INTRODUCTION

On 15 December 1904 *An Act relating to Conciliation and Arbitration for the Prevention and Settlement of Industrial Disputes extending beyond the Limits of any one State* received assent, establishing the Commonwealth Court of Conciliation and Arbitration. The passage of a century in the life of an important Australian institution, and one that is almost unique in the world, is a suitable occasion to reflect on its history. It is a story rich in drama involving strikes, lockouts, imprisonment of union officials, noisy protests in courtrooms and in the streets, momentous High Court judgments, and the rise and fall of governments. Some of the States were ahead of the Commonwealth in industrial regulation. Victoria had set up the wages board system in 1896; Western Australia established compulsory arbitration in 1900, to be followed by New South Wales in 1901. But as time passed, the federal body led the others in many important decisions and took centre-stage in industrial relations. It has been a subject of controversy through most of its existence and an enormous literature, popular and academic, has grown about it.

This volume draws on a number of distinguished scholars to present a thematic history of the federal system. Each tells a story of change and the adaptive evolution of the institution at the centre of the system. That institution itself has undergone many changes – in name, jurisdiction, functions, procedures, style, composition and structure. Its path over 100 years has been anything but

smooth. It has been buffeted by powerful social and political forces, by major stoppages and economic problems – mass unemployment, high inflation, balance of payments crises – that have challenged its operation. It has met with opposition from all sides – unions, employers and government – sometimes singly and sometimes in combination. It has been challenged in the courts and in the field on numerous occasions. Referenda to extend its powers have been rejected repeatedly, although the single attempt to abolish it failed.

What is the secret of its continued survival? Is it, as one employer quoted by Plowman put it, because 'the arbitration tree is rooted in the community', a way of industrial life? Is it because of the Australian belief in the prospect of 'a fair and reasonable' decision from the umpire despite the frequent disappointment of one side or another with the umpire's decision? Can we measure the contribution the system has made to the country's economic performance? Can we disentangle its influence from those of other forces? Has the system contributed significantly to industrial peace, one of the main hopes of its founders? Has its ability to adapt chameleon-like to the changing environment in which it operates been an important factor in its survival?

The contributors propose no single, comprehensive explanation of the durability of the system, but they offer instructive insights into its operation. From different perspectives they reveal that the limited expectations of those who established the institution were soon overtaken. Those who were responsible for its operation came to see new functions as necessary and desirable in pursuit of its charter to secure industrial peace and protect the public interest; the parties that appeared before the tribunal sought further outcomes; the High Court read and re-read the broadly phrased provision of its constitutional foundation, and federal governments repeatedly altered its charter.

Each chapter takes up a theme of federal conciliation and arbitration, and explores it over 100 years of change. In some cases, the authors describe changes that have altered the system dramatically; in others, they follow developments that have taken it back almost full circle to its original design. Because the authors are all concerned with different aspects of the same institution, it is inevitable and indeed desirable that the chapters share common ground.

Tim Rowse deals with the political history of conciliation and arbitration. He provides an account of the original debates on the novel principle of industrial

arbitration, the tortuous passage of the arbitration bill through parliament, the participants in this protracted argument and their points of difference – whether seamen on foreign vessels in coastal shipping and State public servants should be covered, and whether union preference should be available. Two new governments had to be formed before the bill became law. There was no agreement on the need for such a system and opposition continued to its early operation; this reluctance to accept a system of conciliation and arbitration has resurfaced periodically and is revealed by Rowse as inherent in its very nature: 'The legislative history of the Commonwealth's arbitration law is an exploration of the restless marriage between capitalism and liberal democracy, a restlessness manifest in the strivings of Australian politics to reform arbitration'. Trade unions, employers and the political parties have all exhibited an ambivalence about the requirements of the system. Rowse takes the reader through the century, highlighting the times of trouble for the system in the constantly changing economic, social and political climate.

In speaking to the Conciliation and Arbitration Bill in 1903, Deakin said that 'The Bill has been drawn from first to last, looking at the employer and employee with equal eyes, with a view to bringing them before the Bar of the tribunal where . . . they shall have meted out to them evenhanded justice' (*CPD* 30 July 1903: 2883). Rowse claims that this 'middle ground' eluded the system. One of the underlying issues he identifies in the early life of the system, which has returned in more recent times with the *Workplace Relations Act 1996*, is whether the employer–employee relationship 'is a contract between equals' or whether 'it is deeply and radically unequal'.

Stuart Macintyre provides an account of arbitration in action. This chapter is concerned with the structure, composition and operation of the tribunal. It follows the repeated reconstitution of the original Court of Conciliation and Arbitration into the present Industrial Relations Commission. (The change from a Court to a Commission occurred in 1956, and the contributors use these specific titles to refer to the tribunal in the respective periods as well as that generic term.) Macintyre examines the personnel who composed the tribunal and how they conducted their work. He also describes the work of the Registrar and other officials who contributed to the operation of the system, and he traces its growth from a makeshift institution conducted by part-time officers into a

large and complex organisation. Attention is paid to its distinctive practices and customs, the efforts to rationalise its operation and to constrain its independence. The Australian system of conciliation and arbitration emerges from this chapter as a place of routine and drama, an instrument of adjudication and a forum where claims were argued and central aspects of industrial and working life were determined.

One of the themes in this chapter is the tribunal's mode of operation. It was established as a Court but was to operate 'without regard to technicalities or legal forms'. It was to combine conciliation and arbitration of industrial disputes, but a characteristic of the system was that, when conciliation failed, arbitration was compulsory and the Court's awards binding. A senior judge presided, and unlike the systems created in New Zealand and the Australian States, there was no provision for representatives of employers and unions to sit alongside him. Throughout the early decades there was persistent argument over the role of lawyers in the system: employers wanted legal representation, unions resisted their appearance and the technicalities they raised. In a characteristically pragmatic solution, the system developed along dual lines of Court hearings of major cases, with counsel present, and other matters going to lay Commissioners who operated more informally. The judicial tendencies reached a peak under the autocratic Chief Judge Kelly in the 1950s, and led to the reconstitution of the system in 1956. The new Commission dispensed with many of the earlier judicial trappings and developed closer coordination with the work of the lay Commissioners.

In telling the legal story, Michael Kirby and Breen Creighton begin with a discussion of theories of constitutional interpretation. They note that the area of constitutional law dealing with the federal arbitration 'illustrates more vividly than most the impact upon constitutional exposition of the forces of history, economics, national values and survival as well as the forces of changing legal doctrine and political and social needs'. The restrictive approach of the High Court's early interpretation of the Commonwealth's industrial power gave way progressively to a view granting wider jurisdiction to the tribunal, giving it power going well beyond the founding fathers' assumption that it would be used 'in exceptional circumstances such as the disputes of the 1890s'. As noted by Kirby and Creighton, and also David Plowman, the legal challenges by the employers

to the jurisdiction resulted paradoxically in its extension. On the other hand, the High Court has maintained its insistence on the separation of powers, and on two occasions – in 1918 (*Waterside Workers* case, 25 CLR 434) and in 1956 (*Boilermakers* case, 94 CLR 254) forced reconstitution of the tribunal. By the time the remaining important limitation on the tribunal's national coverage was removed in the 1985 *Social Welfare Union* case by the High Court's abandonment of the esoteric meaning given to the term 'industrial disputes', federal legislation confined the scope for centralised determinations to the 'safety net'. Collective bargaining at the enterprise level came to apply to nearly 80 per cent of those under federal coverage.

The role of the tribunal as a maker of economic and social policy is assessed by Keith Hancock and Sue Richardson against a range of economic statistics for most of the century. Those who set the system in motion in the early years of the twentieth century intended it to prevent and settle industrial disputes, and they hardly envisaged it would exercise such a wide influence on the economy. Much of that expansion of its economic role was not based on deliberate choice, despite a great deal of tinkering with the legal and structural basis of the system. What was expected to be a minor adjunct of collective bargaining became, as a result of unfolding events, an instrument of economic and social policy.

The process began with Henry Bournes Higgins, the second president of the Court of Conciliation and Arbitration and one of the leading proponents of 'a new province for law and order', as he was to characterise the system. He formulated principles that continued to be applied long after he had departed from the scene. But other developments were far from his contemplation, and these are amply discussed in a number of the chapters that follow. He was initially reluctant 'to devise great principles of action as between great classes, or to lay down what is fair or reasonable as between contending interests', since he held that 'it is the function of the Legislature, not the Judiciary, to deal with social and economic problems' (*Harvester* case, *Ex parte HV McKay* (1907) 2 CAR 1). Before long, however, he reached the conclusion that 'One cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials of human existence' (Higgins 1922b: 6). This provided the rationale for the basic wage and it had an important social content. But, as Hancock and

Richardson show, the elusive meaning of the 'minimum needs' of a family unit did not deter Higgins from determining such a minimum wage as a first call on industry. In time, with family endowment and other benefits being provided outside the wage system, this concept lost currency.

It is worth noting in passing that Higgins did not invent the concept of the basic wage. It would appear from the wording of some of his pronouncements that he drew from the Papal Encyclical *Rerum Novarum* of 1891, which said that 'there is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage-earner in reasonable and frugal comfort' (Timbs 1963: 24). The same concept had been proposed by Sir Samuel Griffith in a bill to the Queensland Parliament in 1890, while Higgins' counterpart in the New South Wales tribunal had provided a similar justification for a family basic wage in 1905, two years ahead of him.

The basic wage as determined by Higgins was not only the minimum for 'purely' unskilled work, it became the 'foundational' component of all award wages: an additional amount, the 'margin' or the 'secondary wage', was awarded for skill, responsibility and other job requirements beyond 'purely' unskilled work. The effect of this classification of wages was momentous because an increase or decrease in the basic wage set in motion a national wage movement affecting a considerable part of the national wages bill. Such movements, often reinforced by corresponding changes in State basic wages, had economic implications going beyond considerations of 'minimum family needs'. The capacity of the economy to support such wage increases became a vital element for consideration. Consequently, the tribunal had become an arm of economic policy-making, not intentionally but by the accident of its early wage principles. This was reinforced when, before long, the margin of the basic tradesman classification in the metal industry became the yardstick for other categories of skills, and on the principle of 'fairness', this margin became the source of general increases in margins. By the 1960s, the two sources of wage movements, relying on similar national economic considerations, were compounded into one, and in 1966 the 'total wage' concept came into existence. The basic wage came to an end, its place taken by the 'national minimum wage', now no longer a foundational element but a 'wage floor'. And so it has been ever since.

Institutions that are given a broad charter in wage policy have the potential to be swept in unexpected directions, like the Sorcerer's Apprentice, by the forces they unleash. At least that is how it must have seemed to employers in the early life of the system, as narrated by David Plowman. But in truth, an industrial tribunal of the kind under discussion, with substantial statutory discretion available to it, must perforce work in a world of change, often unforeseen and unforeseeable. In such circumstances its functions must be expected to evolve so that it can discharge the essential terms of its broad charter, namely settling industrial disputes in the public interest. In this connection, the somewhat anomalous 'judicial' approach taken by the institutions in the first half-century of its existence gave way to a more realistic understanding of how it operated, namely as a quasi-legislative body adjudicating on wages and conditions of work.

In formulating its principles, the tribunal has found it necessary to search for standards of 'justice' not from the common law or earlier determinations, but from community values and the expressions of such values from the submissions of those who appear before it. While such values must obviously be considered in conjunction with economic considerations, it is no use devising principles that are unacceptable to a large section of the industrial community. The circumstances of mass unemployment in the 1930s were different from those of full employment in an economy largely sheltered from international competition during the 1960s and 1970s, and different again from the circumstances of the 1990s of less than full employment in an open economy. Each presented different industrial relations problems calling for different approaches from the tribunals.

Sir Richard Kirby understood this; hence his willingness to practise 'accommodative' arbitration, as did his successor Sir John Moore, setting the standard practice for the future. In Kirby's words (1970: 4):

> . . . there will be a better understanding of the workings of the Commonwealth conciliation and arbitration system, if we look at the Commission as a key-stone of our industrial relations system, rather than as a legal institution or an economic policy maker . . . the Commission should not attempt to impose unacceptable solutions on the parties involved simply because of its legal position.

This is evident from the various cases discussed by Keith Hancock and Sue Richardson, who point out that 'the tribunal from time to time found it necessary to adapt its policies to the limitations of its *de facto* power'.

The rampant wage inflation of the 1960s and early 1970s brought an even more difficult national wage policy role for the Commission. It became, not by legal power but by the substantial consensus among the parties and governments, part of a set of economic policy instruments to tame the destructive effects, on employees no less than on employers, of wage inflation. But its part depended not only on economic considerations of the kind that the Reserve Bank or the Treasury, for example, saw as desirable, but also on what was possible without industrial upheaval of an order that would negate the desired economic benefits. To this end, on assurances from the parties and the ACTU in particular, about their commitment to wage restraint, it formulated new principles which included indexation intended to be applied generally, including to those covered by State tribunals. The federal tribunal was now sitting on the very peak of centralised industrial determination, not so much as a policy-maker but more as a vital facilitator – or, to use Hancock and Richardson's term, an 'industrial policeman' working by consent of the parties. The short-lived success of this policy was followed later by the Accord, which returned the Commission to a centralised role, again short-lived.

These developments are narrated and analysed by Hancock and Richardson and need not be repeated here. The Acts of 1993 and 1996 effectively marked an end to this role and set in motion a 'bifurcated wage system' – decentralised enterprise-based collective bargaining and a limited centralised function for the Commission to determine a 'safety net' for a small minority, 'a disadvantaged class of wage earners', still clutching at the awards of the system because of their weakness in collective bargaining. In an undefined and unquantifiable form, the social wage concept lingers on within the safety net. For section 88B of the current *Workplace Relations Act 1996* requires the Commission to 'ensure that a safety net of fair minimum wages and conditions of employment is established and maintained', having regard among other things 'to the needs of the low paid'. In a sense, the tribunal has come back to something close to Higgins' view of its function, but now with greater statutory restriction on its discretion and in circumstances of greatly weakened union power. For those employees

with limited capacity to engage in collective bargaining, the tribunal remains a significant guardian of their living standards.

A review of the tribunal's part in wage policy over a century prompts the question of how it has contributed to the economy's performance. Hancock and Richardson, after a close analysis, are unable to give an unambiguous answer to this question. There are too many interacting forces at work to allow the tribunal's actions to be isolated with much confidence. On the issue of employment and unemployment, they maintain that 'There are few suggestions that the catastrophe of 1929–34 was significantly due to wage policy . . . It is unlikely that tribunal policies go far toward explaining either the low unemployment levels of the 1940s, 1950s and 1960s or the high levels of the 1930s and the last quarter of the century'. The net contribution of federal arbitration to inflation is 'unanswerable', but they admit that it may have a short-term role as during the Accord years. They also discount the contribution of the system to productivity movements, including the recent productivity growth accompanying enterprise bargaining.

Has the system produced greater wage equality? International comparisons would suggest an affirmative answer, but would rest on 'heroic' assumptions. In this connection they refer to the findings of Borland and Woodbridge (1999: 109) that 'the Australian system has reduced inequality of earnings, particularly by raising the relative pay of low paid workers; that female, part-time, immigrant and young workers have particularly benefited from the Australian system, in terms of wages'. They further refer to the study of Gregory and Duncan (1981) that the Commission's equal pay decisions of 1969 and 1972 caused a marked compression in gender-related pay differences.

Thus, the system's overall economic contributions remain unresolved, although this does not mean that Hancock and Richardson imply that the system could be abolished without adverse economic consequences. Moreover, they see the reduced award-making role of the Commission in recent years as having produced a divided society, which allows the industrially strong and those with scarce skills to do well, leaving a 'disadvantaged class of wage earners' reliant on the safety net and the protection of social security which, 'however generous cannot replace the tribunal's historic role in enforcing a fair day's pay for a fair day's work'.

The 'greater prospects of the establishment of social justice and the removal of inequalities' envisaged by Deakin came late for Indigenous and women workers, an aspect of 'wage justice' explored by Gillian Whitehouse. Higgins applied the concept early in the life of arbitration to male workers, the breadwinners as he saw them. Women he regarded as temporary participants in the workforce, holding that their proper place was as carers of households, and the measure of wage justice based on that tenuous logic produced a lower female wage for equal or even superior economic performance. However, where women offered competition to male workers and threatened the latter's livelihood, they were to be paid the same wages as men. It was a tidy industrial world: there were traditional male jobs and female jobs, male rates and female rates. Labour scarcity during two world wars and technological changes opened up increasing employment opportunities for women, making a dent in this logic, but it generally applied well into the second half of the twentieth century.

Discrimination against Indigenous workers occurred in other ways, although much of it was outside the wage determination system. Where it did come within the system, it occurred mainly in the exclusion of Indigenous stockmen in Northern Australia from award protection.

For women, significant change came eventually in 1972. The Commission conceded the principle of 'equal pay for work of equal value' even before Australia had ratified the International Labour Organisation's Discrimination (Employment and Occupation) Convention (No. 111) and the Equal Remuneration Convention (No. 100) in 1973 and 1974, respectively. For Indigenous stockmen, the paternalistic view of the tribunal in 1944 that 'it would be inadvisable and even cruel to pay [Indigenous workers] for the work they can do at the wage standards found appropriate for civilized "whites"' (53 CAR 212, 215) was superseded by the decision of the bench of 1966: 'We consider that overwhelming industrial justice requires us to put aboriginal employees in the Northern Territory on the same basis as white employees . . .' (113 CAR 651, 666–9). In both cases, there were concerns about the unemployment consequences of equal treatment. But by the 1960s consistency in the application of wage justice dominated the tribunal's concern; unemployment was a matter for other authorities to rectify.

However, as Whitehouse points out at the end of her chapter, the move to enterprise bargaining by statutory direction since the 1990s has brought another