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ARBITRATION IN ACTION

Stuart Macintyre

The Commonwealth Court of Conciliation and Arbitration heard its first case on 5 November 1906.[1] The Merchant Service Guild, representing ships' officers, had lodged a claim for an award and the Commonwealth Steamship Owners Association responded on behalf of the various shipping companies that operated out of Australian ports. Billy Hughes, the Labor member for West Sydney in the Commonwealth Parliament and secretary of the Waterside Workers' Federation, appeared for the union; he had qualified for the Bar three years earlier. Arthur James Kelynack appeared for the employers; he had a substantial practice in common law.

The two parties had already conferred in the Sydney chambers of the Court's President, Mr Justice O'Connor, who wanted to see if it was possible to arrive at an 'amicable settlement'. They remained at odds over terms of engagement, levels of remuneration, hours of duty, classification levels and other matters. When the case came before the Court for arbitration, the President searched for some basis of determination, for he was conscious that he was creating a precedent for later claims. The Act that established the Court had laid down no principle other than that the Court should decide 'according to equity, good conscience and the substantial merits of the case'. O'Connor rejected the argument put to him by Hughes that the Court should ensure that all ships' officers were paid a 'living wage' that would support a family and household; he held that these employees already enjoyed such a level of remuneration. In the end he decided 'that the

Court is in each case to make such settlement of the matters in dispute as shall be fair and reasonable between the parties'. Having applied this yardstick to the claim of the Merchant Service Guild, he embodied the terms of their employment into an award that became their legal entitlement (1906 1 CAR 1–54).

The case occupied the Court for sixteen days of evidence and argument, and was completed on 12 December. The creation of the Court, by contrast, had exercised the Commonwealth Parliament for the best part of a year. The eventual Act established this new federal court, to consist of a President appointed for a seven-year term from among one of the three Justices of the High Court. The Court was empowered to make compulsory awards prescribing terms of employment so as to settle industrial disputes extending beyond the limits of any one State. The Court would register organisations of employers and employees, and proceed on plaints initiated by them; it could also register collective agreements to give these the force of awards, and it was charged to provide preliminary conciliation of disputes. The distinctive character of this system of industrial arbitration – for there were many precedents for arbitrating disputes between employers and employees – rested on the element of compulsion vested in a permanent and independent government tribunal. The procedure could be invoked by either party and the respondent was forced to participate; an award was binding, with a machinery to enforce awards, and prohibition of strikes and lockouts (Mitchell 1989).

Such was the initial design of an institution that would undergo repeated change and yet persist in recognisable form up to the present. Other chapters of this book relate how the Commonwealth system of industrial arbitration was shaped by politics and the courts, the approaches taken to it by the employers and the unions, its record in securing industrial peace, and its social and economic effects. This chapter is more particularly concerned with the structure, composition and operation of the tribunal. It follows the alteration and reconstitution of the original Court of Conciliation and Arbitration into the present Industrial Relations Commission. It examines the personnel who composed it and how they conducted their work. It considers the tribunal as an organisation with distinctive practices and customs, 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.

ESTABLISHMENT

Compulsory arbitration had been devised by the South Australian politician, Charles Kingston, as a response to the Maritime Strike of 1890. That strike, which drew in many other industries and brought economic activity to a standstill, began when the shipping companies refused to permit their maritime officers to affiliate to a body of trade unions. The ensuing confrontation turned on the rival claims of national combinations of employers and workers, and raised the spectre of violent class conflict. Kingston, along with other progressive liberals, sought a remedy that would resolve the antagonism and protect the public interest. A friend of labour, he accepted the legitimacy of workers combining to pursue their mutual interests. A lawyer and progressive politician in an advanced democracy, he therefore sought to bring the conduct of industrial relations into the ambit of a public tribunal.

Kingston was unable to implement his scheme in his own colony: the tribunals that were introduced there and in other Australian colonies during the 1890s lacked the powers to effect compulsory arbitration. The final session of the Australasian Convention in Melbourne in 1898 agreed narrowly to include arbitration of interstate disputes as a power of the Commonwealth (La Nauze 1972: 207–8). By then, the practicality of Kingston's invention had been demonstrated on the other side of the Tasman. The Liberal government of New Zealand had enacted legislation in 1894 that followed Kingston's original draft bill both in its structure and in much of its content. New South Wales in turn followed New Zealand closely for its Arbitration Act of 1901, while Western Australia adopted a similar model for the Arbitration Court it established in two legislative stages in 1900 and 1902. Victoria, on the other hand, had struck out in a different direction with boards that determined wages but had no role in dispute settlement (Mitchell 1989).

When the Commonwealth created its own Court of Conciliation and Arbitration, it was thus able to draw on working examples of compulsory arbitration for both institutional design and operational procedures. The New Zealand Court was a court of equity, empowered to summon witnesses and take evidence; the Commonwealth Court had the same authority. The President was a judge of the jurisdiction's highest court, though in New Zealand and in New South Wales he

was assisted by two assessors, one representing the unions and one the employers; the Commonwealth Court relied on a single judge. The Victorian wages boards were also composed of elected representatives of employers and workers under an independent chairman. The absence of lay members emphasised the judicial character of the new Commonwealth Court, as did another distinguishing feature of the federal scheme. New Zealand created separate procedures for conciliation by appointing boards composed of union and employer representatives (Holt 1986: 41); the Commonwealth put both conciliation and arbitration in the hands of the judge who presided over this new federal court.

This emphasis upon the dual function of the Court was in keeping with its overriding purpose: to settle disputes and maintain industrial peace. Well before Henry Higgins characterised his jurisdiction as a 'new province for law and order', arbitration was described as a necessary extension of the rule of law. In his second reading speech on the original bill in 1903, Alfred Deakin anticipated Higgins in likening the substitution of industrial litigation for the reign of violence to the replacement of baronial wars by the King's Peace. Deakin saw this step as marking a process of social development from primitive lawlessness to advanced civilisation, and remarked that 'our remote ancestors' had once lived in a time of private feuds like the natives of Papua. The leader of the Opposition, George Reid, interjected: 'There were no lawyers amongst them then'. Deakin replied that 'The appearance of lawyers marks one of the first stages in social development' (*CPD* 30 July 1903: 2862–3).

This was an insiders' joke, for Reid, Deakin and Kingston (who had drafted the bill) were all barristers. Others were less sure that professional advocates would facilitate the operation of an industrial tribunal. The Commonwealth therefore followed its forerunners in allowing legal representation only with the consent of both parties – for, as Reeves (1902a: 2, 118) put it, 'The exclusion of barristers from the conduct of cases was an undoubted advantage, irrelevant and long-winded as a few of the lay agents and union officers were occasionally found to be'. Similarly, the legislation specified that the new Court would operate 'without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its mind on any matter in such manner as it thinks fit' (section 25), a provision that continues to the present day.

This left the office of president to be filled from the judiciary. Strictly, that arrangement was required if the new tribunal was to exercise the powers of a court of record, and there was already an Australian habit of removing contentious issues from the hazards of a trial of strength to determination by an independent body (Parker 1965; Hughes 1980). The shearers' leader, WG Spence, had told the New South Wales Royal Commission on the Maritime Strike (which itself was an illustration of the national proclivity) in 1891 that he thought any dispute-settling agency would require a chairman 'who has a trained mind and none are better than our judges'. Besides, Spence added, 'he would be impartial' (Bray and Rimmer 1989: 71).

The difficulty was to persuade a member of the High Court to undertake the additional duties. The Attorney-General, Josiah Symon, was in bitter dispute with the judges when he wrote to Richard O'Connor to ask that he accept nomination. Since Symon loathed the Chief Justice, Griffiths, and despised his colleague, Barton, the choice was limited – though O'Connor had little experience in industrial relations and less interest. He and the Attorney-General were both on summer holidays, so their letters and telegrams bypassed each other until on 1 February 1905 O'Connor wrote that he had consulted his colleagues and was willing to accept the office, on condition that he could resign if he found the new duties interfered with his work on the High Court. Symon insisted he could accept no such condition since it was a matter for the executive branch of government, and the argument, conducted with stately courtesy, remained unresolved when O'Connor's appointment was gazetted on 10 February 1905 (*CPP* 1905).

In fact, the presidency made little demand on O'Connor's time. After hearing the first application for an award in 1906, he had one more to consider in that year and just two in the following year – together they occupied twenty-six days of sittings – along with a number of shorter hearings of procedural matters. It was rather that O'Connor's duties on the High Court left him little time to arbitrate, so that the Merchant Service Guild had to wait for most of 1906 for its case to be heard.

A court requires premises, personnel and procedures. Following the passage of the *Commonwealth Conciliation and Arbitration Act 1904*, officers of the Attorney-General's Department drafted and gazetted the regulations that would

enable it to operate. A Registry was established in the Commonwealth's temporary capital, Melbourne, and district registries in the five other State capitals. A Registrar was appointed in January 1905, GH Castle, who was already Chief Clerk of the Attorney-General's Department and Registrar of the High Court. The increasing demands of the High Court duties led to his replacement two years later by Alexander Murdoch Stewart. He would serve as the Industrial Registrar for two formative decades and eventually become a Conciliation Commissioner, but for the time being he simply added his new responsibilities to those as Chief Clerk of the High Court, and received no additional payment for them (NAA A432 1929/2656; A432 1929/3456, part 3).

The arrangements for the Deputy Industrial Registrars were even more rudimentary. The Commonwealth simply asked the States to provide an appropriate officer to act in a part-time and unsalaried capacity. The States obliged, offering the Registrar of the Supreme Court in three cases and officials of the State's arbitration courts in the case of New South Wales and Western Australia (NAA A432 1929/3456, part 1). This was meant to be a temporary arrangement until the volume of work became evident, but it continued into the 1920s. The duties of the Deputy Industrial Registrar in New South Wales were the most onerous because of the volume of business there. Several incumbents resigned, and another withdrew on the insistence of his minister. A replacement was assisted by a chief clerk (and the Commonwealth compensated the New South Wales government for a portion of their salaries), yet they too were available on a part-time basis only (NAA A432 1929/3456, parts 2 and 20). Indeed, the very first sitting of the Court on 9 November 1905 was delayed by a failure of these arrangements. The President travelled to Sydney to hear the appeal of a union over registration only to discover that no Deputy Industrial Registrar had been appointed and no papers had been sent from Melbourne (NAA A432 1929/3456, part 8).

All of the officers of the fledgling tribunal were thus working on a part-time basis as they fashioned its procedures. They took over a familiar method of operation. A plaintiff served a log of claims on a respondent and the Court initially tried to negotiate a settlement of them. The remaining matters were taken to arbitration, the arguments presented in adversarial fashion, the evidence presented, witnesses examined and cross-examined, and a decision handed down and made binding.

The Registrar exercised a further responsibility. A union seeking access to the Court had to provide the Registrar with details of the organisation, its constitution and rules, and submit annual returns of membership along with financial records. Registration gave the union coverage of a particular occupation and allowed it to serve claims on employers, who were required to respond. The system of industrial arbitration transformed unions from associations tolerated by the state into protected organisations that the Court recognised, assisted and regulated. The employers, who generally resisted this new dispensation, were themselves drawn into the Court's ambit and responded with their own arrangements.

The fledgling system of industrial arbitration thus brought employers and wage-earners into a new relationship that, in turn, shaped their own forms of industrial and political activity. It fostered the formation of unions and employers' associations, as parties to the Court's awards, as litigants in appeals against its decisions, and as political interest groups seeking legislative amendment of the Court's operation. Arbitration was also a subject of keen public interest. Even as the original legislation was being prepared, a journalist working for the Melbourne *Age* obtained and published a full outline of the bill. Its eventual enactment allowed the formation of the Australian Journalists' Association (Lloyd 1985: 55). Industrial arbitration was the most celebrated of the state experiments, bringing overseas investigators to Australia in the early years of the twentieth century. It was the most influential and durable feature of the arrangements devised by the Commonwealth to reconcile the social and economic objectives of nationhood.

HIGGINS' COURT

O'Connor's unwilling presidency did not last long. Legislation in 1906 created two more positions on the High Court, and in October Henry Higgins and Isaac Isaacs were appointed to them. It was understood that Higgins would replace O'Connor as President of the Court of Conciliation and Arbitration. Since Higgins had served as Attorney-General in the recent Labor ministry, and thought he should not proceed so quickly 'from my advocacy of labour claims as a member into a position in which I should have to drop wholly the attitude of a partisan', he asked Alfred Deakin, his friend and the Prime Minister, for a

year's grace (Rickard 1984: 150). Higgins therefore succeeded to the presidency on 14 September 1907. Reappointed for a further seven-year term in 1914, he resigned on 29 June 1921, less than three months before the expiry of that term. His fourteen years at the helm established the Court as a major national institution.

'I had to learn the business', Higgins wrote, 'with no book of instructions, no teacher other than experience, no kindly light except for the pole star of justice' (Higgins 1922a: v). An immigrant youth of a genteel but impoverished family, he had worked as a teacher while training for his profession and built up a lucrative equity practice at the Melbourne bar. A friend of labour, he had represented a working-class electorate in the Commonwealth Parliament and served in a Labor government, but he was not a member of the Labor Party and formed no intimate friendships with its members. He had known the pinch of poverty but not the sweat and grind of manual toil, the aching limbs and shortened breath – his hands were smooth. He developed his jurisdiction, 'his new province for law and order' as he styled it, with a lawyer's regard for order and consistency. Each case had to be decided on its merits, according to the evidence and the law. A finding established a precedent for later cases, marking out the paths for those who came before his Court.

Higgins was presented in the first case that came before his Court with the opportunity to expand its scope from the settlement of disputes to the determination of wage standards. As part of its effort to foster economic growth and social harmony, and with the support of the Labor Party, Deakin's Liberal ministry had elevated the protection of local industries by tariffs into the doctrine of New Protection. Excise duties were imposed on local manufactures equivalent to the tariff duties on the imported product, but the excise duties would be waived if the President of the Arbitration Court certified that the manufacturer was paying 'fair and reasonable wages' to his workers. O'Connor had readily granted certificates of exemption to a number of manufacturers of agricultural machinery, but Higgins chose as a test case the application of a large employer, HV McKay of Sunshine, which was opposed by the unionists he employed.

In the hearing of what became known as the *Harvester* case, Higgins enunciated the principles he would use. A fair and reasonable wage could not be what

was determined by ordinary bargaining, for the legislation clearly intended something more than 'the higgling of the market'. Nor could a fair and reasonable wage depend upon the level of profits; it should be regarded as a first charge and if an enterprise could not afford to pay an adequate wage, it was better abandoned. Higgins decided that the minimum wage should enable a male worker to live as 'a human being in a civilized community' and to keep his family in frugal comfort. Using some family budgets as evidence for the cost of living, he fixed the minimum wage at 7 shillings per day and refused McKay's application (1907 2 CAR 2–3).

The *Harvester* judgment was quickly established as a landmark of Australian social democracy. It provided the basis for the system of wage determination based on the cost of living that spread to take in the majority of Australian workers; and it gave institutional force to the privileged position of the male breadwinner. But McKay appealed against the decision and the High Court decided (with Higgins and Isaacs dissenting) that the Excise Tariff Act was invalid. This was just the first of many occasions when Higgins' colleagues in the High Court, usually on application by employers, overturned his decisions and trenched the operation of his Court. The principal cases are discussed elsewhere, and here the concern is with their effect on his work.

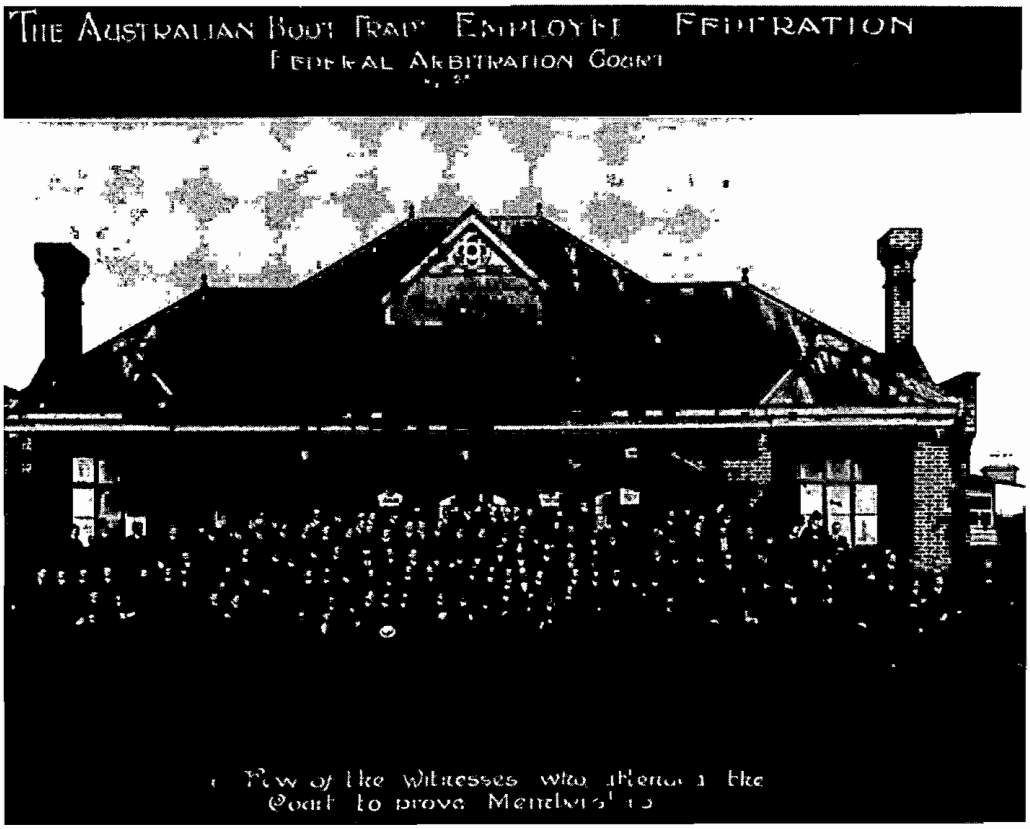
In a series of public statements, Higgins protested at the restrictions that were imposed on his jurisdiction: 'the approach to the Court is through a veritable Serbonian bog of technicalities; and the bog is extending' (1909 4 CAR 42). In the face of these restrictions, Higgins consolidated the procedures of his Court. It would hear a case on a plaint brought by either side in a dispute, and Higgins' initial step was usually to try to resolve the dispute in conference. If conciliation failed, the preliminary hearing was usually occupied by arguments over the nature of the dispute and whether the Court had jurisdiction. When Higgins had resolved this question to his own satisfaction (if not the High Court's), he would hear evidence on the matters in dispute in order to make a determination that would then be incorporated into an award. The award set out duties, rates of payment, hours and other conditions of employment in a comprehensive document that was binding on the parties. His Court sat wherever was most convenient for the case under consideration, borrowing chambers in the State capitals from the

courts there. It travelled further afield, to inland towns and distant factories and mines, so that the President could inspect workplaces and get a better sense of working conditions.

The volume of business was increasing. In its first five years, the Court made just six awards, but it registered 61 organisations, and in the following decade a further 116 (Griffin and Scarcebrook 1990: 25). There was also a rise in the use of the Court to register agreements – just 9 were filed in the first five years, 24 in 1910, and no less than 94 in 1911 (*CPP* 1914–17). A Deputy President operated from 1913 but there were long delays in processing applications for awards. Meanwhile, the increasing use of boards of reference placed greater strains on the Registrar and Deputy Registrars.

The cost of arbitration was considerable. While the Court's charges were modest, a union had to outlay hundreds of pounds to serve claims on a large number of respondents, gather evidence and muster witnesses – and if the employers appealed to the High Court, the cost of defending an award might prove prohibitive. Unions seldom briefed barristers, though they usually retained solicitors. Sometimes the unions accepted the appearance of counsel for the employers; increasingly, they objected. Even then, Higgins usually ruled that the barristers could stay while preliminary legal issues were argued. Wrestling with a difficult procedural issue, he remarked: 'This is just the kind of difficulty in which I confess I would like to have the assistance of counsel skilful in the methods of the law, so that we might by pressure on both sides crack the nut and get the kernel' (*Argus* 6 December 1910). At the same time, he expressed vexation with the issues these lawyers raised. 'I have been exceedingly patient with you', he chastised a leading practitioner, 'but the more I see the lines on which you are going, the more I see that you are trying to find a technical flaw where there is an actual, practical and humane dispute that has to be dealt with' (*Argus* 31 May 1913).

Higgins conducted his Court with a minimum of formality. He dispensed with judicial robes and disdained the rituals of 'the lofty and inaccessible temple in which the mysteries of the law are stored' (Rickard 1984: 193). Yet he brooked no disrespect for his jurisdiction. In a case involving the Builders Labourers' Federation, the secretary of a bogus union was threatened with imprisonment for refusing to give evidence; having submitted to the authority of the Court, he was excused from doing so (*Argus* 25 October 1913). Recalcitrant employers and



One of the union complaints in the early years of conciliation and arbitration concerned the costs of registering and obtaining an award. The Boot Trade Employees' Federation kept this photograph of its witnesses who attended the Court in 1909.

union officers alike were admonished for impugning the integrity of the arbitration system. Higgins looked severely on employers who victimised workers for giving evidence. He took particular exception to parties that divulged confidential proceedings to the press or prejudiced hearings with public commentary. The conciliation process depended on privacy: 'It is obvious that in trying to get conflicting parties to any agreement it is often essential to keep the conference private, so that representatives may speak their minds freely, and discuss freely suggested concessions' (1910 CAR 5 45). It was just as obvious to him that those who made partisan claims on matters before the Court for arbitration were at fault, and he secured apologies from more than one employer's representative for such prejudicial conduct (*Argus* 23 May 1917, 18 May 1918).

HR NICHOLLS AND ARBITRATION IN CONTEMPT

The HR Nicholls Society was established in 1985 by a group of prominent Australians who held the arbitration system in contempt. At its inaugural seminar early in 1986, a number of speakers recalled Nicholls as a forthright defender of 'the liberty of the subject faced with the tyranny of arbitrary power' who had protested against 'the pollution of the real law, and the real courts, by politicised judges and over-powerful unions' (HR Nicholls Society 1986: 13, 156).

Henry Richard Nicholls was born in London in 1830 and under the influence of his socialist father was prominent in the Chartist reform movement. He migrated to Melbourne in 1853 and his brother joined him in Ballarat in the following year. The two enrolled at the Eureka stockade but left before troops overran it. Charles went into mining, Henry into journalism, and their progressive sympathies weakened as their business ventures prospered. Henry Nicholls contributed to the *Argus*, owned the *Ballarat Star* and became editor of the Hobart *Mercury* in 1883.

His editorial on 7 April 1911 was prompted by an angry exchange in the Court of Conciliation and Arbitration between Higgins and Hayden Starke, a leader at the Melbourne bar and afterwards a colleague of Higgins on the High Court bench. Starke, appearing for the employers, alleged that the Broken Hill miners were encouraged in their breaches of agreements by the unions and the government. Higgins refused to countenance such language: 'I will not allow you to speak in that form of a Government of the country and those above us. If you do not comply with my rules you will leave the Court.'

In calling Higgins a political judge appointed for his political services, the *Mercury* said he would not allow any reflections 'on those to whom he may be said to be indebted for his judgeship'. There was a Labor government at the time and Nicholls seems to have been under the misapprehension that Higgins had been appointed to his post by an earlier one.

Nicholls did not appear when the case was heard in Melbourne; his doctor said he was too frail at the age of 82 (he was in fact 81) to make the journey. The Crown's case was that the leader was calculated to bring a judge of the High Court into disrepute. The Chief Justice dismissed the case on the grounds that the words complained of were not calculated to interfere with the course of justice in the High Court. He noted, however, that the 'respondent has very properly expressed his regret for having used something which is capable of being construed as a disrespectful comment, which he did not intend' (*Argus* 23 May, 8 June 1911; Rickard 1984: 185–7). HR Nicholls, it seems, was a reluctant martyr.

In his early years, Higgins received many abusive letters, unsigned but nearly all of them 'from partisans of the employers' (Higgins 1922a: 40). His observations on the inequity of the wage relationship were a particular provocation. For Higgins, the employer was in a much stronger position than the individual employee, for whom the catchcry of freedom of contract amounted in practice to 'despotism in contract'. The worker, he remarked on one occasion, 'is in the same position, in principle, as Esau, when he surrendered his birthright for a square meal, or as a traveller, when he had to give up his money to a highwayman for the privilege of life' (Rickard 1984: 185–6). A storm of criticism followed these remarks, which was scarcely mollified when Higgins had his judgment printed and made available so that those with 'impartial minds' could see how the press had misrepresented it (*Argus* 19 May 1911). More than once, he delivered statements from the bench in response to 'slovenly, reckless and untrustworthy' newspaper reports on his work (*Argus* 21 August 1917).

The *Argus*, a conservative Melbourne daily, was the chief offender, though it was the editor of the Hobart *Mercury* who stung Higgins to an unwise overreaction. Commenting on an exchange in the Court between Higgins and counsel for the employers, the *Mercury* described Higgins as 'a political judge', who had been appointed for his political services and continued to serve those who appointed him (*Mercury* 7 April 1911). At Higgins' behest, a charge of contempt was brought against HR Nicholls, the aged editor of the *Mercury*. The High Court dismissed the charge, making a hero of Nicholls in his home town and providing later critics of arbitration with an illustrious martyr (*Argus* 19 and 23 May, 8 June 1918; 1918 25 CLR 280–6).

The Court of Conciliation and Arbitration, it seemed, was an anomalous national institution, operating both as a legislature and a court. It was a legislature in the sense that it created new laws – awards – that governed industry. It was also a court in that it interpreted its awards, enforced them and punished violations. As a lawmaker, it was subject to public commentary and often virulent criticism of its actions; as a court, it was supposedly a separate branch of government, removed from the ruck of partisan interests. The combination of functions created some of Higgins' difficulties but more of them followed from the fact that his Court lacked the full power of either agency. It was a subordinate legislature, subject to the strictures of the legislators who had created it, and it was something less than a court because of the restrictions imposed by the High Court.

In 1914, the Labor Attorney-General, Billy Hughes, complained that the inability of the Court to arbitrate except in the case of a genuine dispute (the existence of which only the High Court could determine) was nullifying its capacity to maintain industrial peace. He suggested that the Court should have inscribed over its portals 'None who will not strike may enter here'. The problem was compounded by the insistence of the President that he would not hear an application from any union whose members were on strike. 'It serves to disgust unions with arbitration', Hughes complained, 'it is intolerable and it cannot be permitted to continue' (*Argus* 29 October 1914). Within a year, Hughes had succeeded Andrew Fisher as leader of the wartime Labor government, and he quickly used the extraordinary provisions of the Wartime Precautions Act to impose his will on all aspects of national government. Thwarted by his party over his determination to introduce conscription for overseas service, he formed a new government that was more submissive. Billy Hughes, who had previously appeared before the Court on behalf of unions, now acted as a law unto himself. He soon came into collision with the fiercely independent Higgins.

The question at issue was the independence of the Court in a period of national sacrifice, when industrial dislocation jeopardised the war effort. In 1915, Higgins was prepared to accommodate the government when members of the Waterside Workers' Federation refused to accept an award (1915 9 CAR 298–304). This extenuation of the union's apparent breach of an award infuriated the conservative press and alarmed Higgins' deputy, Mr Justice Powers, who had to be dissuaded from resigning.

In 1916, Hughes approached the Registrar to suggest appeasement of another recalcitrant union in a vital industry. The coal-miners were demanding an eight-hour day and Higgins would not hear their claim while they remained on strike. Hughes proposed that Higgins concede the union's claims as a commissioner acting under the Wartime Precautions Act. Higgins was reluctantly prepared to use these powers to hear the case but insisted he should be free to judge the merits of the claim, so Hughes turned instead to a New South Wales judge who did as the Prime Minister asked (*Argus* 14 September, 13 and 28 October 1916, 23 October, 7–13 November 1917; Fitzhardinge 1979: 220–5).

In the following year, the two men were again at odds. A dispute among railway workers in New South Wales spread to the maritime industry and Hughes decided to break the union he had once led by applying to the Court for the

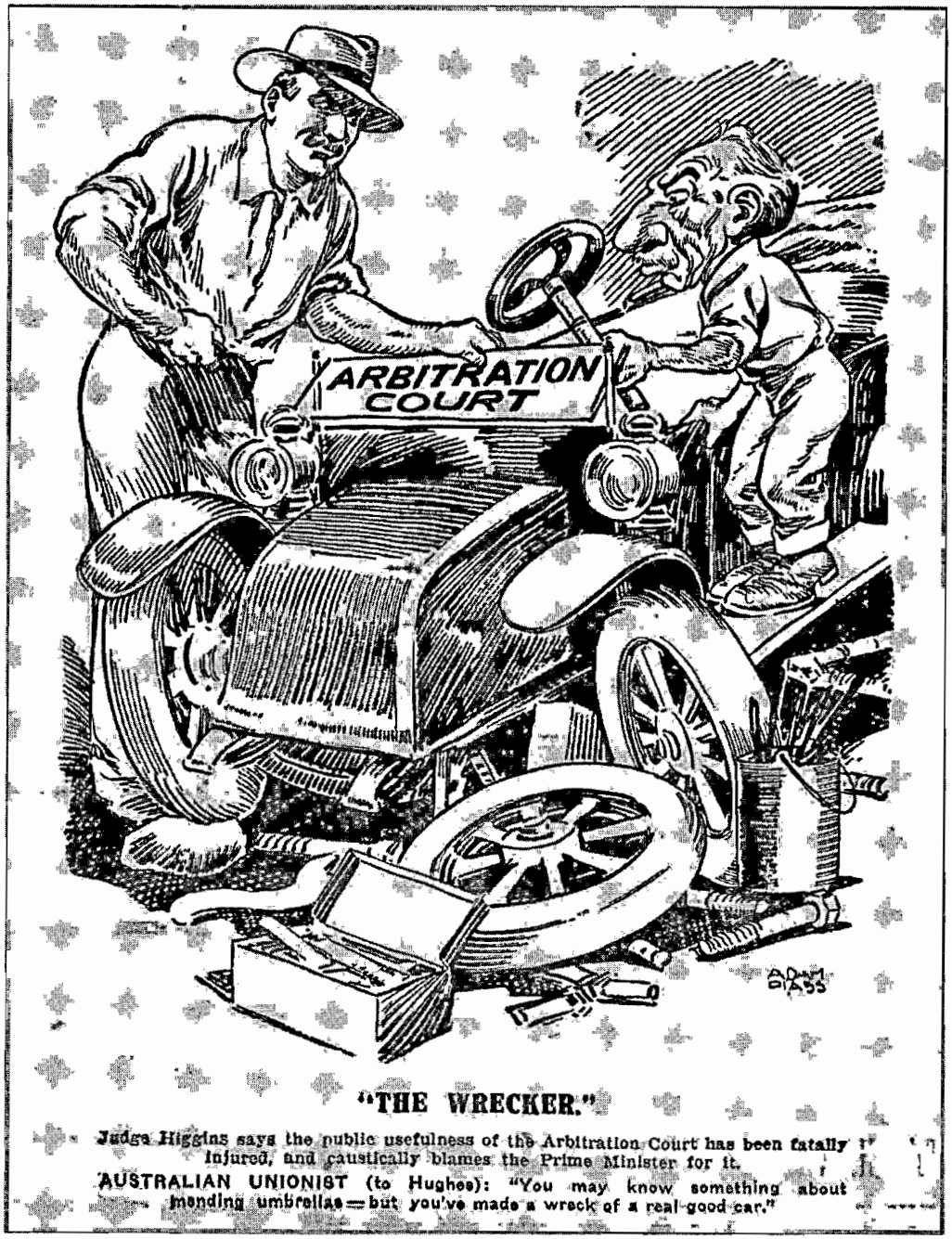
Higgins' refusal to cancel the registration of the Waterside Workers' Federation when it stopped work in 1917 brought to a head his insistence that the Court should not operate at the bidding of the prime minister. His dignified appearance as he receives the gratitude of a feminine Australia evokes the earlier depiction of George Higinbotham, a judge Higgins took as his model. Hughes is represented as a diminutive imp who clings to the sword of power.

registration of the Waterside Workers' Federation to be cancelled. At the same time, he gazetted a regulation under the Wartime Precautions Act to give the Governor-General in council the power to deregister any striking union. Higgins denounced this regulation as 'a sword hanging over me' and refused the application for deregistration. Several weeks later, Higgins revealed Hughes' actions in the earlier coal dispute, and the Prime Minister's denials ('It is a deliberate and monstrous fabrication') occasioned a lengthy exchange that did little to restore his credibility. Characteristically, Higgins had the entire exchange published in the reports of his Court (1917 11 CAR 994–1002).

Finally, in 1919, the government intervened once more in an effort to resolve a dispute in the maritime industry. The Seamen's Union refused to work under an award recently handed down by Higgins, which he was reluctant to improve. The government tried compulsory conferences in the Court and then private negotiations with the union to reach a settlement. Meanwhile, the High Court had decided in 1918 that the Arbitration Court was not a court (on the grounds that its President was not appointed for life), so that its powers to enforce awards were invalid (1918 25 CLR 434). When the government passed an Industrial Peace Act, which allowed it to create special tribunals for the settlement of particular disputes, Higgins declared that 'a tribunal of reason cannot do its work side by side with executive tribunals of panic', and announced his resignation (Higgins 1922a: 176). This time, the government did not allow him to publish his statement in the Court's reports (Higgins 1924: 15) and he therefore combined it with some earlier articles on the work of the Court in a book that became his testament. *A New Province for Law and Order: Being a Review, by its Late President for fourteen years, of the Australian Court of Conciliation and Arbitration* concluded with his pronouncement that 'the public usefulness of the Court has been fatally injured' (Higgins 1922a: 176).

BETWEEN THE WARS

Yet the Court survived. Hughes did not proceed with the provisions of his Industrial Peace Act, but instead ended the exclusive authority of the President. Higgins had recently granted an application for a 44-hour week, and the Act was amended in 1920 to stipulate that in future three judges would be needed to alter the length of the working week. (In the same year, public servants were removed from the



In announcing his resignation from the Court, Higgins said that its public usefulness had been fatally injured. This cartoon from the labour press lays the blame on the prime minister.

Court's jurisdiction and a separate Public Service Arbitrator created.) In place of Higgins the government selected Charles Powers, the least distinguished member of the High Court, to preside over the Arbitration Court. Various other members of the High Court served as deputy presidents until two permanent appointments were made in 1922; one of them, John Quick, had been a member of the Commonwealth Parliament, and the other, Noel Webb, had previously served on the South Australian Arbitration Court. Thus assisted, Powers restored the 48-hour week to Commonwealth awards in 1922.

Charles Powers had been a solicitor in rural Queensland, then a barrister and State parliamentarian, the Crown Solicitor for Queensland and finally for the Commonwealth before appointment to the High Court in 1913. Although a Labor appointee, he was proud of his conservative industrial record: when he wrote to the Attorney-General in 1925 asking for a knighthood, he drew attention to his restoration of the 48 hours, his refusal to implement the recommendations of Piddington's Royal Commission on the basic wage, and other rebuffs to union claims (Fricke 2001). He had, however, introduced the practice of automatic indexation of the basic wage for changes in the cost of living. Powers' Court was subjected to criticism from both sides of industry, yet the volume of business continued to increase as its coverage expanded to take in most of the major industries: there were 261 applications for awards in 1920 and 1921, 460 in 1924 and 1925 (Powers 1926). This was a period of overlapping coverage when unions used the most favourable jurisdiction, but by the end of the decade half of all trade unionists worked under federal awards (Frazer 2001: 116).

Following its return to office, the government sought to extend the federal industrial power by removing the restriction of conciliation and arbitration to interstate disputes. The constitutional referendum failed, as did a further proposal to give the Commonwealth control of essential services. The government had meanwhile reconstructed the Court by a new Conciliation and Arbitration Act in 1926. Ever since the High Court decision of 1918, the Court had lacked judicial authority and relied on the magistrates' courts for enforcement of its decisions. Now the Court was to consist of judges appointed for life and therefore able to exercise a judicial function to police its awards. Provision was also made for the appointment of Conciliation Commissioners, to facilitate the settlement of disputes and ease the congestion of the Court.

George James Dethridge, the first Chief Judge of the Commonwealth Court of Conciliation and Arbitration (1926–1938).

The labour movement was generally supportive of these changes, which held out the prospect of officers with greater expertise working on a full-time basis to improve the Court's operation. There were reservations about strengthening the judicial nature of arbitration. Percy Coleman, the Labor member for Reid and secretary of a public service union, spoke for many when he suggested the Court should 'set aside purely legal considerations and adjudicate upon the conflicting claims'. Not unreasonably, a senior Nationalist asked, 'How does the honourable member expect a bench of lawyers to put aside legal considerations and procedures?' (*CPD* 17 June 1926: 3038–9).

In 1927, the first Chief Judge of the new Court expressed his regret that the Act maintained the restriction on the appearance of counsel. It was, he said, a policy of 'penny wise, pound foolish' (*Argus* 14 September 1927). Later in the same year, John Latham, the Attorney-General, introduced new amendments to the Act, and among them one that allowed lawyers to appear at the leave of the Court in applications for interpretation or variation of awards. A Labor member remarked that 'These lawyers are non-unionists'. Latham replied that 'The lawyers' union at least gives a guarantee of a certain amount of training, which is some guarantee of efficacy' (*CPD* 15 December 1927: 3285). By this time, arbitration had spawned a growing legal practice, and barristers were beginning to specialise in industrial advocacy.

The reconstitution of the Arbitration Court in 1926 increased its formality. An application from the Amalgamated Engineering Union in 1926 for a 44-hour

week brought no less than 25 advocates, 543 exhibits and 145 witnesses before the Court. They included expert witnesses: JT Sutcliffe of the Commonwealth Bureau of Census and Statistics and Frederic Benham, a lecturer in economics at the University of Sydney, provided conflicting advice on the capacity of the economy to bear the reduction in hours. The hearing lasted four months and, with Judge Lukin dissenting, the Court granted the claim (Foenander 1928). Such lengthy hearings increased the congestion of the Court; by 1928 there were nine applicants for awards who had been waiting longer than two years (Anderson 1929: 42).

The easing of restrictions on the appearance of counsel was part of a series of further changes made in the *Commonwealth Conciliation and Arbitration Act 1928* that were designed to strengthen the Court's powers over union militancy. Henceforth, a union would be responsible for strikes called by its branches or even unauthorised stoppages by members; the Court could order a secret ballot for election of union officials at the request of just ten members, and on its own initiative order a secret ballot on any issue that arose in the course of a dispute. The 1928 Act made it an offence to prevent any person from working in accordance with an award, and the Court was given a general power to punish contempt (Sawer 1956: 269–70). Coupled with these draconian measures were amendments made to the Crimes Act in 1926 that were designed to prevent unions from escaping the Court's discipline. While technically the new provisions merely extended to unregistered unions, the penalties that the Arbitration Court could impose on registered ones, the inclusion of strike action in a statute dealing with serious criminal offences, caused particular affront.

So too did the appointments to the reconstituted Court. The Chief Judge was George Dethridge, previously a judge of the Victorian County Court. He was scrupulous in attention to detail and gained respect for his willingness to listen. The two Judges, on the other hand, were regarded as inimical to labour. George Beeby had been a pioneer of the Labor Party in New South Wales, but broke away to form his own Progressive Party in 1912 and became an alarmist critic of industrial unrest. Upright and formal, painfully aloof, he would stand on his dignity. The third Judge was Lionel Lukin, an outspoken conservative from the Supreme Court of Queensland who had clashed repeatedly with the Labor

premiers of that State. They were joined in 1927 by Edmund Drake-Brockman, who until the previous year had been a Nationalist senator and president of the Australian Employers' Federation.

Speaking during the debate on the Conciliation and Arbitration Act of 1928, Matt Charlton, until recently the leader of the Labor Party, warned that the government had made 'a declaration of war against the organised workers of Australia' (*CPD* 16 May 1928: 4892). The Bruce–Page government restructured, recomposed and strengthened the Court as it grappled with a deteriorating economy. The country had borrowed heavily to finance development projects and financiers were concerned that the foreign capital was being used to prop up an unsustainable standard of living. In 1928, a British Economic Mission warned that the cost structure of Australian industry was too high and that 'the combined operation of the tariff and of the Arbitration Acts has raised costs to a level which has laid an excessive and possibly even a dangerous load upon the unsheltered primary industries' (*CPP* 1929).

In a series of decisions that began in the same year, the Court used its new powers to reduce the burden of labour costs. In August 1928, Judge Beeby handed down a new award for the Waterside Workers' Federation that reduced overtime rates and required attendance at a second daily pick-up. The federation was fined when some branches refused to work under the award, and the government used the Transport Workers' Act to license strike-breakers. Then Judge Lukin made a new award for the Timber Workers' Union that increased hours and reduced wages; again the government used its strengthened powers to break union resistance. Finally, in March 1929, the coal-owners locked out the mining unions for refusing to accept a cut in hewing rates. While Judge Beeby made an interim award restoring the old rates, the owners appealed successfully to the High Court, which struck down the award; meanwhile, the government withdrew prosecution of a leading coal-owner for locking out his workers. The aggrieved miners were starved into submission (Hagan 1981: 91–3; Macintyre 1986: 247–8).

These events brought protest and open defiance. In 1927, the secretary of the New South Wales Labor Council led a march of the Amalgamated Engineering Union on a Court sitting in Sydney when Beeby provided for piecework and daily hiring; the union members chanted, 'One in gaol, all in gaol' (Hagan 1981:

84). After Lukin ordered a ballot of the striking timber workers, they burned the ballot papers issued by the Court along with an effigy of the judge (Dixson 1963). In February 1929, the ACTU passed a resolution 'that all unions now before the Federal Arbitration Court be urged not to proceed with their claims' (*Sydney Morning Herald* 11 February 1929).

Yet when Bruce proposed to abandon the field of industrial relations to the States, the labour movement rallied behind the arbitration system. In an atmosphere of imminent economic crisis, Bruce had clearly despaired of the Court's capacity to make the adjustments to wage levels he thought necessary, and arbitration had manifestly failed to maintain industrial peace. In advising business leaders of his intention to abolish arbitration, he warned them that it would be impolitic if the public announcement 'were greeted with paeans of joy and triumph by the employers' federations' (Macintyre 1986: 249).

With the assistance of the vengeful Billy Hughes and other government rebels, the Labor Party defeated Bruce's proposal in the parliament in September 1929 and then won the ensuing election that was effectively a plebiscite on the issue. Labor's victory ensured the maintenance of the Court as a national institution, albeit one that vexed both sides of industry. The unions were enraged when the Court decided in January 1931 to cut the basic wage and all wage rates by 10 per cent. After the judges handed down their decision, cries of 'thieves' were heard in the Court and unionists gathered round the table occupied by their representatives to sing 'The Red Flag'. The secretary of the ACTU, who was the chief union advocate, called for three cheers for the social revolution (*Sydney Morning Herald* 23 January 1931). But the following ACTU congress rejected a motion calling for abandonment of arbitration.

The Labor government was committed to substantial reform of the Court and the ACTU urged it to 'provide for a system of sound business-like arbitration, free from the entangling legalisms of the Law Court . . . to ensure equitable expeditious and less costly methods of dealing with industrial matters' (Hagan 1981: 96). The government obliged in 1930 with a bill that removed many of the penalty provisions in the Act, restored the restrictions on representation by lawyers, gave the Conciliation Commissioners award-making powers, and created Conciliation Committees (consisting of representatives of employers and unions, as in New Zealand) to work with them. The High Court disallowed the

powers given to the Conciliation Committees, while the Senate weakened the other changes; henceforth lawyers could appear subject to approval by the Court and agreement of the parties (Sawer 1963: 13–17).

There were no further changes to the Court itself, other than the retirement of Lukin in 1930 to become federal judge in bankruptcy (the failure of the Labor government to make a more congenial replacement is surprising) and the appointments in 1938 and 1939 of two new judges. Harold Piper was a South Australian lawyer and company director, a member of both the Adelaide and Melbourne Clubs. Thomas O'Mara had worked in the Attorney-General's Department of New South Wales and the Department of Labour and Industry before he practised industrial law, usually appearing for the employers. Chief Judge Dethridge died in 1938 and was succeeded in that post by Judge Beeby.

This was the Court that the secretary of the New South Wales branch of the Australian Railways Union recalled:

> I never forget my first experience in an Arbitration Court, it was before a Full Bench hearing. The judges were arrayed in wigs and gowns, and there was a full exhibition of Court conduct and paraphernalia. My own impression was that it was an awe-inspiring spectacle designed to force its attitude and decisions rather than to serve justice in respect of claims put forward on behalf of workers. (Walker 1970: 86)

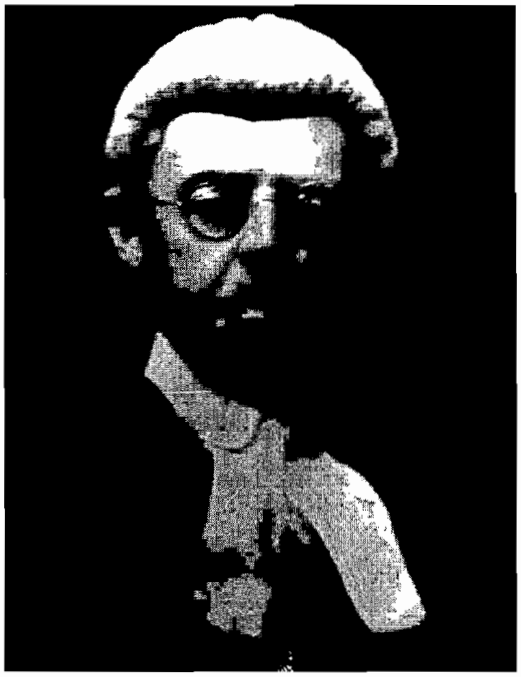
In 1932, 1933 and 1934, the ACTU and the unions approached the Court seeking restoration of the 10 per cent cut in the basic wage. ACTU officers would present the union case, arguing both on economic grounds and by appeal to Higgins' principle of entitlement. On each occasion, the employers' advocates opposed any increase and the full bench of the Court affirmed its new criterion of industry's capacity to pay. Taking advice from economists, the Court awarded a limited increase in 1934. A further increase in 1937 still fell short of the union claim. Victoria in 1934 and New South Wales in 1937 required their tribunals to apply the Commonwealth decisions, and while a majority of wage-earners still worked under State awards, the Commonwealth Court was exercising increasing control over national wage policy. Unions with communist leadership – which by the later 1930s included the Seamen's Union, the Waterside Workers' Federation,

the Miners' Federation, the Federated Ironworkers' Association and the powerful New South Wales branch of the Australian Railways Union – challenged these constraints with industrial campaigns that wrested limited concessions from the federal and State tribunals.

RECONSTRUCTION

During the Second World War, the government assumed a large measure of direct control over industrial relations. Regulations gazetted under the National Security Act controlled wages. The government used its manpower regulations to direct labour to essential industries and provide higher rates for those working in them. Through the Women's Employment Board it determined wages in industries where there was no award for female workers. The stevedoring, maritime and coal mining industries were placed under the control of special tribunals. This left the Arbitration Court with the task of settling disputes, and further wartime regulations enlarged its powers to do so.

In its last month in office in August 1941, the Menzies government was presented with the opportunity to make further appointments to the Court when George Beeby retired as Chief Judge. It appointed Harold Piper to the position. Raymond Kelly, who for the past decade had been President of the South Australian Industrial Court, filled the vacancy on the bench. Scholarly, gentle, dogmatic and authoritarian, Kelly would become a lightning rod for discontent with the Court. The Curtin government made just one wartime appointment, Alfred Foster, who chaired the Women's Employment Board until he joined the Arbitration Court in



Sir George Stephenson Beeby, the second Chief Judge of the Court (1939–1941).

October 1944. Foster had been a member of the Victorian Socialist Party, like Curtin, then a labour lawyer, and from 1928 a judge of the Victorian County Court. A rationalist and civil libertarian, outspoken and domineering in manner, he was soon at odds with Kelly.

At the end of the war, the Chifley government reconstructed the Court. Simplification of arbitration was a long-standing objective of the labour movement and the Labor government's control of both houses of federal parliament offered the opportunity of achieving it. The ACTU wanted the existing Court to be replaced by a new one with a purely judicial function and a single judge; that would leave the settlement of disputes and making of awards to the Conciliation Commissioners (Sheridan 1989: 151). The government had no intention of passing control over wages and hours to these lay officers. There were already claims for an increase in the basic wage and a reduction of the working week to forty hours. Preoccupied with the danger of inflation in a period of post-war reconstruction, Chifley would resist these claims for as long as he could. Meanwhile, the impatience of militant unions brought a sharp rise in industrial disputes; Chifley was determined to maintain the authority of the Court. His Commonwealth Conciliation and Arbitration Act of 1947 made the Arbitration Court a superior court of record with power to impose penalties for contempt of its orders.

The Act kept the Court to arbitrate on hours and wages, while increasing the number of Conciliation Commissioners and giving them power to make binding awards on other matters. There was no appeal from decisions by these Commissioners, who were not required to possess legal qualifications, and lawyers were virtually excluded from their hearings. While the Chief Judge allocated their duties aided by the new Chief Commissioner, there was clear potential for inconsistency between the two arms. This became apparent before the end of the year when the Chief Commissioner granted increases in the margins of metal trades that the Full Court had refused just a few months earlier. The Act was amended in 1952 to allow for appeals and references from the Commissioners to the judges, and also from the Public Service Arbitrator to the Court.

Of the sixteen Conciliation Commissioners initially appointed under the 1947 Act, six were former trade union officials, two had Labor Party backgrounds, four had worked in arbitration (chiefly on the registry side), two were public servants and two were lawyers (Foenander 1952: 222). If the unions expected more

sympathetic treatment from these 'dilutee judges', however, they were quickly disappointed (Sheridan 1989: 156–7). Meanwhile, the government appointed Judge Drake-Brockman Chief Judge following the resignation of Chief Judge Piper in 1947, and Kelly succeeded the ailing Drake-Brockman on his death two years later. Judge O'Mara died in 1946. Several new appointments were made. Bernard Sugerman, a Sydney barrister, was a judge for a year but left in 1947 to join the New South Wales Supreme Court. He was replaced by Richard Kirby, who had become part of the circle of labour lawyers that formed around Bert Evatt in Sydney. In 1949, as relations between the Chifley government and the communist unions broke down completely, it added Edward Dunphy, the head of the Western Australian Arbitration Court and a devoted anti-communist. Kelly gave Dunphy responsibility for supervising union ballots, a task he relished and conducted openly as a campaign against the left-wing influence in unions (CCCA 1951).

The Court could not avoid becoming involved in this confrontation, which was played out against the international and domestic background of the Cold War, since the strength of the Australian Communist Party (which had reached a peak membership of 23 000 at the end of 1944) lay in the unions. The communist hostility to arbitration, always less absolute than its declarations suggested, found expression in this period in a series of campaigns to win by industrial action what the Court would not grant. When a communist union official who represented the Federated Ironworkers' Association in the Basic Wage Case that began in 1949 said as much – 'This issue will be decided outside the Arbitration Court. We do not trust the people in charge of the court to play the game' – he was charged with contempt and punished by the Full Court with a month's imprisonment. Later in the year, Chief Judge Kelly sentenced a miner's official to the same term for refusing to divulge where the union funds, which the Court had ordered to be paid to the Industrial Registrar, had gone. Judge Foster subsequently increased the sentence to a year and extended it to a number of communist union leaders after members of the Waterside Workers' Federation assembled outside the Court and counted him out (Larmour 1985: 194–9).

The antagonism was exacerbated by the conviction of the Chief Judge that industrial disputation was unnecessary. Drawn to the corporatist program of Catholic Action, in 1952 Kelly took the extraordinary step of issuing a letter

to employers and unions that set out his vision of an organic peasant society, proclaimed that 'contentment and peace and happiness are only to be found in the acceptance of authority', and suggested a wage reduction. On hearing of Kelly's letter, the Prime Minister was reported to have exclaimed, 'God save me from my friends!' (d'Alpuget 1977: 128, 139).

Kelly was a remarkably impolitic Chief Judge. He wanted to deny any increase in the Basic Wage Case of 1949–50. Judge Foster, with whom he no longer communicated, wanted to award a large increase of £1 (or 15 per cent). Judge Dunphy was closer in sympathy to Kelly than Foster, but felt some increase was required. Since his two senior colleagues would not compromise, he found no alternative but to side with Foster and leave the Chief Judge in the minority. The Court was similarly divided over the unions' claim for equal pay for women: Kelly saw no reason to alter the old rate of 54 per cent of the male wage; Foster favoured 75 per cent and Dunphy followed him (Larmour 1985: 204–9). This case, which occupied twenty-two months, involved 225 witnesses and ran to more than 8000 pages of transcript, indicated that the reconstructed Court was no less cumbrous than its predecessor. A subsequent case involving the Professional Engineers extended over no less than eight years and their award cost them £100 000 (CCAC 1960: 20; Hutson 1966: 71).

The Commonwealth Court of Conciliation and Arbitration in 1952. From left to right: Justices McIntyre, Dunphy and Foster, Chief Judge Sir Raymond Kelly, Justices Kirby and Wright. The Industrial Registrar, J.E. Taylor, is seated at a lower level in front.

The next Basic Wage Case began in 1952 before an enlarged bench of seven. The Coalition government, returned to office at the end of 1949, appointed the new judges: Sydney Wright, a distinguished employers' advocate who, upon appointment, revealed his sympathy for the working class (d'Alpuget 1977: 150); 'Bunny' McIntyre, the only solicitor ever appointed to the Court; and Edward Morgan, who had succeeded Kelly as head of the South Australian Industrial Court and held views similar to those of his predecessor. Kelly wanted to abandon the system of automatic quarterly indexation and was assisted when first Wright, then Foster, withdrew from the hearing; Foster's withdrawal, after nine months of hearings, caused particular controversy as Kelly insisted the case must begin again. The High Court disagreed and late in 1953 Kelly finally obtained his object of abolishing indexation of the basic wage (d'Alpuget 1977: 128–38; Dabscheck 1995: 143–8).

The decision brought a storm of protest. Albert Monk, the ACTU president had already described the Court as 'a Frankenstein monster', and a decision by the full bench in the following year not to increase margins caused the ACTU executive to call it 'a menace to the industrial peace' (d'Alpuget 1977: 140; Hagan 1981: 290). The impatience of the ACTU president with the Court's inflexibility was shared by Harold Holt, the Minister for Labour, and his powerful departmental secretary, Henry Bland, who sought closer relations with the union peak body.

Morale was not assisted by the Court's dilapidated and cramped facilities. The fact that the Commissioners were housed several blocks away exacerbated their discontent. Kelly, who resented the enhancement of their authority in the 1947 Act, made little effort to assist them. The Chief Judge placed great emphasis on the formality of his Court; he objected to lay advocates and in 1951 secured an unfettered discretion to admit counsel, including to hearings by the Commissioners. In the same year, he gained the title of 'Honourable' for the members of his Court, and for himself assumed the more prestigious designation of Chief Justice, which he had inscribed on his wig tin. When the tin was presented by mistake to the Chief Justice of the High Court, the latter was not amused (d'Alpuget 1977: 117). An appeal from the Boilermakers' Society against fines imposed by the Arbitration Court allowed Sir Owen Dixon to quash the pretensions of the

'ROSTELLA'

The Court of Conciliation and Arbitration began with part-time officers and borrowed premises; the first Registry was accommodated in the Attorney-General's Department in Spring Street, Melbourne. A growing volume of business after the First World War made its President anxious to obtain a separate building in Melbourne.

In 1920, Mr Justice Powers learned that the Navy Board was vacating a building at the western end of Lonsdale Street, close to the Law Courts, and asked Robert Garran, the Commonwealth Solicitor General, to inspect it with him.

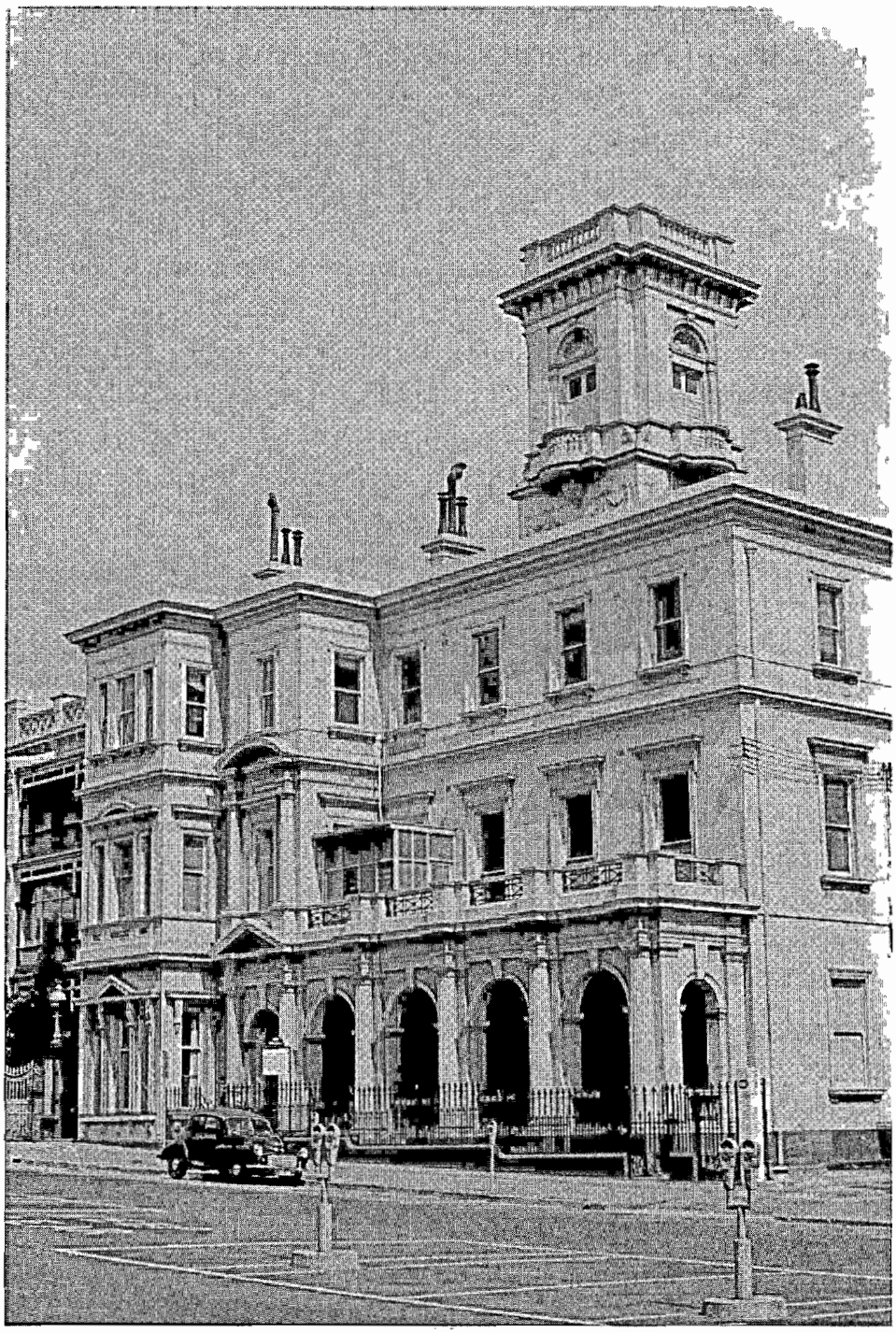
The building was named 'Rostella', a freestanding Victorian mansion of three storeys. It had been built in 1868–69 for Sir Thomas Fitzgerald, a leading surgeon, who added a tower in 1885. Among his collection of fine pictures was Lefebvre's *Chloe*, which is now displayed in Young and Jackson's hotel (Macdonald 1972).

'Rostella' was designed for gracious living. The massive arcaded loggia gave entrance to a grand vestibule and spiral staircase, with spacious formal rooms on the ground floor. Powers was especially excited by the ballroom and its dais, as he thought this would make an excellent Bench for his Court. He did notice the motto inscribed at the back of the dais by the Naval Board — 'Strike first, strike hard, strike often!' — and insisted that it be painted out before the Press was admitted to the new premises (Garran 1958: 282).

The Court remained at 'Rostella' for the next forty years. Selby Hastings, who would become a Deputy Registrar and later a Commissioner, commenced work there in 1940, standing before a slope-topped ledger desk and inscribing notification of disputes into a leather-bound register. His early duties also included rolling empty beer kegs down the spiral staircase after a Christmas party (Hastings 2001).

'Rostella' allowed a straitened grandeur. Coal burned in marble fireplaces in the judges' chambers, but there was no room for their associates. There were baths of Olympian proportion but the sanitary arrangements were primitive. The annual reports of the 1950s paint a plaintive picture of judges three to a chamber, a Registry forced out into another building, and counsel squeezed into the hopelessly cramped and inadequate former ballroom. The Court had to use the High Court's second Melbourne courtroom when it was available and even hold hearings at the Hawthorn Town Hall (*CPP* 1952: 1207).

The staff endured these privations until 1958, when they moved into new, purpose-built premises in 451 Little Bourke Street. Within a decade, the Commission was spilling out of them, and in 1979 it moved to Nauru House. It served for the next quarter-century and the Commission will shortly move again to another new building at the southern end of Exhibition Street.



An exterior view of 'Rostella' shows the colonnade, pediment and tower of the mansion that Powers obtained for the Court.

subordinate tribunal. By a narrow majority, his bench decided that the Arbitration Act had no power to punish contempt on the grounds that, since its primary function was arbitral, it could not be invested with judicial functions.

THE COMMISSION

The government took the opportunity to separate the two activities and remove Kelly to a far more limited role. It established an Industrial Court to perform the judicial functions and a Conciliation and Arbitration Commission to carry out the essential business of resolving disputes and making awards. Kelly was to be the Chief Judge of the new Court, with Dunphy and Morgan as its two other members, but Kelly died before the appointment was made and the senior post was instead taken by John Spicer, who as Attorney-General had informed the members of the old court that it was to be broken up.

The judges were indignant at the apparent loss of status attached to the new Commission since the government wanted to dispense with the legal formality that it saw as encumbering its operation. Foster protested publicly that the government's legislation would make him 'just Mr Alfred William Foster', and Kirby drafted a petition to Menzies on behalf of the aggrieved judges that explained the 'personal humiliation' they would feel to have the wigs 'removed from their heads by Act of Parliament' (Larmour 1985: 223; d'Alpuget 1977: 147–8).

A compromise was reached: the four members who transferred to the Commission (Foster, Kirby, Wright and Ashburner) retained their titles and life tenure but agreed to give up their wigs and gowns except on ceremonial occasions. Various legalistic remnants were retained and remain to this day in formal hearings: the bar table, the raised platform, bowing to the Commissioners as they enter the chamber. The presidential members retained their associates and tipstaffs.

The legislation laid down that these presidential members of the Commission would have legal qualifications, and maintained the distinction between them and the lay Commissioners, whose numbers were halved and supplemented by three specialist Conciliators (a position abolished in 1974). The process of conciliation allowed for greater informality. Jackets were worn and surnames used in hearings of the Commission; arguments were addressed to the bench. During conciliation,

the jackets came off, cigarettes were lit and participants addressed each other by their first names.

While the lay Commissioners continued to arbitrate within the industries to which they were allocated, the new structure made systematic provision for reference or appeal of cases to the presidential members or a mixed bench of presidential and lay Commissioners. Relations improved further when the entire staff of the Commission was brought together in 1958 in a new building in Little Bourke Street. The Commission was far more responsive to local needs and in its first year conducted proceedings in Launceston and Devonport, Newcastle and Port Kembla, Lithgow and Orange, as well as the capital cities (CCAC 1958: 12).

It took longer to resolve antagonisms on the bench. Alfred Foster was the senior member but the presidency of the Commission went to the more conciliatory Richard Kirby; Foster's estrangement effectively removed him from major cases for several years. Sydney Wright was close to Foster while Richard Ashburner, who was appointed to the Court in 1954, had been a leading advocate for the employers. Subsequent appointments to the Commission were Frank Gallagher, who had presided over the Coal Industry Tribunal at the time of the 1949 dispute, and John Moore, who had previously appeared for the Commonwealth. Both were more congenial to Kirby, who made free use of his authority to compose the bench for major cases.

By far the most important were the Basic Wage cases, which the Commission conducted annually. Since changes in the basic wage flowed into the pay packets of the great majority of Australian wage-earners, there was keen public interest in these proceedings. With its decisions, the Commission largely determined the aggregate wage level, a crucial variable in the national economy at a time when the Commonwealth government exercised an unprecedented control of macroeconomic policy. Its willingness to allow such a large measure of autonomy to an independent wage tribunal was remarkable, and perhaps that was a necessary concession to secure acceptance of centralised wage determination.

To be sure, the Commission was guided by the principle of the capacity of industry to pay, and ever since 1926 the Commonwealth had the power to intervene in Basic Wage cases. Counsel for the Crown regularly appeared in these cases to tender economic evidence and make submissions. Even so, the Menzies government frequently affirmed the independence of the national tribunal: the Prime

Minister himself told the House of Representatives in 1952 that 'The Government has made it abundantly clear that all questions which are now pending, such as quarterly adjustment of the basic wage, are within the sole jurisdiction of the Arbitration Court' (*CPD* 6 August 1952: 66). Moreover, the government indicated a preference for a particular amount in only four out of the nineteen cases that were conducted between 1953 and 1972 (Brereton 1989: 92). It was Kirby's habit to notify the Minister for Labour of Basic Wage decisions the night before they were announced, so that the government could make an immediate response (d'Alpuget 1977: 192). Beyond that courtesy, his Commission controlled wage policy.

The Basic Wage cases were conducted as arguments between the unions and the employers, each buttressing its arguments with expert witnesses to persuade the bench of their claims about the economic consequences of a wage increase. As an economist who appeared for the unions remarked in 1951, 'Each party to a dispute will endeavour to prove that expert witnesses called by the other party are incompetents, liars and cheats' (Walker 1970: 88). Horrie Brown of the Australian National University suffered a heart attack after he appeared for the ACTU in the 1953 case (d'Alpuget 1977: 159), while James Perkins of the University of Melbourne refused to give evidence in the 1961 case unless cross-examination was limited (Kerr 1961). It was frequently observed that the presidential members of the Commission, as well as the counsel who addressed them, while expert in the law were lay economists.

The stakes in these cases were high, however, and there was no lack of economic advice. Kirby himself drew on conversations with a range of economists, from 'Nugget' Coombs (then the Governor of the Reserve Bank) to academics such as Dick Downing and Joe Isaac. It was in this period that labour economists turned their attention to wage policy as a vital component of national economic management (Fisher 1983: 98–104) and brought greater precision to the measurement of productivity. The work of the Commission attracted increasing academic attention and the Industrial Relations Society provided researchers and practitioners with a forum for informed discussion, a development Kirby encouraged as patron of the Victorian Society.

With his aggressive style and flair for publicity, Bob Hawke brought a new edge to the Basic Wage cases after 1959. The employers responded by strengthening

their own organisation, with George Polites taking control of the preparation and Jim Robinson, a young Adelaide barrister, jousting with Hawke in the Commission. The ensuing cases brought success to one side, then the other, until in 1966 the Commission took the fateful decision to consider the basic wage together with the margins paid for skill, which until then had been decided separately. With this decision, a familiar ritual assumed a new name: the Commission no longer conducted Basic Wage cases but, rather, National Wage cases.

In amalgamating the two wage components into a total wage, the Commission took the bold step of altering some of the margins. In attempting further to absorb over-award payments into the total wage, it provoked powerful unions into a campaign of rolling stoppages. In resorting to penalties against these unions, it created a head-on confrontation. As is related elsewhere, the union campaign against these penalties culminated in national action during 1969 following the imprisonment of Clarrie O'Shea of the Tramways Union for refusal to pay fines imposed for his contempt of court. Faced with mass protest, the government capitulated. An anonymous benefactor paid O'Shea's fines and the Attorney-General's Department instructed Justice Kerr of the Industrial Court to free him (d'Alpuget 1977: 234).

These dramatic battles were accompanied by a deteriorating relationship between the Commission and the Commonwealth government, and personal difficulties within the Commission. Kirby was distressed by the growing criticism of his Commission and unforgiving of the colleagues who had seized the initiative from him. He did not appoint two of his colleagues to a full bench for eighteen months after they prevailed over his judgment in the 1965 Basic Wage Case, and in 1969 had them removed to the Industrial Court. Public controversy overshadowed the Aboriginal stockmen's award of 1966 (discussed in Chapter 5), in which Kirby took justified pride, while ill health prevented him from sitting on the Equal Pay Case of 1969, which he might well have guided to a better outcome.

For all of the criticism it attracted, the Commission worked with greater efficiency. The number of sitting days for Basic Wage cases fell from over 100 in the early 1950s to as few as 25 by the 1960s. A study of 600 hearings in 1968–69 showed that three-quarters were completed within a month. Lawyers still appeared in most full-bench cases but 90 per cent of those that came before

Commissioners involved no counsel (Isaac 1976: 334). In 1972, the requirement that presidential members have legal qualifications was removed. With Wright's death in 1970, Gallagher's retirement in 1971 and an increased turnover of new appointees, two new presidential members joined the Commission in 1969, two more in 1970, another in 1971 and another two in 1972 (one of them had been Public Service Arbitrator and was the first non-lawyer). Kirby himself retired in 1973 on grounds of ill health from the Commission he had shaped and sustained.

It therefore fell to the new Labor government to appoint his successor. The Prime Minister and his Minister for Labour and National Service wanted Jack Sweeney, a labour lawyer, but Bob Hawke, by now the president of the ACTU, pressed for the senior member of the Commission, John Moore (Cameron 1990: 31). While Hawke prevailed on this occasion, the government quickly put its stamp on the Commission. A change of name in 1973 to the Australian Conciliation and Arbitration Commission expressed Whitlam's expansive view of the national government. The minister was Clyde Cameron, who as president of the South Australian branch of the Australian Workers' Union had extensive experience with arbitration and strong views on how it should be improved. To implement them he replaced the head of his department with Ian Sharp, previously the Registrar of the Commission. This was a sharp break with tradition as Industrial Registrars had previously ended their careers within the tribunal, typically as Commissioners.

The government intervened in the National Wage Case in 1973 to support equal pay for women and chose Mary Gaudron to present its submission (Guy 1999: 254–5). It appointed Elizabeth Evatt as the first female presidential member and Joe Isaac as the first with a background in economics. In its first two years the Labor government secured substantial increases in the minimum wage, and allowed further increases outside the arbitration system. In its last year, with the onset of an international recession, the government persuaded the Commission to reintroduce wage indexation in a belated attempt to contain inflation.

Clyde Cameron recorded a conversation in his diary that took place in October 1975, while Malcolm Fraser was using his numbers in the Senate to block supply and bring down the Whitlam ministry. Cameron, who by this time had been

sacked from the ministry, was seated at a table in the dining room at Parliament House adjoining that of the Opposition leader, and heard Fraser in his cups boast to colleagues how he had been to see Robert Menzies and received advice on the fruits of office: 'It's not the laws – laws you can change; it's appointments that matter' (Cameron 1990: 236). Fraser made many appointments to the Commission after he secured office, and they were as carefully chosen as those made by the Whitlam government between 1972 and 1975.

They did not, however, secure the Commission's compliance with his government's wage policy. Wage indexation lasted for the next six years, despite regular government submissions either for partial indexation or that no increase be awarded because of the country's economic difficulties – it was not until a further recession in 1982 that the Commission agreed to a temporary wage freeze. Until then, it took a cautious approach, sometimes giving only part of the increase recorded in the price index and sometimes restricting the full increase to lower-paid workers.

With unions pressing against these constraints, the government used its legislative powers to introduce new measures against union militancy. In its eight years in office, the Fraser government enacted no less than fourteen amendments to the Conciliation and Arbitration Act. These included a requirement that the Commission consider the effects of wages on inflation and unemployment; provision for the Commonwealth to seek a full-bench review of any award or agreement; and establishment of an Industrial Relations Bureau to instigate proceedings for breaches of awards (Deery et al. 1997: 243–6). A further legislative change, the provision in the *Trade Practices Act 1977* for sanctions against industrial action, was particularly significant since it allowed employers to seek remedies outside the arbitration system altogether. In a further change, the separate Industrial Court was abandoned in 1976 and its functions absorbed by the Federal Court.

It was fortunate that Moore presided over the Commission during this testing period. He had worked closely with Kirby and shared his predecessor's extensive familiarity with the jurisdiction. Courteous and reserved, Moore commanded general respect for his integrity. He was a practical reformer. In 1976, he initiated regular meetings with the heads of the State industrial tribunals to foster greater

cooperation with them. His practice of holding discussions of full-bench cases before the members prepared their decision did much to improve collegiality and cohesion.

Under Moore's leadership, the Commission picked a careful path to maintain its independence. Like Kirby, he pursued an approach described as 'accommodative arbitration' (Yerbury and Isaac 1971), seeking practical agreements on wage-fixing principles acceptable to the parties, mindful of, but not subservient to, government policy. In accepting this more limited role, it no longer claimed to be guided solely by Higgins' pole star of wage justice: it was more a 'facilitator' than a 'prime mover' (Isaac 1989). Some saw this more pragmatic approach as detracting from the prestige of the jurisdiction: when Michael Kirby accepted appointment to the Commission in December 1974, a leading advocate asked him, 'Michael, why would you do this? You will sink like a stone out of sight without a trace' (Kirby 2001b).

Much of the Commission's work was done unobtrusively. Its style of dispute resolution was captured in a novel published at this time by a pseudonymous practitioner believed to be a member of the Commission. It depicted a fanatical left-wing union officer foiled in his attempt to paralyse the nation's economy, and a headstrong American boss who comes to appreciate that the Commission provides a necessary forum for resolving differences. The company executive, along with the federal minister and the union advocate, celebrate the settlement in a pub. The novel is also notable for its use of the phrase 'the industrial relations club' (O'Charley 1978).

A further change of address by the Commission was also suggestive of its evolving nature. By the time Moore retired in 1985, there were modern premises in every State and Territory that provided for District Registries, offices for the members of the Commission and their staff, along with facilities for conferences and hearings. At the end of 1979, the Commission moved its base of operations in Melbourne from the building it had occupied at the west end of Little Bourke Street to several upper floors of Nauru House, the tallest of the office blocks in the eastern precinct of the city. The move doubled the Commission's workspace, testifying to the increase of business and expansion of staff numbers: when Moore retired, there were twelve Deputy Presidents, twenty-seven Commissioners and nearly a hundred support staff in Melbourne alone. What

had begun as a makeshift court in a borrowed chamber was now a tenant in the central business district.

THE COMMISSION CONSTRAINED

The election of the Hawke Labor government in 1983 brought the implementation of the Accord, whereby the government and the ACTU agreed to restore wage indexation and forgo further claims as part of a program of economic reconstruction. Subsequent refinements of the Accord discounted wage increases for improvements in the social wage and superannuation benefits, then linked them to a simplification of award classifications and productivity improvements. These arrangements, which were negotiated between the government and the unions, and then submitted to National Wage hearings, seemed to reduce the Commission's role.

The government had in any case established a committee of inquiry into the federal system of conciliation and arbitration. It was chaired by Keith Hancock, a labour economist, and made a number of recommendations designed to improve the system's operation, but was adamant that 'conciliation and arbitration should remain the mechanism for regulating industrial relations in Australia' (Hancock 1985, Volume 1: 2). This finding heightened rather than stilled the criticisms of the system. In 1983, when John Howard had called for deregulation of industrial relations, he drew on an article written by Gerard Henderson (who would join his staff in the following year) criticising the collusion of the Commission and the parties that came before it in what he called an 'Industrial Relations Club' (Rawson 1984). PP McGuinness, who was then the editor of the *Australian Financial Review*, laid claim to authorship of this epithet when he attacked Hancock's committee as 'paid-up life members of the industrial relations club, the mutual admiration society of practitioners and experts in industrial relations'. McGuinness described the centralised wage-fixing system as a 'shambles' and alleged that its practitioners were 'hopelessly corrupt' (McGuinness 1985: 1–2). These critics were followed by the members of the HR Nicholls Society, who held an inaugural meeting in 1986 and published the proceedings with a foreword from John Stone, the former head of the Treasury, describing the operation of the Commission as an 'irrelevant charade' (HR Nicholls Society 1986: 15).

Such rhetoric was matched by the increasingly impatient secretary of the ACTU, Bill Kelty. Late in 1987, when the Commission delayed a decision in a National Wage Case, Kelty said the Bench had behaved like 'a bunch of clowns' (Dabscheck 1995: 54). Kelty was coming under increasing pressure from member unions seeking larger wage increases. The Accord partners attempted to relieve this pressure by providing for increases in particular industries based on award restructuring and improved efficiency; by the end of the decade they were ready to embrace bargaining at the enterprise level.

The government had followed the Hancock inquiry in 1988 by turning the Conciliation and Arbitration Commission into an Industrial Relations Commission. Hancock suggested the new designation to emphasise the centrality of the tribunal in the wider system of industrial relations; the government used it to indicate the limits of centralised wage determination, and its Act included a provision for enterprise bargaining. Additional legislation in 1993 took this further by establishing two divisions within the Commission, one concerned with awards and one with bargaining: the role of the latter was to approve enterprise agreements. By this time, the Commission had two Vice-Presidents and its other presidential members were classified as Senior Deputy Presidents and Deputy Presidents. Joint Deputy Presidents (who also held senior appointments with State tribunals) were now added as well as Joint Commissioners (who also held State appointments) alongside the Conciliation and Arbitration Commissioners. The government also re-established a separate Industrial Relations Court in 1994.

If the Accord reduced the role of the Commission in wage policy and the intemperate denigration by members of the HR Nicholls Society undermined respect for its integrity, then the government did little to enhance the Commission's standing as an independent authority. There was disquiet when a presidential member of the Conciliation and Arbitration Commission, Jim Staples, was not appointed to the Industrial Relations Commission, as this seemed to violate the principle of tenure of office. John Moore had relieved Staples of many of his duties after he publicly criticised the full bench, but Moore's successor had given him no cases at all after 1985. Barry Maddern, the new President, seemed an unlikely Labor appointment since before his appointment he had appeared as an advocate for employers in many cases.

Maddern had to deal with insistent pressures. Following Bill Kelty's criticism of the Commission, the government legislated to break the link between salaries of presidential members and judges of the Federal Court. Maddern criticised 'the downgrading of the Commission's standing and status' (AIRC Annual Report 1990: 3–4). Shortly after the government fixed the new salaries, the Commission rejected its proposals for enterprise bargaining, which were supported by the unions and most of the employers, on the grounds that 'the parties to industrial relations still have to develop the maturity necessary' for enterprise bargaining to operate (Dabscheck 1995: 70–1). Kelty lashed out angrily (*Australian* 2 May 1991).

In the following year, Kelty claimed that National Wage cases were 'rigged' to favour employers. Kelty referred here to the role of the President in composing the bench for such cases. By his reckoning, there were fifteen members with employer backgrounds, seventeen with union backgrounds and thirteen 'independents', yet he found that those with employer backgrounds made up a majority of the bench in nearly half of the National Wage cases. An anonymous former member of the Commission responded with an attack on 'yuppie graduates who work for a few years in the ACTU office and then expect a deputy presidential position as a God-given right' (*Sydney Morning Herald* 1 September 1992). That the argument could be conducted in such reckless terms, and that independence was regarded as a residual category of the Commission's membership, was a symptom of its difficulties.

When Maddern died, his successor was appointed from outside the ranks of the Commission. Deirdre O'Connor had served on a number of Commonwealth tribunals but had no experience in industrial arbitration when she took up the presidency. She had to deal with a change of government and a further change to the Commission's powers. The *Workplace Relations Act 1996* placed the principal responsibility for determining employment matters upon 'employer and employees at the workplace or enterprise level' (section 3b). It promoted bargaining as the preferred mode of dispute settlement, individual agreements as the preferred outcome. The Act reduced both the arbitral and award-making powers of the Commission. It restricted the scope of awards to a limited range of provisions, and placed greater emphasis on conciliation, with arbitration now to occur 'as a last resort' (section 89a). A separate Office of the Employment

Advocate was created to oversee the new Australian Workplace Agreements, and in 1997 the jurisdiction of the Industrial Relations Court was transferred back to the Federal Court.

Union membership shrank, and the proportion of the workforce covered by federal awards dwindled. A 1999 survey found that 42 per cent of employees were covered by enterprise agreements, 22 per cent by awards and a further 22 per cent by a combination of collective agreements and over-award arrangements (Forsyth 2001: 7). (There are no recent figures to measure the Commission's share of those who continue to work under federal and State awards and agreements, but it had been 40 per cent in 1990 (ABS 1990) and is probably still around that level.) On the other hand, there was no rush to individual agreements and just 130 000 of them were in operation by the end of 2002 (Mitchell and Fetter 2003: 304). The Commission has continued to set what its new President, Geoffrey Giudice, called in 1998 'fair minimum standards' for the national workforce (Norington 1998: 347).

Since the changes made in 1993 and 1996 allowed for industrial action as part of enterprise bargaining, the Commission is no longer expected to enforce the peace. It continues nevertheless to play an active role in dispute settlement. Although the workload of the Commission has continued to increase, the 1993 and 1996 legislative changes have had a significant effect on the distribution of its work. The reduced scope for arbitration, confined mainly to safety net matters, has been offset by increased conciliation activity in enterprise bargaining. The low level of industrial action in recent years has relieved the Commission for dealing with such action.

One of the more significant changes has come from the new provision relating to termination of employment, more commonly referred to as unfair dismissal. Between 1997–98 and 2002–03, annual applications relating to this matter increased from 452 to 7121 (AIRC Annual Reports 1997–98 to 2002–03). Although a large number of applications were withdrawn or lapsed for various reasons, the rest have added substantially to the Commission's work. Of these, on average more than half have been settled by conciliation and about one-fifth by arbitration, while a smaller proportion have gone on appeal to full benches.

The membership of the present Commission attests to the volume of business. It consists of a President, two Vice-Presidents, thirteen Senior Deputy

Presidents, five Deputy Presidents and twenty-seven Commissioners, with an additional fourteen Deputy Presidents and thirteen Commissioners who are members of State Tribunals holding dual appointments. As it approaches its centenary, the Commission is to shift its Melbourne premises once again, to a new building in Exhibition Street, which will provide improved facilities and once again will have its own entrance.

It remains an indispensable part of the Australian system of industrial relations, partly because the Howard government's lack of a majority in the Senate has forced compromise, and partly because it provides a means of facilitating agreements, resolving disputes, protecting entitlements and maintaining a safety net for wage and salary earners. The ambit of this province for law and order has been reduced. It no longer endeavours in the way it once did to enforce industrial peace on powerful antagonists; nor do its wage decisions have such wide effect. Its work is seldom reported as closely as Higgins' Court or Kirby's and Moore's Commission. It continues, however, as a recognisable legacy of a bold experiment and distinctively Australian institution.