

BOOK REVIEW*

*The New Province for Law and Order:
100 Years of Australian Industrial Conciliation and Arbitration*

JOE ISAAC and STUART MACINTYRE

(Cambridge University Press, Melbourne, 2004) xxii + 431 pages
Recommended retail price A\$79.95 (ISBN 0521 84289 1)

As is well known, in 1904 the Australian Parliament enacted legislation to establish a labour court, which was titled the Commonwealth Court of Conciliation and Arbitration. The idea, which had already been implemented in New Zealand and New South Wales (and to a lesser extent in Western Australia), was to bring about industrial peace by requiring trade unions and employers to conciliate their differences and to agree on terms and conditions of labour. Where conciliation failed, the labour court was empowered to arbitrate a settlement between the disputants. These arbitrated settlements were in the form of awards which prescribed wage rates and other terms and conditions of employment in the relevant industry and/or occupation in dispute. Throughout most of the twentieth century, our network of federal and state labour courts and commissions established a grid of awards which specified rates of wages and other terms and conditions of employment like hours of work, annual leave, unpaid parental leave and superannuation entitlements throughout Australia.

The Australian Parliament was able to establish the labour court because the *Australian Constitution* that came into force in 1901 expressly dealt with labour relations. What has become known as the ‘labour power’ – section 51(xxxv) of the *Constitution* – provides that the federal Parliament may enact laws with respect to the prevention and settlement of interstate industrial disputes by conciliation and arbitration. Thus our *Constitution* guaranteed working women and men that their wages would be determined by machinery which was independent of government, of capital and of labour. Fairness in the distribution of the gains in national productivity became a hallmark of our system.

In 1956, after adverse rulings in the High Court and eventually in the Privy Council, the functions of the labour court were reposed in other bodies. The powers to conciliate and arbitrate were given to a Commission which is now called the Australian Industrial Relations Commission. The judicial powers of the labour court are now exercised by the Federal Court of Australia.

This splendid volume, which has been edited by Professor Emeritus Joe Isaac, himself a former Deputy-President of the Australian Industrial Relations Commission, and the historian Professor Stuart Macintyre, is a thematic history

* Professor Ron McCallum, Dean, University of Sydney Law School.

of the last hundred years of federal conciliation and arbitration. The chapters give a thorough assessment of the work of the labour court and the Commission, and it was fitting for this book to have been launched at the Centenary of Arbitration Conference, held in Melbourne in October 2004. This volume is adorned with photographs and cartoons which illuminate the story of federal conciliation and arbitration in Australia, and is rounded off with three useful appendices.

The eight essays, which together with a useful introduction make up this volume, in my view fall into three sections. The opening contribution by Tim Rose traces the political origins of conciliation and arbitration, from the debates over the first *Commonwealth Conciliation and Arbitration Act* of 1904, to the recent political struggles over the place of conciliation and arbitration in our nation. Stuart Macintyre then examines what he calls 'arbitration in action'. In other words, he focuses upon the mechanics of the operation and administration of conciliation and arbitration by looking at the change from a court to a commission, together with the work of the judges and presidential members of these bodies. In their chapter which concludes the first section, Breen Creighton and Justice Michael Kirby of the High Court of Australia, himself a former judge of the Conciliation and Arbitration Commission, thoughtfully analyse the role that the *Australian Constitution*, as interpreted by the High Court of Australia, has played in the evolution of conciliation and arbitration.

The two chapters comprising section two are my favourites. Keith Hancock, also a former Deputy-President of the Commission, and Sue Richardson examine the roles of the labour court and the Commission in setting rates of wages from the famous *Harvester Case* of 1907, to the establishment of enterprise bargaining in the early 1990s when awards became safety nets for those with limited bargaining power, and finally right up to the turn of the millennium. They show how the wage fixing methods of our conciliation and arbitration machinery distributed productivity gains on an industry-wide basis throughout the nation. They are careful in their overall assessment of wage fixation and show that its impact on levels of unemployment, movements in prices, inflation or productivity are difficult to assess with exactitude. After all, any assessment of the fixing of wages will be affected by our social and economic values. For my part, I believe that the establishment of wage rates on a national basis for most of the 20th century did distribute increases in our national productivity on a reasonably egalitarian basis, which helped in the welding together of our nation.

In her chapter, Gillian Whitehouse examines the plight of Indigenous Australians and women under federal conciliation and arbitration. It is clear that for the first 60 years of the previous century, the arbitration tribunals by and large regarded the primary roles of women as those of mothers and homemakers. It was only with the federal equal pay decisions of 1969 and 1972–73 and those of the state tribunals, that attention was paid to gender equality in the workplace. In my view, from 1969 to the establishment of full-blooded enterprise bargaining in March 1994, conciliation and arbitration played a significant role in narrowing the gender wage gap.

Gillian Whitehouse recounts the difficulties that Indigenous workers had when seeking to obtain equal wages with their white sisters and brothers throughout the

first two-thirds of the 20th century. She highlights the cattle industry decision of 1966 which granted Aboriginal stockmen just wages in the cattle stations. It does seem to me that the labour court and the Commission moved slowly in opposing gender and racial discrimination in wages. While the arbitration judges were not in the vanguard in these human rights campaigns, nevertheless they did hand down significant decisions which went a long way to redressing long-standing wages imbalances with respect to women and Indigenous Australians.

The final three chapters of this volume make up its third section. In their respective chapters, David Plowman examines the role of employers, while Malcolm Rimmer looks at the place of the trade unions in conciliation and arbitration. Finally, Bill Harley analyses the difficult issue of managing industrial conflict within a framework of law which has been dominated by conciliation and arbitration. All three chapters are thoughtful perspectives which give depth to this book.

The three appendices which conclude this volume make interesting reading. Appendix One details the main changes to the labour court and to the Commission over the last hundred years. A list of the members of both the labour court and the Commission is set out in Appendix Two. Finally, Appendix Three details the changes in the objects of the federal labour law legislation from its inception with the passage of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), right up to what is now the *Workplace Relations Act 1996* (Cth).

At the time of writing, the Australian Government has announced that it wishes to make major changes to our federal labour laws. Under these proposed alterations, the Industrial Relations Commission will no longer be able to set minimum wages, as this power will be given to a new Fair Pay Commission. Collective agreements will no longer be certified against underlying award conditions by the Industrial Relations Commission. Instead, the Office of the Employment Advocate will approve collective and individual statutory agreements as against a list of minimum conditions, including a minimum wage.

As the government has a majority in both houses of the federal Parliament, it does appear that these changes will make their way onto the statute books. Why then should people read this thematic history of conciliation and arbitration? In my judgment, this volume is essential reading for thoughtful Australians who are confronted by these proposed changes to our labour laws which mark a sharp departure from our past. The proponents of these new laws argue that Australia will be better served when wages are mainly determined by the economic market forces of supply and demand. The idea that the discipline of the economic marketplace should drive key aspects of national economic and social policy is at its zenith. In time, it will become clear that good government necessitates regulation of market excesses which have serious social consequences. At this time, it is books like this thematic history of conciliation and arbitration that will show the way ahead when we once more will grapple with the creation of a fairer and more humane method of regulating Australian labour relations.