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2001

Parliament and the Industrial Power

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Publication Details

This book chapter was originally published as Frazer, AD, Parliament and Industrial Power, in Lindell G and Bennett, B (eds), Parliament: The Vision in Hindsight, Sydney Federation Press, 2001, 93-148.

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Parliament and the Industrial Power

Abstract
The industrial power contained in section 51(xxxv) of the Australian Constitution 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. 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). 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). Yet 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.

Keywords
industrial relations, conciliation and arbitration, Australian Constitution, Boilermakers Case, labour laws and legislation

Disciplines
Law

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This book chapter is available at Research Online: http://ro.uow.edu.au/lawpapers/6

The Vision in Hindsight: Parliament and the Constitution

Parliament and the Industrial Power

Andrew Frazer

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About the Author

Andrew Frazer is a senior lecturer in the Faculty of Law at the University of Wollongong, where he teaches in the fields of employment, labour relations and anti-discrimination law. His PhD thesis (ANU, 1990) examined the origins and early history of the industrial arbitration system in New South Wales. He has published on the history of Australian compulsory arbitration systems, trade union law, international labour standards, and recent changes in labour law and tribunal decision-making. From 1996 to 2000 he was academic member of the Law Society of New South Wales' specialist accreditation committee on employment and industrial law.

Parliament and the Industrial Power

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Introduction

The industrial power contained in section 51(xxxv) of the Australian Constitution 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.

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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, 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.'[1] 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 to major industrial disturbances like the Maritime strike.[2] 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.

Kingston consented to leave the matter until the discussion on the Federal judiciary, when he argued for power allowing 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. In the course of the brief debate, delegates were not entirely clear whether the draft Constitution should allow Parliament to dictate directly the actual terms of settlement of particular strikes and lockouts, or whether the power would only extend to the establishment of machinery for hearing disputes.[3]

The matter was raised again at the Adelaide Convention in 1897, by which time conditions had changed dramatically. There was by now an active conciliation and arbitration system in New Zealand, 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.[4] 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 a state-sanctioned industrial arbitration system of the kind originally advocated by Kingston.[5]

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.[6] 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.' He did not see the need for the Federal legislative power to be limited to interstate disputes. A national court 'would exercise a wider jurisdiction and command greater respect and confidence than can be hoped for under any system of provincial legislation.' 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.[7]

While Kingston saw no problems with overlapping jurisdictions, since Federal and State measures would complement rather than conflict with each other, Higgins' approach 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.[8] The 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 B.R. 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. 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. Both these proponents urged that, as framers of an enduring Constitution, the delegates should provide the Federal Parliament with sufficient power to create tribunals if they were needed, and that the contours and limits of the power could safely be left to the elected legislators of the new Commonwealth. 'Trust the Federal Parliament' was their slogan.[9]

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.'[10] 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.[11] 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).[12]

At the time of its insertion into the Constitution, nearly all the major problems that would emerge 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.

Ultimately the ability for such issues to become constitutional controversies originates in the vagueness of the founders and their willingness to defer such difficult issues to the Parliament to resolve while giving it limited power to do so. There never was a single clear 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.[13] 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 interstateness); 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 Liberal 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.[14] 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).[15] So it fell to Alfred Deakin to introduce legislation in July 1903 establishing the Commonwealth Court of Conciliation and Arbitration. He stressed that the bill was 'federal in all its characteristics,' not only because it was confined to interstate disputes, but also because it allowed the Court to co-operate with similar State bodies by referring matters to them. State industrial tribunals could also refer specific matters to the Commonwealth Court for determination.[16]

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 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.[17]

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.'[18] By adopting the method of judicial arbitration in this way a more comprehensive system of direct regulation by the legislature was rejected.

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. In the Commonwealth Parliament the Australian Labor Party (ALP) members 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.[19]

At the election in 1903 all parties supported a national arbitration system in some form. 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 Liberal ministry resigned to great surprise.[20] 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.[21] 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.

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, 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.[22] Some members 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.[23] Much of the voting in Parliament was tactical, based on political manoeuvre and point-scoring rather than philosophical conviction. There were significant ideological differences, though, over the exclusion of domestic and agricultural workers from the Act and especially over the extent to which employment preference could be awarded to

unionists. Labor members argued that preference was needed to protect unionists from victimisation and to encourage them to make use of the new system, while traditional liberals like Reid objected to it as a special privilege but were willing to accept some measure if individual objections could be put to the Arbitration Court.

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.[24] Applications for Federal awards increased once the High Court began taking an expansive attitude to the Federal arbitration jurisdiction between 1913 and 1926.

Early Attempts to Expand the Industrial Power

First Moves

The scope of legitimate industrial regulation was considerably widened once a policy of uniform tariff protection for local manufacturing had been adopted by the first Commonwealth Parliament, with such protection linked to favourable wages and conditions for Australian workers. 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.[25]

The Deakin liberal 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.[26] 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.[27] 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.[28] 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.[29]

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.[30] 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.[31] 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 New South Wales party at its annual conference.[32] 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.'[33]

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.'[34] 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.[35] He announced a referendum to expand the industrial power 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.'[36] 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.' Deakin was concerned that '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.'[37] Deakin was joined in opposition to the amendments by members of the New South Wales Labor Government, led by Premier W.A. Holman who contended 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.[38]

Hughes was undeterred when the referenda lost. Although only 40 per cent of the voters supported the proposals, he 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.' In Parliament Hughes 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. What was being sought, he maintained, was no more than had been intended by the original framers of the Constitution and the Arbitration Act. 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.[39]

All the proposals again failed to gain popular approval, though with a smaller minority than before: the industrial question failed by just 1.3 per cent of the total formal vote, with three States polling majority support. 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 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.[40] 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.' 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. 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, while the split within the Labor party over the conscription issue prevented a further referendum on Federal powers.[41]

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. To deal with immediate post-war problems, 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 for approval until a mooted convention on the Constitution had considered the whole issue of the division of legislative powers.[42] 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.[43] 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. [44] 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. 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 idea that industrial arbitration was a judicial method which required the finding of a definite dispute between particular parties, and by the sovereign domain of the States. According to this view, section 51(xxxv) of the Constitution conferred '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.'[45] 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. By 1914 the new judges on the High Court had succeeded in replacing the original approach with an expanded 'realist' one which largely allowed the Arbitration Court itself to determine whether there was a dispute within its cognisance.[46] The High Court judges were willing to allow the expansion of Federal jurisdiction because discretion was to be exercised by the judges of an independent tribunal. It is doubtful that such tolerance 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 the Prime Minister, the Rt 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.[47] 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.[48]

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.[49] 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 allowing the establishment of 'authorities with such powers as the Parliament confers on them with respect to the regulation and determination of terms and conditions of industrial employment' as well as investing State authorities with Federal industrial powers. The need for expansion of Commonwealth power was justified as the inevitable result of growth in national industries. The amendment was also 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 to it. Latham noted that the proposal would allow for other forms of industrial regulation to be established, such as wages boards and conciliation committees. 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. 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.[50]

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 focussed 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.[51] 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. A majority of the seven-member Commission recommended that it was the States that should carry exclusive responsibility for industrial regulation. Regarding industrial matters as inherently local rather than national in nature, being tied to such issues as public order, health and industrial development, the majority recommended the deletion of the Commonwealth's existing power.[52] 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 maters of national significance.[53] 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 (discussed below).

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.[54] 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 percent 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.[55]

The Joint Committee on Constitutional Review, appointed by the Menzies Government in 1956, recommended in its report that the Federal Parliament's existing legislative power be expanded to cover '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, and that the economic role of the Commonwealth had expanded rapidly since the Second World 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 had proposed.[56] The report which it issued in 1959 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.

The Committee thought 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.' This 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 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.[57]

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 focussed 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.[58]

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.[59] Such an approach was the short-term solution favoured by the Hancock Committee in 1985 and implemented in the *Industrial Relations Act 1988* 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.[60]

Proposals for changing the Constitution itself were raised by the Constitutional Convention in 1983. Later that decade, the Constitutional Commission suggested widening the industrial power to include 'industrial relations and employment matters,' but thought that the Commonwealth's power should remain concurrent with that of the States.[61] Congruent with its general view that the national Parliament should have responsibility for all aspects of economic policy, in its final report in 1988 the Commission recommended that the Commonwealth'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.[62]

In practice the arbitration system has managed to overcome or at least adapt itself to many of the problems of overlapping jurisdictions and dual coverage which have fuelled much of the debate over reform of the Constitution in the area of industrial relations. 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. A pattern of industry coverage between State and Federal systems gradually emerged, based on whether the industry was national in orientation.[63]

The general tendency towards centralisation has been facilitated by High Court decisions. which have changed the pattern of occupational coverage. In the *Professional Engineers Case* the High Court allowed 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.'[64] 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.[65] 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.[66]

After decades of fruitless discussion, a reference of State powers was finally accomplished in 1996 when the Victorian Parliament, controlled by the Kennett Liberal Government, 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.[67] It is no surprise that recently the incoming Bracks Labor Government has sought to reclaim Victoria's legislative power and re-establish its industrial relations system.

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.

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 casting into doubt the continued existence of arbitration at the Federal level. 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. 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 the vision of conciliation and arbitration originally contained in the Constitution.

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.[68] 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 consumer prices fuelled industrial unrest. The Labor Government, led by the Rt 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. 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 1914* 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.[69]

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.[70] 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.[71] 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. (In fact Hughes increased the powers of the Arbitration Court under separate amending legislation).[72] 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.' [73] 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 the intention early in his tenure to adopt 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.[74] 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 which concluded that the existence of dual jurisdictions for labour regulation was a major impediment to industrial efficiency. Although a single national regime was potentially more efficient, the sheer volume of detailed regulation required was thought to be simply beyond the capacity of the Commonwealth Parliament to legislate. The advisory committee thus recommended that the Commonwealth should restrict its reach to truly national industries.[75]

By the mid-1920s the problems of Federal-State dualism had gained a new dimension. A change in the personnel and outlook of the High Court meant that Federal legislation and

awards were increasingly given pre-eminence as reflections of the national interest, overriding State awards which were seen as lesser expressions of purely local views. In 1926 the High Court held that a Federal award prescribing a 48-hour week prevailed as it was designed to cover the whole field of working hours. The power of the Commonwealth Arbitration Court to restrain State industrial authorities from dealing with matters before it was also upheld at this time[76] Thus industries previously governed by State systems were now open to Federal regulation, compounding the potential for conflict.

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.[77] A series of strikes then erupted in protest 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 in the name of strengthening law and order under arbitration. The trade and commerce power was relied on to insert sections 30J and 30K into the *Crimes Act* in 1926, allowing for criminal prosecution of strikes or boycotts which threaten to disrupt trade and commerce with other countries or among the States. The Arbitration Act was also amended to strengthen the powers of the Court to enforce its orders, while giving the Attorney-General standing to intervene in matters involving standard hours or the basic wage.[78]

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.'[79]

The 1928 amendments were the Government's last-ditch attempt to strengthen the Federal arbitration system, with its heavily judicial approach. 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. For the first time these amendments gave the Court 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.[80] 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.'[81] 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 organized 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.[82]

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.[83] The Act ingeniously allowed particular workers to be excluded from the industry if they failed to obtain a license or were refused one: because of the licence 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.'[84] 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. When this was overwhelmingly boycotted by the timber workers 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 public sympathy for the strikers as a sign of flagging 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 in Parliament 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.[85]

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.[86] 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 altogether the

Commonwealth's use of the industrial power under the Constitution, relying instead on the trade and commerce power. 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.[87] 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 move as contrary to the trend 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.[88]

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...'[89] 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 (plus the Speaker, Sir Littleton Groom, who abstained from voting). 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. While 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 seventy-five member House. Bruce and four other Ministers were defeated in their own electorates.[90] 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 industrial relations 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. The Government aimed to promote co-operation in industrial relations by creating a series of conciliation committees chaired by commissioners attached to the Court. Because the Bill departed from the judicial model of dispute resolution it was blocked by the Opposition-controlled Senate, and a rare conference was held between the managers of both Houses. 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.[91] 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.[92] 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.[93] Most of the Scullin Government's amendments were designed to shift the system from a judicial style of arbitration to a more informal and 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. 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 by Japan 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.[94] 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.[95]

The end of the war brought new demands on the Commonwealth Parliament to legislate for greater control over industrial conditions. 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. Eventually in March 1946 an agreement was reached between the Government and the unions to refer the matter to the Arbitration Court, using the normal procedure for national wage cases.[96]

The Chifley Government sought to continue the wartime system of direct industry regulation in key industries, establishing special permanent tribunals in coalmining and on the waterfront. A proposed national system for the coal industry based on voluntary co-operation was rejected by Treasury official as unstable; a partial solution, applicable only to the New South Wales coalfields, was reached in 1946, using joint legislation by the Labor-dominated Commonwealth and New South Wales Parliaments.[97] In 1947 the Stevedoring Industry Commission was re-established using the trade and commerce power. Its arbitral functions were transferred back to the Arbitration Court two years later when union representatives refused to co-operate with the Commission.[98]

The 1947 Changes

Apart from continuing the special tribunals, the Chifley Government also tried to move the Federal arbitration system 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. Labor's 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.[99]

The Attorney-General, the Hon. Dr H.V. Evatt, 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.[100] 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. 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 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.'[101]

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, 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.[102] 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 consistency.[103] 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 over the Act's interpretation. 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.[104] 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.[105]

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. 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.[106] 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 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 decision echoed previous decisions dating back to 1918 which declared that only a court properly instituted under the Constitution could exercise the judicial power of the Commonwealth. 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.[107]

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.[108] 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, preferred a more informal approach and raised reform of the Act with the newly-created Labour Advisory Council around this time. Holt apparently sounded out Judge Kirby as a possible successor to head a less formal body as early as 1954. The Boilermakers' decision made more pressing the need for overhaul of a system which was already showing strain.[109]

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.[110] The new Conciliation and Arbitration Commission was designed to make the handling of disputes more 'streamlined' and flexible. 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. 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.[111]

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 responsibility. 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.[112] 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.'[113]

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. Once a bans clause was inserted into an award by the Commission, employers could obtain an injunction from the Industrial Court ordering observance of the award; if disobeyed, a heavy fine was imposed by the Court for contempt. 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).[114]

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.[115] 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.[116] 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 to pay the fines 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 Murphy, attributed the cause of the conflict to the division of functions between the Commission and the Court, which derived from the Constitution.[117] 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.[118] 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.[119] 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.

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 Cameron, introduced a bill in April 1973, which he described as 'the first stage of a radical transformation of industrial relations in Australia.'[120] A major aim of the changes was to shift the system away from court proceedings and penalties in favour of bargaining and conciliation. 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.[121]

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. 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.[122] 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.[123] Additional sanctions for industrial action were introduced, notably the prohibition of secondary boycotts under the 1977 amendments to the *Trade Practices Act 1974,* using the trade and commerce power of the Constitution. The Opposition criticised this innovation as an inappropriate use of competition law, implicitly taking the view that only the industrial power should be used to regulate industrial relations.[124]

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.[125] A further proposal made in 1982 would have allowed employers to stand-down employees as a result of industrial action without any power of supervision by the Commission. 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.[126]

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 premissed 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.[127]

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.'[128] In July 1983 such a committee of review was announced. It was tripartite and extra-Parliamentary 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. 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.'[129] 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. 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.[130]

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.[131] While it accepted that the Commission should take account of the public interest and the economic consequences of its decisions, 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.[132]

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.' 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.[133]

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.'[134] 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.

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.[135] 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.[136] When 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.' 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.[137] The revised Bill was pushed through the House on 23 May, passing through all stages with minimal scrutiny.

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.'[138] 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 sanctions against strikes, 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.[139] After extensive debate the Government's scheme prevailed with the support of the Australian Democrats. The Industrial Relations Act which resulted was therefore little more than a reordering of the existing system.

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.[140] 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.[141]

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.[142] 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.[143] When the Federal Government announced that it would introduce amendments designed to facilitate a shift towards enterprise bargaining, 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.[144]

The legislative changes introduced in 1992 and 1993 were designed to formalise this shift to a system based on enterprise-focussed 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.[145] Under the *Industrial Relations Reform Act 1993*, the Commission was also subjected to greater legislative 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.[146] 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.[147] 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.[148]

The Reform Act was also constitutionally significant in its reliance on alternative heads powers, such as the corporations and external affairs powers. 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 covering minimum wages, equal remuneration, parental leave, unfair dismissal and protection for industrial action during bargaining negotiations. Decisions of the High Court in the 1980s had already confirmed that the external affairs power could support a broad range of legislative initiatives.[149] So that the labour 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. 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.

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.'[150] 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.[151] 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.[152]

The enterprise bargaining provisions of the Industrial Relations Reform Act were also partly underpinned by the corporations power. 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.[153] 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, Mr Brereton, in order 'to avoid intrusion into the State jurisdictions.'[154]

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. In the late 1980s Liberal party policy abandoned the traditional conservative faith in a strong arbitration system and increasingly favoured deregulated individual bargaining. 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, 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.[155] 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. The power of the Federal Commission was also limited if a matter was already being addressed by a State tribunal.[156] The Bill also 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 also have no jurisdiction over AWAs, which would come into force simply by being lodged with the Employment Advocate, a new statutory office subject to ministerial direction. 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-established leave entitlements, and relied on wage rates set under relevant awards of either the Australian Industrial Relations Commission or a State industrial authority.[157]

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. The Democrats 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.'[158] 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 mater by arbitration would be in the public interest.[159] 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 Kernot, an agreement was reached on amendments acceptable to both parties which would allow the Bill to pass.[160] 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 independent role in a reduced form. 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 withdrawn 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.[161]

Under the Workplace Relations Act the Parliament has engaged in unprecedented direct intervention by circumscribing the range of issues which can be addressed by the Commission when arbitrating an industrial dispute, limiting it to a list of allowable award matters. While validated by the High Court, this amendment was strongly criticised by Justice Kirby who described this approach as departing from '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).'[162] 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.[163]

Most recently, Mr 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 interstateness, competing award respondency and dual registration.'[164] 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.

The Vision in Hindsight

Despite its limitations, the Commonwealth Parliament has continued to rely extensively on the industrial power over the past century, making limited use of other constitutional powers. 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. 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....[165]

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 its 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. 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.

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.[166] Debate on industrial relations reform has generally been well-informed, particularly in the Senate where close scrutiny of government proposals resulted in significant concessions in 1930-31, 1967, 1973, 1982 and 1996. Sustained criticism of government policy also took place in the Upper House in 1969-72 and again in 1988. Of course the clearest example of parliamentary supremacy occurred in 1929 when the Bruce-Page government lost power over its attempt to abandon the industrial power.

Industrial relations policy has tended to be seen as a political rather than a technical matter, with frequent debate focussed 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.[167] 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 increased 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.[168] 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.

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. 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.[169]

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. In those respects the original vision of Kingston, Higgins and Deakin continues to exert influence.

Endnotes

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18 Deakin, *ibid*., p. 2870 (30 July 1903).

19 *Ibid.*, vol. 16, p. 4788 (8 September 1903); *ibid*., p. 4838 (9 September 1903); 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.

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137 Governor-General's Speech, *Commonwealth Parliamentary Debates*, H. R. vol. 156, p. 14 (14 September 1987); Mr Willis, *ibid.*, H. R. vol. 161, p. 2335 (28 April 1988).

138 Senator Chaney, *Commonwealth Parliamentary Debates*, S. vol. 128, p. 192 (24 August 1988); *ibid*., pp. 571-2 (31 August 1988); *ibid*., p. 658 (1 September 1988); *ibid*., pp. 820-1 (27 September 1988).

139 Senator Chapman, *ibid*., S. vol. 129, p. 1225 (12 October 1988); Senator Cook, *ibid*., p. 1229.

140 Edward M. Davis and Russell D. Lansbury, 'Employment Relations in Australia', in Greg J. Bamber and Russell D. Lansbury, eds, *International and Comparative Employment Relations: A Study of Industrialised Market Economies*, revised edn, Allen & Unwin, Sydney, 1998, p. 135; Russell D. Lansbury and Greg J. Bamber, 'The End of Institutionalised Industrial Relations in Australia?', *Perspectives on Work*, vol. 2, no. 1, 1998, pp. 26-28.

141 Braham Dabscheck, *The Struggle for Australian Industrial Relations*, Oxford U.P., Melbourne, 1995, ch. 3.

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143 *National Wage Case, April 1991* (1991) 36 IR 120.

144 *National Wage Case, October 1991* (1991) 39 IR 127. A ministerial statement announcing the intention to bring in new legislation was made while the National Wage Case was still in progress: *Senate Weekly Hansard*, no. 18, 1991, pp. 2279, 2284 (17 October 1991).

145 *Industrial Relations Act 1988-92*, Pt VI Div. 3A (especially s. 134F), inserted by *Industrial Relations Legislation Amendment Act 1992* (Cwlth).

146 *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.

147 *Review of Wage Fixing Principles August 1994* (1994) 55 IR 144, Print L4700.

148 *Victoria v. Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 537-8.

149 *Commonwealth v. Tasmania* (Tasmanian Dams Case) (1983) 158 CLR 1; *Richardson v. Forestry Commission* (1988) 164 CLR 261; *Queensland v. Commonwealth* (1989) 167 CLR 232.

150 Ronald C. McCallum, 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993', *Sydney Law Review*, vol. 15, 1994, p. 134.

151 J. Howard, *House of Representatives Weekly Hansard*, no. 12, 1993, p. 3355 (22 November 1993); Senator Crane, *Senate Weekly Hansard*, no. 14, 1993, p. 3897 (6 December 1993).

152 *Victoria v. Commonwealth* (1996) 187 CLR 416 at 487, 496.

153 L. Brereton, *House of Representatives Weekly Hansard,* no. 10, 1993, p. 2782 (28 October 1993); P. Slipper, *ibid.*, no. 11, 1993, p. 3077 (17 November 1993); Senator Sherry, *Senate Weekly Hansard*, no. 14, 1993, p. 3951; *Industrial Relations Act 1988-93*, ss. 170NA(1), 170NC(1)(c).

154 *House of Representatives Weekly Hansard,* no. 10, 1993, p. 2782 (28 October 1993); *Industrial Relations Act 1988-93* (Cwlth), ss. 170NC(1)(b), inserted by *Industrial Relations Reform Act 1993* (Cwlth).

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158 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.

159 *Ibid*., p. 334.

160 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*, no. 12, 1996, pp. 4719-21.

161 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.

162 *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.

163 *Workplace Relations Act 1996* (Cwlth), s.89A(7). The Commission may also make an award covering non-allowable matters if it has terminated the bargaining period: ss.170MW, 170MX.

164 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.simplerwrsystem.govau/discussion/outsidersinside.htm#alternative] (18/11/00), and supporting discussion papers located at this site. For an analysis of this proposal, see Andrew 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], (20/1/01).

165 Justice Michael Kirby, 'Industrial Relations in the "Frozen" Continent', A*ustralian Journal of Labour Law,* vol. 2, 1989, p. 5.

166 See Carol Fox and Marilyn 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.

167 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).

168 *Consolidated Register of Senate Committee Reports 1970-1988*, Senate Committee Office, Canberra, 1998, pp. 174-176.

[169] 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, 2000, p. 263; Neil Williams and Andrew Gotting, 'The Interrelationship between the Industrial Power and other Heads of Power in Australian Industrial Law', *Australian Bar Review*, vol. 20, 2000, pp. 265-82.