



A U S T R A L I A N
I N D U S T R I A L
R E L A T I O N S
C O M M I S S I O N

Historical Overview

The Australian Industrial Relations
Commission

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This booklet sketches the historical background to the Australian Industrial Relations Commission.

The 1890s and Federation

The establishment of special tribunals in Australia for industrial relations purposes had its origins in the major strikes of the 1890s. These bitter struggles between capital and organised labour caused widespread dislocation and distress. The damage done to the social and economic fabric of colonial society led to a growing community belief that, if employers and unions could not resolve their disputes, then they should be required in the public interest to submit their competing claims to an independent third party for arbitration: a 'new province for law and order' should replace what had become the law of the jungle.

By the end of the first decade of the 20th century all States (previously colonies) of the recently-formed federal Commonwealth of Australia and the Commonwealth itself had established industrial tribunals.

Another development during the 1890s was the Australian colonies' move towards political federation. Arrangements for a federal Commonwealth of Australia were developed in a series of conventions which drafted a Constitution (or body of fundamental principles according to which a country is governed) for the proposed federation. As part of this process the main industrial relations power of the

Commonwealth was written into the Constitution as section 51, placitum xxxv, namely that the Commonwealth Parliament has 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*'.

Federation was achieved when the Commonwealth of Australia came into existence on 1 January 1901.

First 50 years 1904-56: from establishment of the Arbitration Court to the Boilermakers' case

The first federal industrial tribunal - the Commonwealth Court of Conciliation and Arbitration - was established under the *Conciliation and Arbitration Act* passed by the Federal Parliament in 1904. The Court which initially consisted of a High Court judge had both arbitral and judicial powers; that is it could make an award specifying wages and conditions of employment in settlement of an interstate dispute and it could interpret and enforce the award, if necessary imposing penalties on any party to the award who did not comply with its provisions.

The Act also provided for the registration of organisations of employers and employees (unions).

The federal system had a slow beginning - the Court made only six awards in its first five years and in 1910 Higgins J, the President of the Court at the time, noted that the approach to the Court was through a '*bog of technicalities*'. Higgins J is perhaps best remembered as the author of the famous Harvester judgment in 1907 [Ex parte HV McKay (Harvester Case) (1907) 2 CAR 1] which established the concept of the basic or foundational wage, a component of federal award wages for 60 years. The Bruce Government was defeated over its attempt to withdraw the Commonwealth from industrial relations regulation (excluding the maritime industry) in favour of the States in the late 1920s. By this time, the federal tribunal had increased its influence rapidly relative to the influence of state tribunals.

The Court was completely reconstituted in 1926 to comprise a Chief Judge and other judges and the legislation then contained:

- explicit reference to the basic wage and provision that cases relating to it, together with those concerning hours of work, be heard by a multi-member or Full Bench;
- provision for the Commonwealth Attorney-General to intervene 'in the public interest' in basic wage and hours cases - this facilitated the Federal Government putting submissions to the Court; and
- provision for the appointment of Conciliation Commissioners to assist parties to reach agreements - at first only one was appointed and his term came to an end in 1934, but ten had been appointed by the end of 1944.

The *Conciliation and Arbitration Act 1904* was amended in 1947 to enhance the role of Conciliation Commissioners, and to separate the roles of the Court and the commissioners. The Court was confined to judicial functions (interpretation and enforcement) and arbitration in respect of four specified matters, namely basic wage, minimum female wage, hours of work and paid annual leave. All other matters were left for Conciliation Commissioners. This separation led to concern about consistency of approach and amendments to the Act in 1952 sought to enhance co-ordination between judges and commissioners.

Arbitration Commission 1956-1988

The conciliation and arbitration machinery underwent a fundamental change in 1956 following the decision of the High Court in the *Boilermakers' case [R v. Kirby and others; ex parte the Boilermakers' Society of Australia]* (1955-56) 94 CLR 254.

The High Court held that it was unconstitutional for the Commonwealth Court of Conciliation and Arbitration to be vested with both arbitral and judicial powers because of the acceptance in the Constitution of the separation of legislative and judicial powers. As a result, the *Conciliation and Arbitration Act 1904* was amended to establish two separate bodies:

- the Commonwealth Conciliation and Arbitration Commission (renamed the Australian Conciliation and Arbitration Commission in 1973) to exercise the conciliation and arbitration power; and
- the Commonwealth Industrial Court (which in 1977 became the Industrial Division of the Federal Court) to exercise judicial power.

Most of the members of the old Court were appointed to the Arbitration Commission.

The Commission consisted of a President, Deputy Presidents, a Senior Commissioner, Commissioners and (non-member) Conciliators. The presidential members had to be either judges of the old Court or lawyers of five years' standing. No formal qualifications were required for commissioners and conciliators. It was envisaged that day-to-day work within the Commission would be the function of commissioners and conciliators, leaving the presidential members to deal with matters of larger importance.

The President allocated industries or disputes to members. Full Benches were of three kinds:

- the Commission in presidential sessions (at least three such members) to determine the basic wages of both males and females, hours of work and paid long service leave;
- matters referred 'in the public interest' to be heard by a bench of mixed (presidential and non-presidential) composition; and
- appeal benches, again of mixed composition.

Some of the flavour of the change in arbitration proceedings after 1956 is conveyed in the following comments made by the inaugural President of the Commission, Sir Richard Kirby, as part of a review of the Commission's first decade of operation:

'For the first time Judges and lay Commissioners became jointly members of a Commonwealth arbitration tribunal often sitting together as members of full benches and each helping the other with their different types of training and experience . . . Another change associated with the setting up of a Commission in preference to a Court lies in the more relaxed and less formal conduct of proceedings before single members and full benches which is to some extent symbolised by the discarding early in the Commission's history of wigs and gowns by Judges and members of the legal profession.'

[President's Tenth Annual Report to Parliament for the year ended 13 August 1966]

This booklet has noted the 1907 Harvester judgment and made reference to basic wages. The Harvester judgment was the first attempt at establishing a wage based upon needs, below which no worker should be expected to live. In that case Higgins J said that a 'fair and reasonable wage' for an unskilled labourer would be based on 'the normal needs of the average employee, regarded as a human being living in a civilized community' [at p.3]. The rate determined was based on the households of unskilled labourers, after taking into account the household expenditure costs covering the 'modest requirements of the worker's household'. The wages required by a worker to live in a civilised community were described by Higgins J in a later decision as the 'living wage' which ultimately became known as the 'basic wage'.

In 1919 the government established a Royal Commission (the Piddington Royal Commission) for the purpose of inquiring into the actual cost of living [*Report of the Royal Commission on the Basic Wage*, Commonwealth Parliamentary Papers, 1920-21, Vol. IV] and in 1922 the Court introduced the system of automatic quarterly cost of living adjustments. Inquiries into the basic wage were held over the subsequent decades until the Commission abolished the basic wage as a component of wages in the 1967 National Wage Case [(1967) 118 CAR 655]. In its 1967 decision the Commission introduced the system of expressing wages as total wages, but retained a minimum wage. The adjustment of the minimum wage ceased in the 1970s, however, and its relevance to contemporary standards thereafter declined.

In 1972 a number of changes were made to the structure and operation of the Commission. These included:

- creation of a panel system whereby the President assigned members to panels, consisting of a presidential member and commissioners, who were responsible for specified industries/sectors of employment with the presidential member heading the panel and organising and allocating its work;
- standardisation of Full Bench composition for all purposes to three or more members with at least two presidential members;

- alteration of qualifications for Deputy President to enable appointment of suitable people who were not lawyers, leaving the President as the only member required to be legally qualified; and
- abolition of the positions of Senior Commissioner and Conciliator.

In 1983 the newly-elected Hawke Government announced the first comprehensive review of the federal system of industrial relations since the original *Conciliation and Arbitration Act* was passed in 1904. A three person committee chaired by Professor Hancock conducted the review and presented a comprehensive report to the Government in April 1985. The report recommended the retention of the conciliation and arbitration system but accepted that it needed revision and efforts made to improve its operation.

Australian Industrial Relations Commission

After consideration of the Hancock recommendations, the Government introduced a legislative reform package, the centrepiece of which was the repeal of the Conciliation and Arbitration Act and its replacement by the *Industrial Relations Act 1988*. The new Act completely revised the provisions of the old Act and, while maintaining most of its predecessor's substance, introduced a number of changes to federal industrial arrangements. These included:

- establishment of the Australian Industrial Relations Commission to replace the former Arbitration Commission and three specialist tribunals covering the maritime industry, public sector employment and airline pilots;
- establishment of the Australian Industrial Registry as a statutory authority to replace the former Office of the Industrial Registrar which carried out administrative arrangements for the Commission;
- provision for persons to hold dual appointments on the Commission and a State industrial tribunal;
- creation of a new Commission position of Designated Presidential Member with responsibilities for matters such as registration, amalgamation and major rule changes of employer and employee organisations; and
- revised provisions about registered agreements and demarcation disputes.

During the latter part of the 1980s the nature of national wage cases was changing to reflect changes in the economic environment in which the Commission was operating. Beginning in 1987, the Commission in a series of national wage decisions sought to provide a framework to encourage the industrial relations parties to improve efficiency and productivity. The framework was provided by the wage fixing principles set out in those decisions. The principles sought to regulate improvements in award wages and conditions by increasingly linking such improvements to award modernisation and workplace reform.

A related development was widespread debate about the need and scope for the implementation of enterprise bargaining in the Australian context. The growing focus on enterprise bargaining led to the amendment of the Industrial Relations Act in 1992 to facilitate approval or certification of agreements by the Commission. The same amendment also created the new Commission offices of Vice President and Senior Deputy President.

Industrial Relations Reform Act 1993

The Keating Government, soon after winning the March 1993 election, signalled a major policy thrust in industrial relations and indicated that the Government was working towards a model of industrial relations which placed:

'primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals . . . (and) . . . under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.'

The outcome of action on this front was major amendments to the Act contained in the *Industrial Relations Reform Act* passed in December 1993.

The Reform Act, which came into effect on 30 March 1994, made major changes to federal industrial relations arrangements, perhaps the most far-reaching in the ninety year history of those arrangements. The constitutional underpinning of the Reform Act was a major change in itself: whereas previously there were only a small number of provisions in the Act based on the external affairs and corporations powers of the Constitution, significant parts of the new Reform Act had their jurisdictional basis in these powers.

In brief, the main changes introduced by the Reform Act were:

- encouraging and facilitating workplace and enterprise bargaining and agreements;
- protecting wages and conditions of employment through awards;
- ensuring labour standards meet Australia's international obligations;
- providing a framework of rights and responsibilities for the parties involved in industrial relations consistent with a less centralised system;
- preventing and eliminating specified forms of discrimination;
- inclusion of provisions on secondary boycotts - these replaced and amended provisions previously in the Trade Practices Act; and
- establishment of a specialist labour court (the Industrial Relations Court of Australia) to take over functions previously exercised by the Industrial Division of the Federal Court, and receive applications alleging unlawful termination under the minimum entitlements provisions on termination of employment.

Further, the Act had been restructured with distinct parts dealing with the award system, minimum entitlements of employees, promoting bargaining and facilitating agreements and paid rates awards. The Act clearly distinguished between the arbitrated award safety net and the bargaining stream. It intended that the actual wages and conditions of employment of employees would be increasingly determined through bargaining at the workplace or enterprise.

Workplace Relations Act 1996

On 25 November 1996 the Workplace Relations and Other Legislation Amendment Act 1996 (the WROLA Act) received Royal Assent. The WROLA Act states that it is 'An Act to amend the Industrial Relations Act 1988, and for other purposes. Upon the WROLA Act receiving the Royal Assent, the short title of the Industrial Relations Act 1988 was changed to the *Workplace Relations Act 1996*.

The amendments addressed the Howard Government's priorities in reshaping the Australian industrial relations system. The new framework supported a more direct relationship between employers and employees, with a much reduced role for third party intervention and greater labour market flexibility.

In brief, the key changes involved:

- maintaining the award system to provide a safety net of fair and enforceable minimum wages and conditions;
- providing for effective choice and flexibility in reaching both collective and individual agreements;
- confining the AIRC's arbitral role, so as to avoid inappropriate interaction between agreements and awards;
- ensuring greater employee choice about representation and removing uninvited union involvement in the bargaining process; and
- replacing the unfair dismissals provisions with a system based on a 'fair go all round'.

Referral of Victorian industrial relations powers to the Commonwealth

Section 51(xxxvii) of the Constitution empowers the Commonwealth to make laws with respect to "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".

In 1996, the Victorian Parliament referred aspects of its industrial relations powers to the Commonwealth and abolished the Employee Relations Commission of Victoria. As a result of this historic referral of powers from the Victorian Government, the *Workplace Relations and Other Legislation Amendment Act (No. 2) 1996* amended the

Workplace Relations Act 1996 by insertion of a new Part XV using the additional Commonwealth legislative capacity provided by the reference of certain matters to the Commonwealth Parliament by the *Commonwealth Powers (Industrial Relations) Act 1996 (Vic.)*.

The main effects of Part XV were to provide for the additional operation in Victoria of a number of provisions of the *Workplace Relations Act 1996* and for the preservation and maintenance of minimum conditions of employment for Victorian employees.

In 2003-04 the Victorian Government and the Commonwealth Government agreed to further changes including:

- improving the minimum employment conditions for Victorian employees; and
- introducing provision for Common Rule Awards in Victoria.

Work Choices Act 2005

In December 2005, the Australian Parliament passed legislation substantially amending the *Workplace Relations Act 1996*. The aim of the *Workplace Relations Amendment (Work Choices) Act 2005* was to introduce a simpler, more flexible, national industrial relations system based primarily on the Corporations Power of the Australian Constitution.

The legislation largely came into effect on 27 March 2006. It substantially changed the role of the Commission although dispute resolution remains a core function.

Copies of the *Workplace Relations Act 1996*, Workplace Relations Regulations, and Australian Industrial Relations Commission Rules are available on the AIRC website at www.airc.gov.au.

Parts of this booklet draw heavily upon material in the report of the Committee of Review of Australian Industrial Relations Law and Systems (AGPS April 1985), known as the Hancock Report.

Note - this document is currently being reviewed.

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This document has been prepared by the Australian Industrial Registry. It is not intended to be comprehensive, but is designed to assist in gaining an understanding of the Commission and its work. The Registry does not provide legal advice.