutional authority' by allowing Parliament to change the solution reached in an award, and thus producing 'a radical enlargement of the Federal legislative power under section 51(xxxv).'²⁹⁹ Even here, though, the legislation is not completely prescriptive and reserves some discretion to the Commission to arbitrate on a future matter if satisfied that it is exceptional, will not be resolved by conciliation and would result in a harsh or unjust outcome if not included in an award.³⁰⁰ The High Court has long emphasised that while the legislature may prescribe the procedure used in settling industrial disputes, the Parliament's power under section 51(xxxv) does not extend to telling the Commission how it shall calculate the outcome of an arbitration.³⁰¹

The increased prescription of Commission functions reflects a heightened concern by successive governments to increase the rate of change in the industrial relations system, and a diminution of trust in the Commission's ability to produce that change.³⁰² As a former deputy president of the Commission, Mr J. E. Isaac, commented to the Senate committee reviewing the current Government's proposed amendments in 1999:

Until recently, the changes in principles and procedures of the Federal tribunals have been driven not so much by legislation as by the exercise of the wide discretion available to tribunals within the statute. This discretion manifested itself in a number of ways... . All these changes were made on the basis of submissions in proceedings by parties and interveners, including governments, without legislative prompting. Since 1993, legislation has been the prime mover in the changed approach of the ... Commission to the settlement of disputes and determination of awards.³⁰³

The last decade has witnessed an increase in the legislature's active intervention in industrial relations which is unprecedented except, perhaps, for the 1920s. In tandem with this development, the structure and machinery of industrial law and relations, and even its constitutional framework, have become ever more politicised, the subject of election debate and policy in a way not seen for the last seventy years.

Despite, or perhaps because of, these trends, it is likely that the industrial power will continue to be the mainstay of federal legislative authority in the field of industrial relations. Although other constitutional powers, particularly the corporations power, have recently attracted enthusiasm from several quarters, they still lack comprehensiveness. The corporations power does not cover unincorporated employers and its limits in the employment area are untested, while the external affairs power is limited in subject-matter to the terms of ILO standards. Such powers will however continue to be used as valuable supplementations to the industrial power, as in the legislation of 1993 and 1996.³⁰⁴

There are several reasons why the industrial power is likely to retain its primary significance. Most of the reasons given over the years for retention of the arbitration system still have force. The division of responsibilities between the Commonwealth and the States is a powerful source of inertia favouring the retention of arbitration. While the Commonwealth could conceivably arrogate to itself full responsibility for employment matters by the use of alternative constitutional powers, such a move would meet strong political hostility in defence of federalism and States' rights. In any case, there would still remain some areas of employment regulation not covered by federal power and which would need to be filled by State legislation. The broad interpretation given to the industrial power by the High Court since the 1980s has reduced most of the former obstacles limiting the federal arbitration jurisdiction, although it still remains a complex and technical matter to institute proceedings.

Indirect regulation through an independent tribunal remains a useful means of delegating power and responsibility, and an effective way to limit the politicisation of industrial relations issues. It is also unlikely that government will totally abrogate the economic policy and regulatory functions of the Commission, although the dispute resolution role may decline further under the decentralised bargaining regime. Besides this, it does seem that arbitration as an institution still has a large measure of popular legitimacy as well as political support. The progress of the 1996 legislation suggests that any major legislative proposal, if it is to succeed, will need to retain an independent arbitral body to set minimum conditions, oversee fairness in bargaining and settle more serious disputes.

Endnotes

1. This Paper is current at 31 May 2001.
2. M. Perlman, *Judges in Industry: a study of labour arbitration in Australia*, Melbourne University Press, Melbourne, 1954, ch. 2; J. Romeyn, 'Towards a Motivational Theory of Arbitration in Australia', *Journal of Industrial Relations*, vol. 22, 1980, pp. 186–7; C. B. Fox, W. A. Howard and M. J. Pittard, *Industrial Relations in Australia: Development, Law and Operation*, Longman, Melbourne, 1995, pp. 485–8.
3. See M. Rimmer, 'The Workplace Relations Act 1996: An Historical Perspective', *Australian Bulletin of Labour*, vol. 23, no. 1, 1997, pp. 74–5.
4. Convention Debates, Sydney, 2 March to 9 April, 1891, 3 April 1891, p. 688.

The Convention Debates will be cited as follows:

Official Record of the Proceedings and Debates of the National Australasian Convention Debates, Sydney, 2 March to 9 April 1891, Government Printer, Sydney, 1891, cited as Convention Debates, Sydney, 1891.

Official Report of the National Australasian Convention Debates, Adelaide, 22 March to 5 May 1897, Government Printer, Adelaide, 1897, cited as Convention Debates, Adelaide, 1897.

- Official Record of the Debates of the Australasian Federal Convention, Sydney, 2 September to 24 September 1897, Government Printer, Sydney, 1897, cited as Convention Debates, Sydney, 1897.
- Official Record of the Debates of the Australasian Federal Convention, Melbourne, 20 January to 17 March 1898, Government Printer, Melbourne, 1898, vol. 1., 20 January to 22 February 1898, vol. 2., 22 February to 17 March 1898, cited as Convention Debates, Melbourne, 1898.
5. *South Australian Parliamentary Debates*, 17 December 1890, col. 2507–9; New South Wales Royal Commission on Strikes, *Report, Minutes of Evidence and Appendices*, Government Printer, Sydney, 1891, Minutes of Evidence pp. 233–9, Conciliation Appendix pp. 71–5; R. Mitchell, 'State systems of Conciliation and Arbitration: the Legal Origins of the Australasian Model', in S. Macintyre and R. Mitchell, eds, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890–1914*, Oxford University Press, Melbourne, 1989; A. Frazer, *Law and Industrial Arbitration in New South Wales, 1890–1912*, PhD thesis, Australian National University, 1990, pp. 91–4. It is Kingston who was most likely the progenitor of the Australasian system of compulsory conciliation and arbitration.
 6. L. F. Crisp, *Federation Fathers*, Melbourne University Press, Melbourne, 1990, p. 299.
 7. Convention Debates, Sydney, 6 April 1891, pp. 781–5.
 8. Frazer, *Law and Industrial Arbitration in New South Wales*, op. cit., pp. 57–76, 100–101, 114–6; P. G. Macarthy, 'Victorian Wages Boards: their Origin and the Doctrine of the Living Wage', *Journal of Industrial Relations*, vol. 10, 1968, pp. 116–32; R. Francis, *The Politics of Work: Gender and Labour in Victoria 1880–1939*, Cambridge University Press, 1993.
 9. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 646.
 10. Convention Debates, Adelaide, 1897, 17 April 1897, p. 782.
 11. *ibid.*, pp. 782, 791.
 12. *ibid.*, p. 792.
 13. *ibid.*, pp. 784–7.
 14. Convention Debates, Melbourne, 1898, 27 January 1898, vol. 1, pp. 186, 213.
 15. *ibid.*, pp. 189, 192.
 16. *ibid.*, p. 208.
 17. *ibid.*, pp. 203, 213.
 18. *ibid.*, p. 210; J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p. 208. Forrest introduced compulsory arbitration legislation to his own colony in 1900 in order to gain political support: N. F. Dufty, 'The Genesis of Arbitration in Western Australia', *Journal of Industrial Relations*, vol. 28, 1986, pp. 545–63.
 19. Senate and House of Representatives, *Debates*, 19 October 1910, p. 4810.

20. *Daily Telegraph*, 18 January 1901; R. Norris, *The Emergent Commonwealth: Australian Federation Law: Expectations and Fulfilment 1889–1910*, Melbourne University Press, 1975, pp. 66–7.
21. A recent biography argues that Kingston resigned for personal and family health reasons: M. Glass, *Charles Cameron Kingston: Federation Father*, Melbourne University Press, 1997, pp. 218–9.
22. Senate and House of Representatives, *Debates*, 30 July 1903, pp. 2859–60, 2880.
23. *ibid.*, p. 2863. It was commonly thought at the time that the Act would set minimum wages directly: see Deakin, *ibid.*, 22 March 1904, p. 764.
24. *ibid.*, 30 July 1903, p. 2870.
25. *ibid.*, 8 September 1903, p. 4788; *ibid.*, 9 September 1903, p. 4838; Norris, *Emergent Commonwealth*, *op. cit.*, pp. 189–190. Deakin's concerns over the inclusion of State government railway workers were later vindicated when the High Court struck down this aspect of the eventual Act: *Federated Amalgamated Government Railway and Tramway Service Association v. N.S.W. Railway Traffic Employees' Association (Railway Servants Case)* (1906) 4 CLR 488.
26. Senate and House of Representatives, *Debates*, 21 April 1904, p. 1244.
27. Senate and House of Representatives, *Debates*, 10 August 1904, p. 4029; G. Sawyer, *Australian Federal Politics and Law 1901–1929*, Melbourne University Press, Melbourne, 1963, p. 38.
28. Senate and House of Representatives, *Debates*, 8 December 1904, p. 8089.
29. Arthur Bruce Smith, (Free Trade, Parkes, NSW), *ibid.*, 12 August 1903, p. 3459
30. *ibid.*, 6 August 1903, p. 3190.
31. Mr. P. Glynn, (Free Trade, Angas, SA) *ibid.*, 13 April 1904, p. 888; Mr D. Thomson, (Free Trade, North Sydney, NSW) *ibid.*, p. 906; G. B. Edwards, (Free Trade, South Sydney, NSW), *ibid.*, 14 April 1904, p. 1018.
32. G. H. Reid, *ibid.*, 24 June 1904, p. 2688; *ibid.*, 1 December 1904, pp. 7763, 7772–3; Sawyer, *Australian Federal Politics and Law 1901–1929*, *op. cit.*, pp. 44–5.
33. D. H. Plowman, *Holding the Line: Compulsory Arbitration and National Employer Co-Ordination in Australia*, Cambridge University Press, Melbourne, 1989, pp. 11–22; D. Plowman and G. Smith, 'Moulding Federal Arbitration: the Employers and the High Court, 1903–1935', *Australian Journal of Management*, vol. 12, 1986, pp. 203–229.
34. Senate and House of Representatives, *Debates*, 28 June 1901, pp. 1819–27; *ibid.*, 29 Aug 1901, p. 4296; Norris, *Emergent Commonwealth*, *op. cit.*, p. 191; J. Rickard, *H. B. Higgins: The Rebel as Judge*, George Allen & Unwin, Sydney, 1984, p. 129.
35. *Ex p. H. V. McKay* (1907) 2 CAR 1; P. G. Macarthy, 'Justice Higgins and the Harvester Judgment', *Australian Economic History Review*, vol. 9, 1969, pp. 17–38.
36. *The King v. Barger* (1908) 6 CLR 41.

37. Sawyer, *Australian Federal Politics and Law 1901–1929*, op. cit., pp. 83–4.
38. Senate and House of Representatives, *Debates*, 8 November 1907, p. 5780; *ibid.*, 13 March 1908, p. 8994; *ibid.*, 22 May 1908, p. 11 382. The *Harvester* principle was followed in *Marine Cooks, Bakers and Butchers' Association of Australia v. Commonwealth Steam-Ship Owners' Association* (1908) 2 CAR 55 at 60; *Barrier Branch of the Amalgamated Miners' Association v. Broken Hill Proprietary Company Ltd* (1909) 3 CAR 1 at 21; *Australian Boot Trade Employees' Federation v. Whybrow and Co.* (1910) 4 CAR 1 at 10; see also H. B. Higgins, *A New Province For Law and Order*, Constable, London, 1922, pp. 5–7.
39. P. M. McGlynn (August 1909), 'Memorandum Relating to (I) the Australian Industries Preservation Act, and (II) the Industrial Power: Together with Suggestions for the Amendment of the Constitution in Relation to Trusts and Industrial Matters', Commonwealth Parliamentary Papers, General, 1910, vol. 3, p.3.
40. J. H. Catts, (Labor, Cook, NSW), Senate and House of Representatives, *Debates*, 19 October 1910, p. 4833; Royal Commission on the Constitution, *Report*, Government Printer, Canberra, 1929, p. 182.
41. *Sydney Morning Herald*, 27 January 1903, p. 13.
42. *Australian Boot Trade Employees Federation v. Whybrow and Co.* (1910) 4 CAR 1 at 42.
43. *Commonwealth Conciliation and Arbitration Act 1904–10* (Cwlth), s. 4, amended by *Commonwealth Conciliation and Arbitration Act 1910* (Cwlth), s.2(b); M. Lee, *The Industrial Peace Act, 1920: A Study of Political Interference in Compulsory Arbitration*, MEc Thesis, University of Sydney, 1980, p. 63. The validity of the extended meaning of 'industrial dispute' was upheld in *Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co Ltd (No 1)* (1913) 16 CLR 591.
44. Senate and House of Representatives, *Debates*, 18 October 1910, pp. 4697, 4708. On Labor attitudes to the High Court, see also Senator Rae, (Labor, NSW), *ibid.*, 13 July 1910, p. 304.
45. L. F. Fitzhardinge, *William Morris Hughes: A Political Biography; vol. 1, That Fiery Particle, 1862–1914*, Angus & Robertson, Sydney, 1964, p. 258.
46. A. Deakin, Senate and House of Representatives, *Debates*, 19 October 1910, pp. 4812, 4815, 4827; Sir J. Quick, (Protectionist, Bendigo, Vic.), *ibid.*, 20 October 1910, pp. 4932, 4934; Sir J. Cook, (Liberal, Parramatta, NSW), *ibid.*, 21 October 1910, p. 5035.
47. Senate and House of Representatives, *Debates*, 19 October 1910, p. 4825.
48. C. Joyner, *Holman versus Hughes: Extension of Australian Commonwealth Powers*, University of Florida Press, Gainesville, 1961, p. 28; H. V. Evatt, *Australian Labour Leader: The Story of W. A. Holman and the Labour Movement*, Angus & Robertson, Sydney, 1942, pp. 264–5.
49. Senate and House of Representatives, *Debates*, 20 November 1912, p. 5685. Paragraph (c) dealing with strikes and lockouts was added after the Bill was introduced.
50. W. M. Hughes, (Labor, West Sydney, NSW) *ibid.*, pp. 5687, 5693.
51. W. G. Spence, *ibid.*, 20 November 1912, p. 5734.

52. Mr Archibald, (Labor, Hindmarsh, SA), *ibid.*, 20 November 1912, p. 5719; W. G. Spence, *ibid.*, p. 5732–3; also W. M. Hughes, *ibid.*, p. 5686.
- 53.. *ibid.*, p. 5734.
54. *Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. Ltd* (1913) 16 CLR 245; Lee, *Industrial Peace Act*, *op. cit.*, p. 39.
55. S. Bennett and S. Brennan, 'Constitutional Referenda in Australia', *Research Paper no. 2, 1999–2000*, Department of Parliamentary Library, Canberra, 1999, endnote 10.
56. W. M. Hughes, Senate and House of Representatives, *Debates*, 23 Jun 1915, p. 4256, Sir J. Cook, *ibid.*, 18 June 1915, pp. 4195, 24 Jun 1915 pp. 4325–6.
57. Senator Mullen, *ibid.*, 11 November 1915, p. 7459; Evatt, *Australian Labour Leader*, *op. cit.*, p. 368; Joyner, *Holman versus Hughes*, *op. cit.*, p. 49.
58. *Farey v. Burvett* (1916) 21 CLR 433 (power to fix price of bread); Joyner, *Holman versus Hughes*, *op. cit.*, p. 51.
59. Senate and House of Representatives, *Debates*, 1 October 1919, pp. 12846–7. The parliamentary Labor party opposed this method, claiming that it was inadequate and conflicted with the party's aim of seeking permanent expansion of Federal powers.
60. W. M. Hughes, *ibid.*, 1 December 1921, p. 13473; Lee, *Industrial Peace Act*, *op. cit.*, p. 21 ff; Royal Commission on the Constitution, *Report*, *op. cit.*, p. 182.
61. Mr Brennan, (Labor, Batman, Vic.), Senate and House of Representatives, *Debates*, 30 November 1921, pp. 13403–4; J. J. Macken, *Australian Industrial Laws: The Constitutional Basis*, 2nd edn, Law Book Co, Sydney, 1980, pp. 255–6.
62. *Federated Felt Hatting Employees Union of Australasia v. Denton Hat Mills Ltd* (1914) 18 CLR 88 per Griffith CJ at 91.
63. *Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. Ltd (No. 1)* (1913) 16 CLR 591. An expansive approach to the prevention power had been taken by Isaacs and Higgins JJ in *R v. Commonwealth Conciliation and Arbitration Court; ex p. Whybrow & Co.* (1910) 11 CLR 1.
64. *R v. Commonwealth Court of Conciliation and Arbitration; ex p. G. P. Jones (Builders Labourers' Case)* (1914) 18 CLR 224; *R v. President of the Commonwealth Court of Conciliation and Arbitration; ex p. William Holyman & Sons Ltd* (1914) 18 CLR 273.
65. S. M. Bruce, (Nationalist, Flinders, Vic.), Senate and House of Representatives, *Debates*, 1 Mar 1923, p. 86.
66. M. Charlton, (Labor, Hunter, NSW), *ibid.*, 14 June 1923, p. 66.
67. *Sydney Morning Herald*, 18 May 1926, p. 9; *Worker*, 26 May 1926, p. 1.
68. S. M. Bruce, Senate and House of Representatives, *Debates*, 20 May 1926, pp. 2164, 2168.
69. J. G. Latham, *ibid.*, 9 June 1926, p. 2837.
70. S. M. Bruce, *ibid.*, 20 May 1926, p. 2164; *Worker*, 16 June 1926, p. 16

71. M. Charlton, Senate and House of Representatives, *Debates*, 2 June 1926, p. 2544; W. A. Watt, (Nationalist, Balaclava, Vic.), *ibid.*, p. 2926 (10 June 1926); *Worker*, 30 June 1926, p. 15; A. Wildavsky, 'The 1926 Referendum', in A. Wildavsky and D. Carboch, *Studies in Australian Politics*, Cheshire, Melbourne, 1958, p. 12.
72. Royal Commission on the Constitution, *Report*, *op. cit.*, p. 248. For the history of the Royal Commission, see C. Saunders, 'The Parliament as Partner: A Century of Constitutional Review', *Research paper no. 2, 2000–01*, Department of the Parliamentary Library, Canberra 2000, pp. 15–16.
73. Royal Commission on the Constitution, *Report*, *op. cit.*, pp. 245, 302. T. R. Ashworth, president of the Victorian Employers' Federation, also recommended giving the Federal Parliament unlimited power in order to reduce complexity and promote efficient management by Cabinet.
74. D. H. Drummond, 'The General Case for Revision of the Constitution', in David Maughan et al., *Constitutional Revision in Australia*, Australasian Publishing Co., Sydney, 1944, p. 37.
75. Constitutional Alteration (Post War Reconstruction and Democratic Rights) Bill 1944; Report from the Joint Committee on Constitutional Review, 1959, *Senate and House of Representatives, Papers 1959–60*, vol. 3, p. 403, para 732; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select Sources on Constitutional Change in Australia, 1901–1997*, AGPS, Canberra, 1997, pp. 82–7.
76. Report from the Joint Committee on Constitutional Review, 1959, *op. cit.*, p. 403, paras 727–32.
77. *ibid.*, para 762. One member, Mr Downer, dissented on this point, considering that bringing the details of industrial matters into the political arena could result in parties making uneconomic election promises in order to gain votes.
78. *ibid.*, para 779.
79. *ibid.*, paras 767, 783.
80. *R v. President Commonwealth Conciliation and Arbitration Commission; ex p. Association of Professional Engineers* (1959) 107 CLR 208; D. Thomson, 'Professional Engineers' Case', *Australian Law Journal*, vol. 34, 1960, p. 46.
81. J. T. Ludeke, 'The Reference of Industrial Powers from the States to the Commonwealth', *Australian Law Journal*, vol. 54, 1980, pp. 88–91; C. Saunders, 'Constitutional Problems and Intergovernmental Solutions', in J. Aldred, ed., *Industrial Confrontation*, George Allen & Unwin, Sydney, 1984, pp. 64, 68.
82. I. M. Macphee, (Liberal, Balaclava, Vic.), House of Representatives, *Debates*, 21 October 1982, p. 2378; see *Conciliation and Arbitration Act 1904–83*, ss. 44B, 44C, inserted by *Conciliation and Arbitration Amendment Act (No. 2) 1983* (Cwlth), s. 11.
83. *Conciliation and Arbitration Act 1904–80*, s. 4A, inserted by *Conciliation and Arbitration Amendment Act (No. 2) 1980* (Cwlth); later *Industrial Relations Act 1988*, s. 177. See also *Industrial Arbitration Act 1940* (NSW), s. 38E.

84. In *R v. Duncan; ex p. Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.
85. *Industrial Relations Act 1988* (Cwlth), Pt VII.
86. Committee of Review into Australian Industrial Relations Law and Systems, *Report*, AGPS, Canberra, 1985, vol. 1 pp. 2–6; vol. 2, pp. 270–295 esp. p. 278.
87. *ibid.*, pp. 277, 318, 334.
88. *Commonwealth Powers (Industrial Relations) Act 1996* (Vic.), s. 4; *Workplace Relations Act 1996* (Cwlth), Pt XV, schedule 1A. The reference only extends to the matters explicitly mentioned. An exception is made for State public sector employees and law enforcement officers: see *Dempster v. Comrie* (2000) 96 FCR 570.
89. *Proceedings of the Australian Constitutional Convention*, Government Printer, Adelaide, 1983, vol. 1, pp. 224–7, 323.
90. Constitutional Commission, Advisory Committee on the Distribution of Powers, *Report*, Commonwealth of Australia, Canberra, 1987, p. 35.
91. *Final Report of the Constitutional Commission*, AGPS, Canberra, 1988, vol. 2, p. 800.
92. *ibid.*, p. 800.
93. *Conciliation and Arbitration Act 1904*, s. 41(1)(d)(ii), originally s. 38(h); P. R. Gray and S. R. Marshall, 'Yielding the field: the Australian Industrial Relations Commission's Discretion to Refuse to Invoke its own Jurisdiction', *Australian Journal of Labour Law*, vol. 3, 1990, pp. 36–47; see now *Workplace Relations Act 1996*, ss. 111(1)(g)(iii), 111AAA.
94. *Federated Hotel, Club, Restaurants and Caterers' Employees' Union v. Abbott* (1928) 26 CAR 489; see J. H. Portus, 'Aspects of the Commonwealth and State Division of the Industrial Power', in G. W. Ford, J. M. Hearn and R. D. Lansbury, eds, *Australian Labour Relations: Readings*, 3rd edn, Macmillan, Melbourne, 1980, p. 395. In practice, the test placed the onus on an applicant seeking a Federal award to show 'defined circumstances' sufficient to warrant the disturbance of the status quo: *Municipal Officers' Association of Australia v. State Electricity Commission of Victoria* (1971) 138 CAR 500.
95. *R v. Commonwealth Conciliation and Arbitration Commission; ex p. Association of Professional Engineers, Australia* (1959) 107 CLR 208.
96. *R v. Coldham; ex p. Australian Social Welfare Union* (1983) 153 CLR 297.
97. That public sector employees engaged in administrative or governmental functions might not be able to gain an award under the Federal system because of the Constitution's recognition of the continued independence of the States (and not because public servants were not employed in an industry under the then interpretation of the industry power) was recognised in *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31 (per Rich J at 66, Dixon J at 80). Reconsideration of the issue was expressly left open in the *Social Welfare Union Case* (1983) 153 CLR at 313. Since then the exception has been recognised for a limited group of employees and not in relation to all employment conditions: *R v. Lee; ex p. Harper* (1986) 160 CLR 430 at 452–3; *Re Australian Education Union; ex p. Victoria* (1995) 184 CLR 188 at 232; *Victoria v. Commonwealth* (1996) 187 CLR 416 at 503.

98. Commonwealth Bureau of Census and Statistics, *Official Year Book of the Commonwealth of Australia*, Melbourne, Government Printer, 1925, p. 587; *ibid.*, 1930, p. 390; Royal Commission on the Constitution, *Report*, Canberra, *op. cit.*, p. 160.
99. H. B. Higgins, *A New Province for Law and Order*, *op. cit.*, p. 66; Rickard, *H. B. Higgins: The Rebel as Judge*, *op. cit.*, p. 236.
100. A series of public statements were made by Hughes and Higgins, which were published in the Melbourne *Argus* and reprinted in (1917) 11 CAR 994–1002.
101. L. F. Fitzhardinge, *William Morris Hughes: A Political Biography*; vol. 2, *The Little Digger*, Angus & Robertson, Sydney, 1979, p. 443; Lee, *Industrial Peace Act*, *op. cit.*, p. 118.
102. *Industrial Peace Act 1920* (Cwlth), ss. 13, 18, 20.
103. W. M. Hughes, Senate and House of Representatives, *Debates*, 29 July 1920, p. 3109; *ibid.*, 10 September 1920, p. 4441; Mr Blakeley, (Labor, Darling, NSW), *ibid.*, p. 3226; Mr Tudor, (Labor, Yarra, Vic.), *ibid.*, 4 August 1920, p. 3233.
104. *Commonwealth Conciliation and Arbitration Act 1920* (Cwlth); see Lee, *Industrial Peace Act*, *op. cit.*, pp. 161–3.
105. Statement Made in Court by Mr Justice Higgins on Announcing his Resignation (25 September 1920) in Higgins, *A New Province*, *op. cit.*, pp. 175, 173.
106. Hon S. M. Bruce, Senate and House of Representatives, *Debates*, 13 June 1923, p. 51.
107. R. Morris, 'From the Webbs to Scullin: the Appearance of Industrial Relations as a Branch of Knowledge in Australia', *Labour History*, no. 64, 1993, p. 81.
108. *Federated Saw Mill etc. Employes' Association of Australasia v. James Moore and Sons Pty Ltd* (1909) 8 CLR 465 per Griffith CJ at 500; *Australian Boot Trade Employes Federation v. Whybrow & Co.* (1910) 10 CLR 266 per Griffith CJ at 286–7.
109. *Waterside Workers' Federation of Australia v. Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 218, 230; *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 CLR 434 per Isaacs and Rich JJ at 463; see also *Waterside Workers Federation of Australia v. Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482 per Isaacs and Rich JJ at 528.
110. *Forty-Four Hours Week Act 1925* (NSW).
111. (1926) 37 CLR 466; for description as the *Forty-Four Hours Case*, see *H. V. McKay Pty Ltd v. Hunt* (1926) 38 CLR 308 per Isaacs J at 311.
112. (1926) 37 CLR 466 per Isaacs J at 479, 480. The principle was applied in October to strike down a Victorian Wages Board decision which gave a wage higher than a Commonwealth award: *H. V. McKay Pty Ltd v. Hunt* (1926) 38 CLR 308.
113. *R v. Commonwealth Court of Conciliation and Arbitration; ex p. Engineers etc (State Conciliation Committee)* (1926) 38 CLR 563.
114. L. Bennett, 'The Federal Conciliation and Arbitration Court in the Late 1920s', *Labour History*, no. 57, November 1989, pp. 49–50.

115. *Waterside Workers Federation of Australia v. J. W. Alexander Ltd* (1918) 25 CLR 434.
116. Governor-General's Speech, Senate and House of Representatives, *Debates*, 13 January 1926, pp. 6–7; C.L.A. Abbott, (CP, Gwydir, NSW), 14 January 1926, p. 47; Mr Latham, *ibid.*, 21 May 1926, p. 2234.
117. J. G. Latham, Senate and House of Representatives, *Debates*, 15 December 1927, pp. 3277, 3279.
118. *Commonwealth Conciliation and Arbitration Act 1904–28* (Cwlth), ss. 38C, 35A, 7–8, 56D, 86D, amended by *Commonwealth Conciliation and Arbitration Act 1928* (Cwlth).
119. *Commonwealth Conciliation and Arbitration Act 1904–28* (Cwlth), s. 25D.
120. Mr Scullin, Senate and House of Representatives, *Debates*, 16 May 1928, pp. 4892, 4896, 4902; Mr Blakeley, *ibid.*, p. 4912.
121. *Transport Workers Act 1928* (Cwlth); Richard Morris, 'The 1928 Marine Cooks' Strike and the Origins of the Transport Workers' Act', *Great Circle*, vol. 21, 1999, pp. 109–120. The regulations were enacted as legislation by the *Transport Workers Act 1929* (Cwlth).
122. S. M. Bruce, Senate and House of Representatives, *Debates*, 15 February 1929, p. 676.
123. *ibid.*, 1 March 1929, p. 330.
124. D. Carboch, 'The Fall of the Bruce-Page Government', in A. Wildavsky and D. Carboch, *Studies in Australian Politics*, *op. cit.*, pp. 133, 193.
125. S. M. Bruce, Senate and House of Representatives, *Debates*, 23 August 1929, p. 289; Maritime Industries Bill 1929, cl. 6, 9(2), 13, 24, 30.
126. W. M. Hughes, Senate and House of Representatives, *Debates*, 5 September 1929, p. 596.
127. W. M. Hughes, *ibid.*, 10 September 1929, p. 841.
128. Carboch, 'The Fall of the Bruce-Page Government', *op. cit.*, p. 270–4; G. Sawyer, *Australian Federal Politics and Law 1929–1949*, Melbourne University Press, 1963, pp. 2–4. For a summary of election results see C. A. Hughes and B. D. Graham, *A Handbook of Australian Government and Politics, 1890–1964*, ANU Press, Canberra, 1968, p. 613.
129. Mr Brennan, Senate and House of Representatives, *Debates*, 30 May 1930, p. 2364.
130. G. Anderson, 'The Commonwealth Conciliation and Arbitration Act 1930', *Economic Record*, vol. 7, 1931, pp. 85–6; *Commonwealth Conciliation and Arbitration Act 1904–30* s. 34, amended by *Commonwealth Conciliation and Arbitration Act 1930* (Cwlth).
131. Senate and House of Representatives, *Debates*, 8 August 1930, p. 5666.
132. *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 CLR 319 at 385.
133. O. de R. Foerander, *Towards Industrial Peace in Australia*, Melbourne University Press, Melbourne, 1937, p. 64.
134. Senate and House of Representatives, *Debates*, 18 June 1930, pp. 2838–9.

135. *National Security (Industrial Peace) Regulations 1940* (Cwlth), SR 1940, No. 290; Foenander, *Wartime Labour Developments in Australia*, op. cit., 1943, pp. 5–8; S. J. Butlin, *War Economy, 1939–1942*, Australian War Memorial, Canberra, 1955, p. 245–6.
136. S. J. Butlin and C. B. Schedvin, *War Economy, 1942–1945*, Australian War Memorial, Canberra, 1977, pp. 26, 372, 555–6
137. J. Hagan, *The History of the ACTU*, op. cit., p. 189; T. Sheridan, 'Planners and the Australian Labour Market 1945–1949', *Labour History*, no. 53, November 1987, p. 104.
138. H. V. Evatt, Senate and House of Representatives, *Debates*, 12 Mar 1947, p. 548.
139. *ibid.*, p. 550.
140. *Commonwealth Conciliation and Arbitration Act 1904* (Cwlth), s. 4 as amended by *Commonwealth Conciliation and Arbitration Act 1947* (Cwlth), s. 6(b).
141. H. V. Evatt, Senate and House of Representatives, *Debates*, 12 Mar 1947, pp. 548–9; *Commonwealth Conciliation and Arbitration Act 1904–47* (Cwlth), ss. 13, 24, 25.
142. R. G. Menzies, Senate and House of Representatives, *Debates*, 16 Apr 1947, p. 1304.
143. Foenander, *Studies in Australian Labour Law and Relations*, op. cit., pp. 72, 82–85; B. Dabscheck, *Arbitrator at Work: Sir William Raymond Kelly and the Regulation of Australian Industrial Relations*, George Allen & Unwin, Sydney, 1983, p. 142; B. Dabscheck and John Niland, *Industrial Relations in Australia*, George Allen & Unwin, Sydney, 1981, pp. 226–7.
144. *R v. Galvin; ex p. Metal Trades Employers' Association* (1949) 77 CLR 432.
145. *R v. Commonwealth Court of Conciliation and Arbitration; ex p Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389. Similar problems had arisen soon after the Act was changed in 1930 by reserving alterations to the basic wage or its principles to a Full Court: see *Australian Workers' Union v. Commonwealth Railways Commissioner* (1933) 49 CLR 589.
146. T. Sheridan, *Division of Labour: Industrial Relations in the Chifley Years, 1945–1949*, Oxford University Press, Melbourne, 1989, pp. 154–5.
147. Under s. 48 of the original 1904 Act the Court could issue an injunction to compel compliance with an award or restrain a breach, under penalty of a £100 fine or three months' imprisonment. An additional power to order compliance with an award or order which had been breached was inserted as s. 38(da) by *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cwlth). This provision, along with other penalty provisions, was removed by the 1930 amending Act. It was reenacted as s. 29(b) by *Commonwealth Conciliation and Arbitration Act 1947* (Cwlth). The 1947 Act made the Arbitration Court a court of superior record, which was supposed to give it plenary powers to punish for contempt of its orders, including an order for compliance with an award.
148. *R v. Metal Trade Employers' Association; ex p. Amalgamated Engineering Union Australian Section* (1951) 82 CLR 208; *Conciliation and Arbitration Act 1904–1951* (Cwlth), ss. 29(c), 29A inserted by *Conciliation and Arbitration Act (No 2) 1951* (Cwlth), ss. 6–7; Jack Hutson, *Penal Colony to Penal Powers*, revised edn, Amalgamated Metals Foundry and Shipwrights' Union, Sydney, 1983, p. 238.

149. Swearing In of Sir Owen Dixon as Chief Justice, (1952) 85 CLR xvi.
150. *R v. Kirby; ex p. Boilermakers Society of Australia* (1956) 94 CLR 254 at 289; affirmed by Privy Council (1957) 95 CLR 529. For the immediate significance, see Orwell de R. Foenander, *Industrial Conciliation and Arbitration in Australia*, Law Book Co, Sydney, 1959, pp. 21–24.
151. See the economic statement by the Prime Minister, Mr Menzies, House of Representatives, *Debates*, 14 March 1956, p. 788.
152. House of Representatives, *Debates*, 15 February 1956, pp. 20, 25; *ibid.*, 6 March 1956, p. 524.
153. B. d'Alpuget, *Mediator: A Biography of Sir Richard Kirby*, Melbourne University Press, Melbourne, 1977, pp. 141–147.
154. H. E. Holt, House of Representatives, *Debates*, 8 March 1956, p. 643; *ibid.*, 10 May 1956, p. 1991; D. W. Oxnam, 'Recent Changes in the Federal Arbitration System', *Australian Quarterly*, vol. 29, no. 1, March 1957, p. 80.
155. H. E. Holt, House of Representatives, *Debates*, 10 May 1956, p. 1989–90.
156. *Conciliation and Arbitration Act 1904-56*, s. 19, inserted by *Conciliation and Arbitration Act 1956* (Cwlth).
157. H. V. Evatt, House of Representatives, *Debates*, 22 May 1956, p. 2343.
158. K. F. Walker, 'Arbitration in a New Key', *Economic Record*, vol. 33, 1957, p. 60.
159. *R v. Kelly; ex p. Australian Railways Union* (1953) 89 CLR 461 per Dixon CJ at pp. 474–5.
160. *Seamen's Union of Australasia v. Commonwealth Steamship Owners' Association* (1936) 54 CLR 626 per Latham C. J at 642; per Dixon J at 645; contra Evatt and McTiernan JJ at 655; L. Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Co., Sydney, 1994, p. 75. Evatt and McTiernan noted that the effect of a bans clause was to remove altogether the employees' ability to press their demands in future bargaining: at 650.
161. Hutson, *Penal Colony to Penal Powers*, *op. cit.*, pp. 240–2; Bennett, *Making Labour Law in Australia*, *op. cit.*, pp. 79–82.
162. Hutson, *Penal Colony to Penal Powers*, *op. cit.*, p. 265; J. Hagan, *The History of the ACTU*, *op. cit.*, p. 268.
163. These were the 'one man bus' cases: *R v. Commonwealth Conciliation and Arbitration Commission; ex p. Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228; *R v. Commonwealth Conciliation and Arbitration Commission; ex p. Melbourne and Metropolitan Tramways Board* (1966) CLR 443; *Melbourne and Metropolitan Tramways Board v. Horan* (1967) 117 CLR 78; see E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia*, Butterworths, Sydney, 1972, pp. 521–6, 560.
164. Hutson, *Penal Colony to Penal Powers*, *op. cit.*, pp. 267–9; *Industrial Registrar and Australian Tramway and Motor Omnibus Employees Association* (1969) 24 Industrial Information Bulletin 700; *Sydney Morning Herald*, 16 May 1969, p. 4.

165. Senate, *Debates*, 20 May 1969, pp. 1371.
166. L. H. E Bury, (Liberal, Wentworth, NSW), House of Representatives, *Debates*, 22 May 1969, p. 2113.
167. B. M. Snedden, (Liberal, Bruce, Vic.) House of Representatives, *Debates*, 5 June 1970, p. 3080; *Conciliation and Arbitration Act 1904-70*, ss. 32A, 33A, inserted by *Conciliation and Arbitration Act 1970* (Cwlth).
168. P. R. Lynch, House of Representatives, *Debates*, 7 December 1971, p. 4182; Mr Lynch, *ibid.*, 26 April 1972, p. 2004; *Conciliation and Arbitration Act 1973* (Cwlth); L. Cupper, 'Legalism in the Australian Conciliation and Arbitration Commission: The Gradual Transition', in G. W. Ford, J. M. Hearn and R. D. Lansbury, eds, *Australian Labour Relations: Readings*, 3rd edn, Macmillan, Melbourne, 1980, pp. 412–3.
169. House of Representatives, *Debates*, 12 April 1973, p. 1424.
170. *ibid.*, p. 1425.
171. *ibid.*, p. 1436; Mr Lynch, *ibid.*, 8 May 1973, p. 1755; Mr McMahon, *ibid.*, p. 1775.
172. C. P. Mills, 'Labour Legislation under a Labor Government', *Australian Law Journal*, vol. 47, 1973, pp. 321–2.
173. Mr Cameron, House of Representatives, *Debates*, 30 August 1973, p. 662; *Conciliation and Arbitration Act 1973*.
174. R. Mitchell, 'Industrial Relations Under a Conservative Government: The Coalition's Labour Law Programme 1975 to 1978', *Journal of Industrial Relations*, vol. 21, 1979, pp. 435–7; R. Mitchell, 'Australian Industrial Relations and Labour Law Policy: A Post-War Review', *Australian Quarterly*, vol. 52, 1980, pp. 49–57.
175. A. A. Street, (Liberal, Corangamite, Vic.), House of Representatives, *Debates*, 31 March 1977, p. 839.
176. *Conciliation and Arbitration Act 1904–79*, s. 25A (Commission not able to award pay for period of industrial action), s. 143A (power of Governor-General to suspend or cancel registration of organisation if found by a Full Bench of Commission to have engaged in industrial action), inserted by *Conciliation and Arbitration Amendment Act 1979* (Cwlth); R. Mitchell, 'Liberal and Labor Governments and Labour Legislation: Is there a Trend to Direct Intervention', in P. Sutcliffe and D. Ralston, eds, *Trends in Australasian Industrial Relations: Proceedings of the Conference Held at the Bellevue Hotel, Brisbane, 22 August to 25 August 1985*, Association of Industrial Relations Academics of Australia and New Zealand, 1995, p. 102.
177. *Conciliation and Arbitration Amendment Bill 1982* (Cwlth); K. Beazley, (Labor, Swan, WA), House of Representatives, *Debates*, 22 April 1982, p. 1808; *ibid.*, Senate, *Debates*, 5 May 1982, p. 1858.
178. *R v. Coldham; ex p. Australian Social Welfare Union* (1983) 153 CLR 297; *Federated Clerks' Union v. Victorian Employers' Federation* (1984) 154 CLR 472; *Re Manufacturing Grocers' Employees Federation of Australia*; *ex p. Australian Chamber of Manufactures* (1986) 160 CLR 341; *Re Cram; ex p. New South Wales Colliery Proprietors' Association*

- Ltd* (1987) 163 CLR 117; see E. Stern, "'Industrial Disputes" and the Jurisdiction of the Federal Industrial Tribunal: An Analysis of Recent Developments', *Australian Journal of Labour Law*, vol. 3, 1990, pp. 130–158.
179. 'Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions Regarding Economic Policy, February 1983', in F. Stilwell, *The Accord and Beyond*, Pluto Press, Sydney, 1986, p. 167.
 180. Committee of Review into Australian Industrial Relations Law and Systems (Hancock Report), *Report*, vol. 2, AGPS, Canberra, pp. 1–2.
 181. *ibid.*, p. 214.
 182. *ibid.*, pp. 219, 224.
 183. *ibid.*, pp. 169, 205.
 184. *ibid.*, pp. 241–2.
 185. *ibid.*, p. 369.
 186. *ibid.*, pp. 401, 403. The Committee accepted that there was a role for purely private arbitration, but thought that it should not be recognised in legislation because 'it is important for those who exercise statutory functions of conciliation and arbitration to do so within a recognised system, to adhere to generally accepted principles, to be subject to appeals and to be open to public scrutiny' (p. 548).
 187. *ibid.*, pp. 206, 339.
 188. *ibid.*, pp. 340–1.
 189. *ibid.*, pp. 545–6.
 190. *ibid.*, p. 399.
 191. *ibid.*, p. 416.
 192. *ibid.*, p. 425.
 193. *ibid.*, pp. 637–9, 657.
 194. *ibid.*, pp. 642–3.
 195. R. Willis, (Labor, Gellibrand, Vic.), House of Representatives, *Debates*, 14 May 1987, p. 3165–6.
 196. *ibid.*, 14 May 1987, pp. 3167, 3171–2; Industrial Relations Bill 1987 (Cwlth), cl. 62, 164–8, 193–7, 215–7.
 197. R. J. Hawke, (Labor, Wills, Vic.), House of Representatives, *Debates*, 26 May 1987, p. 3293; Senator F. Chaney, (Liberal, WA), Senate, *Debates*, 27 May 1987, p. 3004; Senator T. Aulich, (Labor, Tas.), *ibid.*, p. 3009; B. Dabscheck, *Australian Industrial Relations in the 1980s*, Oxford University Press, Melbourne, 1989, p. 146.
 198. Governor-General's Speech, House of Representatives, *Debates*, 14 September 1987, p. 14; see Senate, *Debates*, 12 October 1988, pp. 1227, 1230.

199. Mr Willis, House of Representatives, *Debates*, 28 April 1988, p. 2335. In addition, the High Court's decision in *Re Ranger Uranium Mines Pty Ltd; ex p. Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, upholding the Commission's power to order reinstatement of unfairly dismissed employees, was thought to make it unnecessary to establish a court with jurisdiction over unfair dismissals.
200. House of Representatives, *Debates*, 23 May 1988, p. 2835.
201. Senator Chaney, Senate, *Debates*, 24 August 1988, p. 192; *ibid.*, 31 August 1988, pp. 571–2; *ibid.*, 1 September 1988, p. 658; *ibid.*, 27 September 1988, pp. 820–1.
202. Senator G. Chapman, (Liberal, SA), *ibid.*, 12 October 1988, p. 1225; Senator P. Cook, (Labor, WA), *ibid.*, p. 1229.
203. The Government accepted the Democrats' amendments reducing the minimum size of registered employee organisations (from 3000 to 1000 members), but further proposals to strengthen collegial ballots in unions were defeated by the combined votes of the major parties: *ibid.*, 30 September 1988, p. 1105, 12 October 1988, p. 1243.
204. A. Stewart, 'The Industrial Relations Act 1988: The More Things Change...!', *Australian Business Law Review*, vol. 17, 1988, p. 104; J. W. Shaw, 'The "New" Powers of the Australian Industrial Relations Commission', *Journal of Industrial Relations*, vol. 31, 1989, pp. 82–92.
205. E. M. Davis and R. D. Lansbury, 'Employment Relations in Australia', in G. J. Bamber and R. D. Lansbury, eds, *International and Comparative Employment Relations: A Study of Industrialised Market Economies*, revised edn, Allen & Unwin, Sydney, 1998, p. 135; R. D. Lansbury and G. J. Bamber, 'The End of Institutionalised Industrial Relations in Australia?', *Perspectives on Work*, vol. 2, no. 1, 1998, pp. 26–28.
206. B. Dabscheck, *The Struggle for Australian Industrial Relations*, Oxford University Press, Melbourne, 1995, ch. 3.
207. Davis and Lansbury, 'Employment Relations in Australia', *op. cit.*, p. 136.
208. *National Wage Case, April 1991* (1991) 36 IR 120; (1991) AILR 118.
209. The Government's submissions to the Commission advocated greater scope for bargaining: Senator Cook, Senate, *Debates*, 4 September 1991, p. 1158. A ministerial statement announcing the intention to bring in new legislation was made while National Wage Case was still in progress: Senate, *Debates*, 17 October 1991, pp. 2279, 2284.
210. *National Wage Case, October 1991* (1991) 39 IR 127; (1991) AILR 369.
211. *Industrial Relations Act 1988–92*, Pt VI Div. 3A (especially s. 134F), inserted by *Industrial Relations Legislation Amendment Act 1992* (Cwlth).
212. *Industrial Relations Act 1988–92*, s. 134M(3); retained as s. 170MM(4) by *Industrial Relations Reform Act 1993* (Cwlth).
213. *Industrial Relations Act 1988–93*, Pt VIB Div. 5, especially s. 170QK; *Appeal by Public Sector Union* (ABC Case) (1994) AILR 372, Print L4605; *Asahi Diamond Industrial Australia Pty Ltd v. Automotive Food Metals and Engineering Union* (1995) 59 IR 385 at 421–8, Print L9800.

214. *Industrial Relations Act 1988-93*, ss. 170MC, 170MD, 170MG, inserted by *Industrial Relations Reform Act 1993*.
215. *Industrial Relations Act 1988-93*, s. 88A(b). Paid-rates awards specified actual rather than minimum entitlements, but were only made if it was not appropriate or likely for the matters to be settled by agreement: s. 170UA.
216. *Industrial Relations Act 1988-93*, ss. 170MC(1)(b); 150A.
217. *Review of Wage Fixing Principles August 1994* (1994) 55 IR 144, Print L4700.
218. *Victoria v. Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 537-8.
219. In most respects the Court's jurisdiction was exclusive: *Industrial Relations Act 1988-93*, ss. 413 (interpretation of awards), 414 (organisations), 294 (cancellation of registration), 163G-163H (boycott conduct), 163EE (remedies for unlawful termination). However, under s.178 other courts could also impose penalties for breaches of an award (apart from a bans clause), although the amount they could impose was lower.
220. B. Dabscheck, 'The Coalition's Plan to Regulate Industrial Relations', *Economic and Labour Relations Review*, vol. 4, 1993, pp. 6-9; C. Briggs and J. Buchanan, 'Australian Labour Market Deregulation: A Critical Assessment', *Research paper*, no. 21, Department of the Parliamentary Library, Canberra, 1999-2000.
221. P. Reith, House of Representatives, *Debates*, 23 May 1996, p. 1295.
222. *Workplace Relations Act 1996*, ss. 88A-88B, 89, 89A, 111AAA.
223. *Workplace Relations Act 1996*, s. 152(2)-(3).
224. Workplace Relations and Other Legislation Amendment Bill 1996, schedule 13.
225. Supplementary Report by Senator Andrew Murray for the Australian Democrats, Senate Economics References Committee, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, Senate Printing Unit, Canberra. 1996, pp. 328, 330, 331.
226. *ibid.*, p. 334.
227. Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill, October 1996; *Australian*, 28 October 1996, p. 1; Senate, *Weekly Hansard*, 30 October 1996, pp. 4719-21.
228. Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cwlth); Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, Senate Printing Unit, Canberra, 1999, Democrat Senators' Report, pp. 389-92.
229. *Superannuation Guarantee (Administration) Act 1992* (Cwlth); upheld as valid use of taxation power in *Northern Suburbs General Cemetery Reserve Trust v. Commonwealth* (1993) 176 CLR 555. The Commission awarded superannuation in its *National Wage Case 1986*, and its power to do so (as the subject of an industrial dispute) was affirmed by the High Court in *Re Manufacturing Grocers' Employers Federation of Australia; ex p.*

Australian Chamber of Manufactures (1986) 160 CLR 341. However the Commission held in its *National Wage Case April 1991* (1991) 36 IR 120; (1991) AILR 118 that the award system was inappropriate vehicle for further imposts, leading to the enactment of the 1992 scheme.

230. By this means, power was given to the Arbitration Court to determine all kinds of industrial disputes (including those limited to a single State), any industrial matter referred by the Minister even though not an industrial dispute, and to make industry-wide common rule awards. Conciliation commissioners were also given enhanced powers to make awards: *National Security (Industrial Peace) Regulations 1940*. Special bodies were also set up to control all aspects of employment in the shipping and stevedoring industries: *National Security (Maritime Industry) Regulations 1942*; *National Security (Stevedoring Industry) Regulations 1942*. Extensive provisions were also made for the 'dilution' of labour in the metals and furniture industries, allowing workers who were not fully trades qualified to be certified and trained. See Foenander, *Wartime Labour Developments in Australia*, op. cit.; Foenander, *Studies in Australian Labour Law and Relations*, op. cit., pp. 13–18.
231. *Coal Production (War-time) Act 1944* (Cwlth); *Women's Employment Act 1942* (Cwlth) and *Women's Employment Regulations*.
232. *Report on the Coal-Mining Industry*, vol. 1, Senate and House of Representatives, *Papers*, 1945–46, vol. 3, pp. 468–71.
233. The legislation also set up a system of local conciliation boards overseen by the tribunal: *Coal Industry Act 1946* (Cwlth), ss. 34, 36, 42. In practice most industrial matters were determined through these local bodies, within the framework of an industry award set by the tribunal: see C. Fisher, *Coal and the State*, Methuen, Sydney, 1987, pp. 226–7; on the origins of the tribunal see *ibid.*, p. 245; J. Romeyn, *Centralised and Specialist Tribunals: the Influence of Structure on Arbitral Decision-Making in Australia*, Industrial Relations Research Centre, University of New South Wales, Sydney, 1982, p. 21. In *R v. Duncan; ex p. Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, the High Court held that the Tribunal could validly exercise Federal and State powers concurrently.
234. Mr Dedman, Senate and House of Representatives, *Debates*, 24 July 1946, p. 3009; J. B. Chifley, *ibid.*, 30 July 1946, p. 3273.
235. E. E. Crichton, 'The Development of Public Service Arbitration Pt I', *Public Administration*, vol. 15, 1956, pp. 151–153.
236. G. E. Caiden, *Career Service*, Melbourne UP, 1965, p. 105.
237. Sir R. Best, (Liberal, Kooyong, Vic.), Senate and House of Representatives, *Debates*, 4 December 1911, p. 3627; W. M. Hughes, *ibid.*, p. 3629; *Arbitration (Public Service) Act 1911* (Cwlth).
238. W. M. Hughes, Senate and House of Representatives, *Debates*, 3 September 1920, p. 4199; *Arbitration (Public Service) Act 1920* (Cwlth), s. 6; Caiden, *Career Service*, op. cit., pp. 145–6. The Royal Commission on Public Service Administration consisted of D. C. McLachlan, the former Public Service Commissioner, who had very clear ideas about the importance of the Commissioner remaining supreme authority in the public service.

239. Gerald E. Caiden, *Career Service*, op. cit., pp. 207–9.
240. The Hon H. V. Evatt, Senate and House of Representatives, *Debates*, 5 June 1952, p. 607; *Public Service Arbitration Act 1952* (Cwlth).
241. *Conciliation and Arbitration Amendment Act (No. 2) 1983* (Cwlth), s. 40. The *Public Service Arbitration Act 1956* (Cwlth) had already made the Public Service Arbitrator a member of the Conciliation and Arbitration Commission, though still exercising power under the 1920 Act.
242. *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 per the Court at 541; cf. *Australian Steamships Ltd v. Malcolm* (1914) 19 CLR 298 per Gavan Duffy and Rich JJ at 334.
243. *Transport Workers Act 1928* (Cwlth), s. 2 (definition of 'transport workers'); *Huddart Parker Ltd v. Commonwealth* (1931) 44 CLR 492; *Victorian Stevedoring and General Contracting Company Pty Ltd v. Dignan* (1931) 46 CLR 73; Foenander, *Towards Industrial Peace in Australia*, op. cit., p.183. Ironically, while the Act was passed to challenge the power of the Waterside Workers Federation by providing for licensing of wharf labourers (and thus allowing employers to promote employment of non-unionists who had been licensed), the High Court upheld regulations made by the Scullin Labor Government which gave preference in employment to members of the union. The regulations were repealed by the Lyons Government.
244. *Stevedoring Industry Act 1947* (Cwlth), ss. 12, 13, 19. On the history of the legislation, see *R v. Kelly; ex p. Waterside Workers' Federation of Australia* (1952) 85 CLR 601 at 626–8; Foenander, *Studies in Australian Labour Law and Relations*, op. cit., pp. 28–32.
245. H. V. Evatt, Senate and House of Representatives, *Debates*, 21 February 1947, pp. 125–6; R. G. Menzies, *ibid.*, 28 February 1947, p. 308.
246. Mr Dedman, Senate and House of Representatives, *Debates*, 28 June 1948, p. 1579; H. E. Holt, *ibid.*, 5 July 1949, p. 1973.
247. *Stevedoring Industry Act 1949* (Cwlth), ss. 33–34.
248. *R v. Webb; ex p Waterside Workers' Federation of Australia* (1955) 93 CLR 528. As none of the parties to the case wished to pursue the implications of the separation of powers, the Court did not determine the issue; but the judges' unease at the mixture of such powers, later decided in the *Boilermakers' Case*, is apparent: at 542.
249. H. E. Holt, House of Representatives, *Debates*, 29 May 1956, p. 2554. A special presidential member of the new Conciliation and Arbitration Commission was assigned to the industry: *Conciliation and Arbitration Act 1904–56* (Cwlth), Pt III Div. 4.
250. *Conciliation and Arbitration Act 1904–1967* (Cwlth), s. 88U(2) inserted by *Conciliation and Arbitration Act 1967* (Cwlth); Senator Gorton, Senate, *Debates*, 26 October 1967, p. 1788; N. Blain, *Industrial Relations in the Air*, University of Queensland Press, St Lucia, 1984, p. 55.

251. *Industrial Relations Act 1988* (Cwlth), s. 5, replacing *Conciliation and Arbitration Act 1904–87* (Cwlth), ss. 72, 88H.
252. Trade Practices Act Review Committee (Swanson Committee), *Report to the Minister for Business and Consumer Affairs*, Canberra, Govt. Printer, 1976, P. P. 228/1976, pp. 85–6.
253. The Hon. J. Howard, House of Representatives, *Debates*, 8 December 1976, p. 3533; Hon J. Howard, *ibid.*, 3 May 1977, p. 1477; R. F. Shipton, (Liberal, Higgins, Vic.), *ibid.*, 24 May 1977, p. 1751.
254. M. Young, (Labor, Port Adelaide, SA), *ibid.*, 24 May 1977, p. 1748; R. Willis, *ibid.*, 25 May 1977, pp. 1818–20.
255. *Seamen's Union of Australia v. Utah Development Co* (1978) 144 CLR 120 per Mason J at 154. The boycott provisions were also subsequently declared valid under the corporations power of the Constitution, in so far as they prohibited boycott conduct affecting trading corporations: *Actors and Announcers' Equity v. Fontana Films Pty Ltd* (1982) 150 CLR 169.
256. *R v. Burgess; ex p. Henry* (1936) 55 CLR 608 at 681.
257. T. Sheridan, *Mindful Militants The Amalgamated Engineering Union in Australia, 1920–1972*, Cambridge University Press, 1975, p. 170; J. Hagan, *The History of the ACTU*, *op. cit.*, p. 118.
258. *Commonwealth v. Tasmania* (Tasmanian Dam Case) (1983) 158 CLR 1; *Richardson v. Forestry Commission* (1988) 164 CLR 261; *Queensland v. Commonwealth* (1989) 167 CLR 232.
259. *Industrial Relations Act 1988–93*, ss. 3(b)(ii), 170AA, 170BA, 170CA, 170KA, 170PA,
260. J. Howard, House of Representatives, *Debates*, 22 November 1993, p. 3355; Senator Crane, Senate, *Debates*, 6 December 1993, p. 3897.
261. *Victoria v. Commonwealth* (1996) 187 CLR 416 at 487, 496.
262. R. C. McCallum, 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993', *Sydney Law Review*, vol. 15, 1994, p. 134.
263. Senate Economics References Committee, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, Senate Printing Unit, Canberra, 1996, pp. 244, 298.
264. *Huddart, Parker & Co. Pty Ltd v. Moorehead* (1909) 8 CLR 330 per Higgins J at pp. 409–10.
265. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
266. *Actors and Announcers' Equity v. Fontana Films Pty Ltd* (1982) 150 CLR 169 per Mason J at pp. 201, 211.
267. *Industrial Relations Act 1988–92* (Cwlth), ss. 127A–127C, inserted by *Industrial Relations Amendment Act 1992* (Cwlth).

268. *Re Dingjan; ex p Wagner* (1995) 183 CLR 323; *Victoria v. Commonwealth* (1996) 187 CLR 416; see George Williams, *Labour Law and the Constitution*, Federation Press, Sydney, 1998, pp. 115–8.
269. L. Brereton, House of Representatives, *Debates*, 28 October 1993, p. 2782; P. Slipper, (Liberal, Fisher, Qld), *ibid.*, no. 11, 1993, p. 3077 (17 November 1993); Senator N. Sherry, (Labor, Tas.), *Debates*, 1993, p. 3951; *Industrial Relations Act 1988–93*, ss. 170NA(1), 170NC(1)(c).
270. House of Representatives, *Debates*, 28 October 1993, p. 2782; *Industrial Relations Act 1988–93* (Cwlth), ss. 170NC(1)(b), inserted by *Industrial Relations Reform Act 1993* (Cwlth).
271. *Industrial Relations Act 1988–93* (Cwlth), ss. 170NA, 170NB, 170NP, inserted by *Industrial Relations Reform Act 1993* (Cwlth). The Commission could refuse to approve an agreement if the employer did not give eligible unions a reasonable opportunity to take part in the negotiations and be party to the agreement: s. 170ND(7). See generally R. Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act', *Australian Journal of Labour Law*, vol. 7, 1994, pp. 156–62.
272. *Industrial Relations Act 1988–93* (Cwlth), s. 170NL, inserted by *Industrial Relations Reform Act 1993* (Cwlth).
273. There were 172 applications for certification, extension or variation of enterprise flexibility agreements in the last full year of their operation: *Annual Report of the President of the Australian Industrial Relations Commission, 1996–97*, table 1, p. 14.
274. G. F. Smith and R. C. McCallum, 'A Legal Framework for the Establishment of Institutional Collective Bargaining in Australia', *Journal of Industrial Relations*, vol. 26, 1984, pp. 3–24; S. E. K. Hulme, 'A Constitutional Basis for the Federal Coalition's Industrial Relations Policy—and Related Matters', *Economic and Labour Relations Review*, vol. 4, 1993, pp. 62–76.
275. The Hon. Peter Reith, 'Getting the Outsiders Inside—Towards A Rational Workplace Relations System In Australia', Ministerial Address to the National Press Club, Canberra, 24 March 1999, [<http://www.simplerwrssystem.govau/discussion/outsidiersinside.htm#alternative>] (18 November 2000), and supporting discussion papers located at this site. For an analysis of this proposal, see A. Stewart, *Federal labour Law and New Uses for the Corporations Power*, Australian Centre for Industrial Relations Research and Training, Working Paper no. 61, 2000, [<http://www.econ.usyd.edu.au/acirrt/pubs/cp.pdf>], (20 January 2001).
276. H. V. Evatt, 'Control of Labor Relations in the Commonwealth of Australia', *University of Chicago Law Review*, vol. 6, 1939, p. 529.
277. Justice M. Kirby, 'Industrial Relations in the "Frozen" Continent', *Australian Journal of Labour Law*, vol. 2, 1989, p. 5.
278. See C. Fox and M. Pittard, *Amending the Industrial Relations Statute: An Australian Preoccupation*, National Key Centre in Industrial Relations, Monash University, Working Paper no. 69, 1999, pp. 12, 23.

279. A Ministry of Labour Advisory Council was formed in 1952, and was succeeded by the National Labour Advisory Council in 1967. While these were created by executive action, the most recent body was a statutory creation: *National Labour Consultative Council Act 1977* (Cwlth).
280. *Consolidated Register of Senate Committee Reports 1970–1988*, Senate Committee Office, Canberra, 1998, pp. 174–176.
281. House of Representatives, *Debates*, 19 October 1967, pp. 2064–5; *ibid.*, 26 October 1967, p. 2341; *ibid.*, Senate, *Debates*, 31 October 1967, pp. 1920–6; *ibid.*, House of Representatives, *Debates*, 2 November 1967, p. 2638; N. Blain, *Industrial Relations in the Air*, pp. 59–60.
282. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, *op. cit.*, pp. 205–6, 57.
283. *Commonwealth Conciliation and Arbitration Act 1904–20*, (Cwlth), s. 18A(4) inserted by *Commonwealth Conciliation and Arbitration Act 1920* (Cwlth), s. 9; Foenander, *Towards Industrial Peace in Australia*, *op. cit.*, pp. 135–7.
284. H. E. Holt, Senate and House of Representatives, *Debates*, 22 May 1952, p. 116; *Conciliation and Arbitration Act 1904–52*, s. 31A(4), inserted by *Conciliation and Arbitration Act 1952* (Cwlth), s. 13.
285. 'It will of course still be for the Commission to decide whether to hear an appeal or reference in the public interest:' R. I. Viner, (Liberal, Stirling, WA), House of Representatives, *Debates*, 20 May 1976, p. 2324; *Conciliation and Arbitration Act 1904–76*, s. 36A, inserted by *Conciliation and Arbitration Amendment Act 1976* (Cwlth). Cupper, 'Legalism in the Australian Conciliation and Arbitration Commission', *op. cit.*, p. 434.
286. *Commonwealth Conciliation and Arbitration Act 1904–26* (Cwlth), s. 18B; see C. P. Mills, *Federal Industrial Laws*, 3rd edn, Butterworths, 1963, p. 220.
287. R. M. Martin, 'Governments, Industrial Tribunals and the Rule of Law', *Journal of Industrial Relations*, vol. 6, 1964, pp. 37–50.
288. F. Brennan, (Labor, Batman, Vic.), Senate and House of Representatives, *Debates*, 30 May 1930, p. 2366; *ibid.*, 24 July 1930, p. 4612; *Commonwealth Conciliation and Arbitration Act 1930* (Cwlth), s. 18.
289. *Commonwealth Conciliation and Arbitration Act 1904* (Cwlth), s. 38(h).
290. *Commonwealth Conciliation and Arbitration Act 1910* (Cwlth), s. 2(c); *Five Day Working Week Case* (1944) 54 CAR 34; see C. P. Mills, *Federal Industrial Laws*, 3rd edn, Butterworths, Sydney, 1963, p. 94.
291. *Conciliation and Arbitration Act 1904–72* (Cwlth), s.39(2), inserted by *Conciliation and Arbitration Act 1972* (Cwlth), s. 16.
292. R. Willis, House of Representatives, *Debates*, 28 May 1976, p. 2677.
293. Committee of Review into Australian Industrial Relations Law and Systems, *Report*, vol. 2, p. 340; *Industrial Relations Act 1988* (Cwlth), ss. 3(c), 90.

294. J. T. Ludeke, 'The Public Interest and the Australian Industrial Relations Commission', *Journal of Industrial Relations*, vol. 34, 1992, p. 602; S. A. Kennedy, 'Reflections on Matters of Independence and Industrial Tribunals in Australia', *Journal of Industrial Relations*, vol. 35, 1993, pp. 289–90; M. Kirby, 'The Removal of Justice Staples and the Silent Forces of Industrial Relations', *Journal of Industrial Relations*, vol. 31, 1989, pp. 334–71.
295. *Industrial Relations Act 1988* (Cwlth), ss. 93, 94, 96, 97.
296. *Industrial Relations Act 1988–92*, ss.134E–134F, inserted by *Industrial Relations Amendment Act 1992* (Cwlth); *Industrial Relations Act 1988-93*, ss. 170MC–170MD, 170NC–170ND, inserted by *Industrial Relations Reform Act 1993* (Cwlth).
297. *Workplace Relations Act 1996*, ss. 3(b), 88A(d), 89. Under the *Industrial Relations Reform Act 1993* the Commission was supposed to ensure that awards (other than paid rates awards) underpinned direct bargaining by providing only minimum wages and conditions: *Industrial Relations Act 1988–93*, s. 88(b).
298. *Workplace Relations Act 1996*, s. 89A, inserted by *Workplace Relations and Other Legislation Amendment Act 1996* (Cwlth).
299. *Re Pacific Coal Pty Ltd; ex p. Construction, Forestry, Mining and Energy Union* [2000] HCA 34; 172 ALR 257 per Kirby J at para 297.
300. *Workplace Relations Act 1996* (Cwlth), s.89A(7). Similarly, the Commission may make an award covering non-allowable matters if it has terminated the bargaining period, which can be done basically because one party is not genuinely negotiating or because industrial action is threatening serious public consequences: ss.170MW, 170MX. This power to arbitrate may only be exercised by a Full Bench, which must consider certain factors laid down by the legislation: s.170MX(4), (5).
301. *R v. Commonwealth Conciliation and Arbitration Commission; ex p. Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 per Barwick CJ at 242; per Windeyer J at 269.
302. See A. Stewart, 'The Industrial Relations Reform Act 1993: Counting the Cost', *Australian Bulletin of Labour*, vol. 20, 1994, p. 159.
303. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, op. cit., p. 202.
304. See R. J. Buchanan and I. M. Neil, 'Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power', *Australian Bar Review*, vol. 20, 2001, p. 263; N. Williams and A. Gotting, 'The Interrelationship between the Industrial Power and other Heads of Power in Australian Industrial Law', *Australian Bar Review*, vol. 20, 2001, pp. 264–82.