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CONTROL OF LABOR RELATIONS IN THE COMMONWEALTH OF AUSTRALIA

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IN AUSTRALIA, the intervention of the legislature in labor relations and industrial disputes has long been accepted as a postulate of political life. Of course there is frequent disagreement as to the precise method or principle of legislative interference, which is not surprising in view of the fact that the two principal political parties of the country are closely associated with organized employer groups on the one hand and employee groups on the other. None the less, in no portion of the Commonwealth does anyone seriously advocate the principle of *laissez faire* in labor relations.

It was not always so. Prior to the decade commencing in 1890, trade unionism had not been developed either on any national basis or to any considerable extent in any of the then separate colonies. Similarly, the employing classes felt no need for close organization to protect their interests. At the time there were in Australia six self governing colonies acting independently of each other. Federation was not to come until 1901. Heavy overseas borrowing, failure either to use agricultural land profitably or to build up secondary industries, inadequate direct taxation, and above all serious collapses in the price of the staple product, wool, all helped to cause a period of acute depression. Almost inevitably, the employers made proposals to reduce wages and a series of great strikes and lockouts at once followed. The working classes were poorly organized for the struggle and were soon defeated. Politicians advised the trade unionists that they should seek representation in the legislature instead of resorting to direct action. In the key colony of New South Wales, the advice, whether sincere or not, was at once acted upon and a political labor party was organized. Its supporters soon extended beyond trade

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unionists and it obtained such successes that between 1891 and 1904 it held the balance of power between the two main political parties, viz., the free-trade (or direct taxation) party and the protectionist (or indirect taxation) party. The Labor party adopted the technique of extorting concessions from one party in return for its support and for this purpose its members "sunk the fiscal issue." On the whole, the Labor party was successful in its objects. Amongst other demands it obtained direct taxation on land values, the enactment of workshops and factories legislation, coal mines regulation, early closing of shops, additional direct taxation, navigation regulation, old age pensions, and miners' accident relief. As it has turned out, the most far reaching of the legislation it obtained was that relating to the compulsory settlement of disputes between employers and employees.

First of all, in 1899, an act was passed in New South Wales empowering the government, in cases of trade disputes where attempts at amicable settlement had failed, to direct an investigation "into the causes and circumstances of the dispute." All such enquiries were to be conducted by a judge of one or other of the superior courts of the State. Under this act the parties to the trade dispute might agree to have their differences settled by an arbitrator. In that case compulsory effect could be given to the award; but, except by such agreement, all the enquiries under the act were merely to inform public opinion as to the causes of the dispute. There was ample power to enforce the attendance of witnesses for the purposes of the enquiry, but (except prior agreement) no other compulsive element was contained in the act.

The act was almost a dead letter, neither the trade unions nor the employers being anxious to bear the heavy costs of long investigations without any guarantee that effect would be given to the tribunal's opinion. The Labor party still pressed upon the New South Wales government its demands for compulsory arbitration, and in 1901, the first Industrial Arbitration Act was passed.

This was the first Australian act which efficiently provided not only for compulsory *investigation* of industrial disputes before a permanent tribunal, but also for the *enforcement* of its awards and orders. The act has been so much copied that its main provisions should be referred to. The tribunal set up was called the Court of Industrial Arbitration and consisted of a supreme court judge as president and two additional members—both appointed by the government and representative of employer and employee interests respectively. All appointments were of three years duration. The court's main function was to hear and settle "industrial

disputes," and, by definition, such disputes could arise only as between employers on the one part, and an industrial union of employees or trade union on the other part. In New South Wales trade unions had been in existence long before the act and, under its terms, a trade union could become registered before the court as an industrial union, whereupon it could initiate proceedings for the settlement of a dispute. The court was empowered to prescribe in its award a minimum rate of wages, and also to direct preference of employment to unionists; but this preference was only at the point of engagement and "other things being equal." The court's jurisdiction extended to the cancellation of the registration of an industrial union, *e.g.*, in cases where the union had wilfully disobeyed an order of the court.

Although the tribunal appointed to hear and settle the disputes was called a court and its chairman was a supreme court judge, and although it enforced its own orders by fine, etc., it was in the main an administrative body. There was no appeal from its decisions. So far did the legislature go in preventing interference by the Supreme Court with the industrial arbitration tribunal that Section 32 provided:

Proceedings in the court shall not be removable to any other court by *certiorari* or otherwise; and no award, order, or proceeding of the court shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court of judicature on any account whatsoever.²

In spite of this very clear expression of the legislative will, the Supreme Court of New South Wales frequently yielded to the temptation of intermeddling with the orders and awards of the industrial court. As the common law writ of prohibition and the word "jurisdiction" were not mentioned in Section 32, the Supreme Court held that a writ of prohibition could issue in cases of excess of jurisdiction. In particular the Supreme Court insisted that the existence of an industrial dispute was an essential preliminary to the tribunal's jurisdiction and that wherever the industrial unions had failed to establish this condition, *e.g.*, by failing to demand improved conditions from the employers and to secure a formal refusal before approaching the industrial court, the awards obtained were invalid for want of jurisdiction; although many months may have been spent in the hearing of the merits of the dispute. Further, the High

² Act No. 59 of 1901 § 32. Cf. § 10 (e) of the National Labor Relations Act of the U.S., 49 Stat. 390 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1938), which, instead of giving the National Labor Relations Board's decisions finality, seems almost to invite their review on the facts by the circuit court of appeals and which assimilates the findings of the Board to findings of a jury which may be set aside unless supported by evidence.

Court of Australia held (on appeal from the Supreme Court of New South Wales) that the industrial court of that State had no power to make a general order that a particular code of wages and conditions of labor deliberately adopted by agreement between the registered organizations of employers and employees should be in force throughout the industry. So disgusted was Judge Heydon, the second president of the court, with the disastrous effect such jurisdictional reviews were having upon the smooth administration of the act that he said:

The barque of the *Industrial Arbitration Act* made a brave show with sails and bunting at its launching and when directed by my predecessor. His captaincy speaks for itself; but since I took the helm, the Act has been riddled and shelled, broken fore and aft and reduced to a sinking hulk. No pilot could navigate such a craft. Do not say, however, that no ship can sail the seas, because this one has been so badly built.²

The act of 1901 also provided that strikes or lockouts should be penalized if they took place, either (1) before a reasonable time had elapsed for a reference to the industrial court of the matter in dispute, or (2) during the pendency of any proceedings in the court. Leave of the court had to be obtained before a prosecution could be begun. It appeared that, as soon as the industrial court proceedings were concluded, and the award pronounced, the statutory prohibition against strike or lockout ceased. But as a general rule, the trade unions were content to enforce the terms of the court's award by prosecution, *e.g.*, in the case of failure to pay the minimum wage. In some of the later statutes, both State and Commonwealth, strikes and lockouts were prohibited irrespective of the time at which and the circumstances in which they began. Indeed, in some awards, made under the sanction of the Commonwealth statute, penalties were provided in case of any combination of employees to *refuse* work although no engagements to accept work had yet been made, and although the refusal was not unreasonable in the circumstances. Provisions such as these, though rarely inserted, amounted to enforcing something like a servile status and on that account were strongly condemned by Mr. Justice Higgins of the Federal Court of Arbitration.

It is important to understand the attitude of the political Labor party towards the New South Wales Act of 1901. For nearly ten years prior to its passage, economic depression had curbed the spirit and lessened the power of the trade unions. Almost every lockout directed against them had succeeded, almost every strike had failed. W. A. Holman, one of Labor's ablest spokesmen, and later premier of the State, in supporting

² New South Wales Parliamentary Papers, Report of Royal Comm'n on Industrial Arbitration xxvi (1913).

the introduction of the act, thus referred to one of the great strikes in the wool industry:

Who was responsible for the gigantic shearing strike of 1894?—for the breach of an agreement which had been in force since 1891, and worked most harmoniously for three years? What was the position of the union under those circumstances? They appealed to a deaf heaven for justice. They had their agreement, and there it was—so much waste paper, the employers disregarding it and offering a new one. We—I was then a member of the Shearers' Union, although not a shearer—we had then absolutely no resource but to appeal to the god of battles—we appealed, and the union went down in the fight. But had there been a Court of this kind, and that agreement in force, there would have been no strike, none of the shearing riots of 1894.³

Holman thus justified the principle of the new legislation:

All that the passing of the bill will do is to substitute the methods of reason, arbitration, common sense, and judgment for the methods of brute force. The bill will substitute the force of the law, which, in its ultimate analysis, is the regulated brute force of the community, for unregulated brute force; and that is what every piece of legislation does.⁴

In spite of the frequent issue of writs of prohibition against the industrial court, the Labor movement in New South Wales was not dissatisfied with the results obtained. There was considerable improvement in working conditions, particularly in women's trades and "soft collar" occupations. There was also a great increase in union membership which in turn helped the growth in power of the political Labor movement.

Prior to federation, sweating became so rife in the neighbouring colony of Victoria that by an act passed in 1896 wage fixing authorities called Wages Boards were established with power to fix minimum wages in a limited number of trades. The main distinctions between this system (which still continues in the State of Victoria though subject to the superior jurisdiction of the Federal Arbitration Court) and that introduced by the New South Wales act of 1901 may be thus described:

1. The wages board system merely extended the principle of factory legislation so as to minimize sweating which was regarded as obnoxious to decent factory conditions.
2. Although subsequently extended to most trades, the system operated at first only in relation to the clothing trade, the boot trade, furniture making and bread baking.
3. The wages boards had not general jurisdiction over industrial claims or disputes between unions and employers, whereas in New South Wales, the subject matter of the court's jurisdiction extended to every industrial claim or matter which was *bona fide* in dispute.
4. Under the wages board system the unions had no power to enforce the determination of the wages boards. The maximum wage fixed was equally applicable to non-unionists and enforcement lay exclusively in the hands of the government factory inspectors.

³ New South Wales Parliamentary Debates (Aug. 23, 1900).

⁴ *Ibid.*

The result was not surprising. In Victoria, trade unionism did not increase in strength as it did in New South Wales. The trade unions were most interested in policing or enforcing the wages boards' determinations and yet they were given no authority to prosecute. The chief inspector of factories in Victoria was almost in despair at his inability to enforce the determinations of the Boards:

It is notorious that some of the men, who are quite able to earn the minimum wage, and are no doubt actually earning more than that sum for their employers, sign for the minimum wage and take less. I have had . . . repeated admission from men that they have done it. Prosecutions have been taken for these breaches, and taken successfully. It is, however, very difficult to get sufficient evidence for such prosecutions. Most undoubted evidence of fraud is necessary, for, if men were allowed to sign for wages and then simply deny receiving them, our whole commercial system would be rendered unstable and no one would be safe. Why do they do it? Because they are afraid of not getting work, because they know that there are men at the door of the factory probably waiting for any chance to take their places, because they know that there are old and slow workers who are willing to take any wage and sign anything if they can only get work.⁵

The ultimate reason why the New South Wales union movement prospered rapidly and that in Victoria did not, was mainly political. In New South Wales, the Labor party was able to extract favorable legislation from a government which was compelled to rely upon its support. In turn the growing strength of unionism itself precluded attempts to interfere with the privileged position unionists were obtaining under the industrial court system. Thus, in 1908, by which time the New South Wales Labor party had become the direct opposition and was no longer merely a third party, a Conservative government was intent upon adopting the wages board system of Victoria instead of the system established by the New South Wales act of 1901. But the Labor party succeeded in retaining the principle that the recognized unit of the employees both in the hearing of the disputes and in the enforcement of the awards when made should be the trade union (in its capacity of industrial union). Subsequently, in spite of changes of government and frequent amendments of the industrial arbitration law, no serious attempt has been made to undermine this fundamental principle.

I next turn to the intervention of the national legislature in connection with labor disputes. Formed in 1901, the Commonwealth of Australia was a true federation modelled in great part upon the Constitution of the United States. There were of course some important points of difference. In Australia, the constitutional guaranties inserted were not so ex-

⁵ Report of Inspector of Factories 12, 14 (1898).

tensive. Although interstate free trade, religious freedom and trial by jury were safeguarded in specific terms, the founders of the constitution were so impressed with the vagueness and uncertainty of the "due process" clause as interpreted in the United States that no serious proposal was made to include any provision that could be regarded as analogous. For present purposes the main provisions affecting the division of legislative power as between the Commonwealth and the six States comprising the Federation, were the following:

SECTION 1. The Legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

SEC. 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) Trade and commerce with other countries, and among the States

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

SEC. 61. The Executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

SEC. 71. The Judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

SEC. 107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission of the State, as the case may be.

SEC. 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Of the thirty-nine heads of Commonwealth legislative power mentioned in Section 51, I have set out only three in the above list of provisions. None of the thirty-nine include "labor," "employment," "wage fixation" or "industry." The only reference to labor or industry is in subsection

(xxxv) describing the Commonwealth legislative power in relation to conciliation and arbitration for the settlement of certain industrial disputes.

So far as the control of labor relations is concerned, the general result admitted of no doubt. Over such topic, the legislative powers of the States, plenary within their borders prior to Federation, were not withdrawn. Further, except so far as the constitution conferred a subject matter of power upon the new Commonwealth legislature, that legislature could not act at all. Even where the Commonwealth Parliament was empowered to act under Section 51, *prima facie* each State legislature retained concurrent power to act subject only to Section 109 which provided for the supremacy of Commonwealth legislation in event of actual conflict between it and State legislation.⁶ Thus in relation to labor matters the States continued to have power to control within their own borders questions of hours, wages, conditions of labor, the status of trade unions and the like matters.

It is interesting to recall that the clause from which Section 51 (xxxv) derives was included in the draft Australian constitution at a late moment in the proceedings of the drafting convention. The inclusion was due to the insistence of H. B. Higgins who was later to become Mr. Justice Higgins, the second president of the Commonwealth Arbitration Court which was established in exercise of the Commonwealth legislative power. When Higgins' suggestion was adopted, very few members of the Convention expected that very early in its history the Commonwealth Parliament would follow the example of New South Wales in its industrial arbitration experiment. To the great surprise of all, the Labor party was successful in electing sufficient members of the first Commonwealth Parliament to enable it to hold the balance of power between the protectionist and free trade groups. Then, at the general election of 1903, the Labor party increased its following, and, until the year 1909, when its opponents coalesced and Labor became the sole opposition party, it retained the balance of power and exercised it to obtain concessions in accordance with the *modus operandi* already perfected in New South Wales. The most important result of its policy of "concessions in return for support" was the passing in 1904 of the Commonwealth Conciliation and Arbitration Act in exercise of the legislative power specified in Section 51 (xxxv) of the constitution.

The Commonwealth act provided that a court of conciliation and arbi-

⁶ There are a number of legislative powers of the Commonwealth Parliament which are made exclusive under § 52, but they need not be referred to here.

tration should be established. The tribunal was to consist of a president appointed for seven years from among the justices of the High Court and the president could from time to time appoint a deputy president from among the High Court justices or the Supreme Court judges of any State. The first president was Mr. Justice O'Connor. Then from 1907 until 1920, Mr. Justice Higgins held the office of president. During the latter portion of his term of office, his deputy was Mr. Justice Powers, also a High Court justice. After Justice Higgins' retirement, other deputy presidents were appointed, until, in 1926, the arbitration system was altered by providing that judges of the court should have strict federal judicial tenure (life appointments). The first chief judge under the new system was Judge Dethridge, who held office from 1926 until his death early in the present year.

In the first act of 1904 the court was empowered to settle industrial disputes extending beyond the limits of any one State (except in relation to agricultural, viticultural, horticultural, and dairying pursuits). By subsequent acts the jurisdiction extended to all such interstate disputes without any exceptions. Awards were made enforceable at the instance of any registered organization or its members. The essentially administrative character of the tribunal was evidenced by Section 25 of the 1904 act which provided:

In the hearing and determination of every industrial dispute the Court shall act according to equity, good conscience, and the substantial merits of the case, 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 just.

Despite many amendments in the Commonwealth statute, its main line of development is unbroken. As in the case of the New South Wales act of 1901, and the later New South Wales act of 1912, trade unions alone could initiate court proceedings on behalf of employees. When registered under the act the trade unions became "registered organizations" for the employees, and the act also provided for organizations for employers. In practice it was quite impossible for a "company union" to become registered as an employees' organization. After an industrial dispute had come into existence, any registered organization could bring it into court for adjudication. By subsequent legislation, the president of the court was enabled to summon all persons interested in the dispute to a "compulsory conference" in order to exhaust the method of conciliation. Failing agreement at such a conference, or after an organization had itself brought the dispute into court, the president heard evidence. In the early days of the court, when first awards were being made in an industry,

these public hearings occupied considerable time. The arbitrator's decision was always embodied in an award.

As a rule, the award contained four separate parts:

a) *Hours*.—The arbitrator would determine the hours of labor (usually on a weekly basis) and suitable increased overtime rates. Very early in the court's history, forty-eight hours became the standard working week. Later the forty-four hour standard was accepted.

b) *Basic wage*.—This was the wage which had to be paid to every adult worker whatever his degree of skill. One of Mr. Justice Higgins' greatest contributions was his declaration that the "basic wage," that is "enough wages to enable a worker to maintain his existence with its normal necessary wants" was a minimum standard and was absolutely irreducible.⁷ This wage was fixed by an investigation of the normal requirements of an average family (husband, wife and three children) living according to a reasonable standard of comforts. Higgins J. made his first investigation of the "basic wage" in what was called the "Harvester Wage Enquiry" in 1907 at which time he fixed seven shillings a day, or forty-two shillings a week as a reasonable base rate.

Gradually the court devised an elaborate method of adjusting the basic wage in accordance with the rise and fall of the cost of living. The central statistical bureau of the Commonwealth regularly obtains particulars of prices and for each quarter issues index figures which show the rise or fall in the cost of living for (say) (1) rents, (2) clothing, (3) food, (4) miscellaneous elements, and (5) various combinations of the other four elements. The basic wage is adjusted upon the basis of the data thus obtained. In this way, the nominal basic wage may alter from quarter to quarter but the real wage, representing the necessary commodities actually purchasable, remains substantially unchanged until the court decides to alter the general basic wage or to adjust it by some different calculus. The present practice is that neither the basic wage nor the method of calculating it can be altered except by three judges of the federal court.

c) *Marginal allowance*.—This allowance consisted of the additional wage in excess of the irreducible minimum (*i.e.*, the basic wage). The actual wage to be paid in any case was calculated by adding the basic wage to the marginal allowance applicable to the classification or grade of the particular worker. From the first the court regarded it as important to separate the "marginal allowance" from the "basic wage." Whereas the latter standard could not be decreased, Mr. Justice Higgins held that

⁷ Higgins, *Industrial Arbitration* 10.

he was at liberty to alter the marginal allowance according to the economic success or otherwise of the particular industry. Thus he said:

The remuneration of the employee cannot be allowed to depend on the profits made by his individual employer. This proposition does not mean that the possible profits or returns of the industry as a whole are never to be taken into account in settling the wages. So long as every employee gets a living wage, I can well understand that workmen of skill might consent to work in such a case for less than their proper wages, not only to get present employment, but in order to assist an enterprise which will afford them and their comrades more opportunities for employment hereafter. For this purpose, it is advisable to make the demarcation as clear and as definite as possible between that part of the wages which is due to skill, or to monopoly, or to other considerations. Unless great multitudes of people are to be irretrievably injured in themselves and in their families, unless society is to be perpetually in industrial unrest, it is necessary to keep this living wage as a thing sacrosanct, beyond the reach of bargaining. But where the skilled worker has secured a living wage, he has attained nearly to a contractual level with the employer and, with caution, bargaining may be allowed to operate.⁸

d) Industrial conditions.—These conditions dealt with the general regulation of the relations between employer and employee so far as relevant to the industrial dispute before the court. The award could, and did, cover such matters as preference to unionists, privileges of employees, requirement of notice of termination of employment, methods of classification of employees, setting up of boards of reference to deal with minor matters in the working out of the awards.

Although an award, when first made or subsequently consolidated, usually included the four main matters which I have described, the court had power to vary the award. But it could not, by variation, insert any provision which was "outside the ambit" of, *i.e.*, irrelevant to, the settlement of the industrial dispute of which the court had cognizance. In other words the court had no general authority to order what was just or fair unless there had been a demand which warranted such order.

This brings me to the great difficulties encountered by the Commonwealth arbitration court (immediately after its presidency had been taken over by Mr. Justice Higgins) in resisting the many legal and constitutional attacks which the employers conducted in the High Court. In the United States, similar legal attacks have been made, but there they were almost invited by the terms of the National Labor Relations Act itself which confers upon certain courts exercising the judicial power of the United States a fairly wide supervisory jurisdiction over the administrative tribunal. In Australia every effort was made by the legislature to confer

⁸ Higgins, *A New Province for Law and Order* 143, 144 (1922).

complete autonomy upon the administrative tribunal. The example of New South Wales was followed, Section 31, Commonwealth act of 1904 providing that "no award of the court shall be challenged, appealed against, reviewed, quashed, or called in question in any other court on any account whatever." All right of appeal was excluded. By a later act it was expressly provided that no award of the court should be "subject to prohibition, mandamus, or injunction." But the High Court, then under the chief justiceship of Sir Samuel Griffith—regarded by many as a pronounced exponent of "State rights"—continued to act on the thesis that the constitution itself authorized the High Court to keep inferior federal tribunals within their jurisdiction by issuing any "prohibition" order deemed necessary. The fact that in making its award the Arbitration tribunal exercised a purely administrative jurisdiction did not prevent the frequent issue of writs of prohibition. One competent observer has stated:

Writs of prohibition and mandamus were taken out against the Court and its President almost as a matter of course after each award. Many cases were stated for the High Court. Mr. Justice Higgins was the most prohibited man in the Commonwealth. The law reports are full of cases arising out of the Court's work. The workers won awards only to see them quashed or overthrown on some legal technicality. Almost every word in Sec. 51 par. (xxxv) of the Constitution has been the subject of interminable litigation and almost every section of the Arbitration Act also. The cost both to employer and employee must have amounted to hundreds of thousands of pounds. This legal conflict recalls the earlier fight of the workers for the recognition of their unions and like that fight seems now to have ended. It is another illustration of the working class struggle.⁹

Higgins himself had to make public complaint against the High Court's bombardment of his court:

At present the approach to the Court is through a veritable Serbonian bog of technicalities; and the bog is extending. After full consideration, I must state it as my opinion that these decisions as to the limits of the Court's power, with all the corollaries which they involve, will make it impracticable to frame awards that will work—will entail indeed, a gradual paralysis of the functions of the Court. Yet this Court, if it be trusted—and unless it can be trusted, it ought not to exist—shows magnificent promise of usefulness to the public. It is in a position to solve problems which cannot be solved, to settle disputes which cannot be settled by any tribunal except one that has authority in all parts of Australia. In this very case, in my reasons for award, I showed that in industries as to which there is inter-State competition, the State Wages Boards confessedly cannot do justice. It would not be well to go into further detail on this subject, for obvious reasons. But I am clearly entitled—I am even in duty bound—to make known the obstacles and dangers which confront the Court, and before it is too late.¹⁰

⁹ Foster, *Working Class Standards* 20.

¹⁰ 4 C.A.R. 42.

At a much later stage in the court's history Higgins wrote:

But the attacks on the Court and its awards are, of course, generally made from the side of employers, many of whom naturally resent any curtailment of their powers. The applications for prohibition against the President have been sometimes in part or temporarily successful. Prohibition is applied for because of some alleged excess of the Court's jurisdiction, and the argument generally turns on the question, was there a dispute, and if there was, did it extend beyond one State? Sometimes the argument turns on the validity of some section of the Act. The proceedings in the High Court are very long and very costly, and it is astonishing what a wealth of learning is involved in the meaning of the word "dispute" and the words "extending beyond the limits of one State."¹¹

Looking back at the cases from the vantage point of a later generation, one might be amazed at the regularity and persistency with which the awards of the court were assailed, except for the fact that similar attacks characterized the New South Wales tribunal and seemed to be part of a general scheme for discrediting an institution which the employers regarded as threatening their unrestricted economic power. Higgins complained of the "intense strain and partisan abuse" to which he had been subjected,¹² but he should not have been overpowered with surprise after he had openly proclaimed that his court was "an instrument for raising the downtrodden and for improving the stamina and character of the coming generation."¹³ Throughout, Higgins was inspired by the ideal that through the gradual substitution of arbitration for the weapons of strike and lockout he was extending the province of law and order to a new field. "I had," he said, "to learn the business, with no book of instructions, no teacher other than experience, no kindly light except from the pole star of justice."¹⁴ At times Higgins was also assailed from the side of the trade unions¹⁵ and his extreme caution in improving existing standards led to the doggerel (sung to the tune of *Yankee Doodle*):

I know the Arbitration Act,
As a sailor does his "riggins,"
So if you want a *small* advance
I'll talk to Justice 'Iggins.

A present day student is almost bound to conclude that the difficulties once raised as to the construction of the Commonwealth legislative power over industrial arbitration were greatly exaggerated and over-elaborated. But some consideration of the points of law is I think of value.

By Section 51 (xxxv) Parliament could make laws with respect to "con-

¹¹ Higgins, *op. cit. supra* note 8, at 29.

¹² *Id.* at 175.

¹³ Higgins, *op. cit. supra* note 7, at 5.

¹⁴ Higgins, *op. cit. supra* note 8, at v.

¹⁵ *Id.* at 28.

ciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." It was clear enough that Parliament itself had no power to decree what wages and conditions of workers should be, but was compelled to allow such matters to be dealt with only by way of conciliation or arbitration. This restriction Parliament recognized, for it never attempted to do much more than set up an administrative tribunal to arbitrate in default of conciliation.

But the word "arbitrate" was subjected to acute and subtle analysis. To "arbitrate" (it was said) was impossible unless there were parties to the "industrial dispute" and all such parties were before the arbitration tribunal. Therefore it was held that the court could not be empowered by Parliament to make its awards binding except upon the parties before it. The trade union was thus compelled to prove that it was in dispute as to terms and conditions of labor with every employer in Australia whom it wished to be bound by the court's award. If, for instance, it made its demands upon ninety-seven employers only when there were 100 employers in the industry, and if each of the ninety-seven employers rejected the union's demands, it was held that the arbitrator could not, incidentally to his award, require the remaining three employers to observe the terms of the award. In industries which included thousands of employees, the difficulty this created was very great.

An alternative view was that an "industrial dispute" bears little or no resemblance to an ordinary civil dispute and that Parliament's constitutional power extended to authorizing the arbitrator to safeguard his award against minor evasions and discriminations by making its terms a "common rule" of the relevant industry. But this view was summarily rejected. In practice this led to enormous expense and delay for the unions were compelled to seek out every runaway employer in the country in order to serve him with its "log" or code of demands and to get from him a refusal to accede to such demands.¹⁶

Then came the cases determining what was the true criterion of "industrial" in the phrase "industrial dispute." It was held that "industrial dispute" means something more than a dispute between employer and employee—there must be something affecting the conduct of an "industry." Thus, disputes extending beyond the limits of one State between teachers and their employers are deemed outside the jurisdiction of the court, whereas in the case of employment in the services of insurance and banking a sufficient "industrial" character is deemed to adhere to the insurance and banking clerks.

¹⁶ Whybrow's Case, 11 C.L.R. 1 (1910).

Further the dispute must be a "genuine" dispute. In many cases the jurisdiction of the arbitration court was denied by the High Court upon the ground that, in the circumstances of the particular case, all that the trade union had done was to invoke the federal court's jurisdiction without creating a dispute. But the High Court always refrained from asserting that in order to create a *bona fide* or genuine dispute there must be strike, lockout, or industrial disturbance. Indeed one of the supposed objects of the federal act was to prevent strikes and lockouts. The court marked time near or about its declaration that there must be something more than a mere demand for better conditions followed by refusal on the part of the employers in order to create a dispute. How much more, no one quite knew. In more recent times, the principle acted upon is that, so long as the demands are authenticated as the deliberate expression of the will of the union, refusal of the demand is sufficient to attract the jurisdiction of the court.¹⁷

A problem arose over the concept of an industrial dispute "extending beyond the limits of any one State." Was the concept merely geographical? For a considerable time it was believed that where there was no nexus between similar industrial operations conducted by employers in two States there could be no single dispute covering the two States. Thus, in the trade of building, there was no competition between the trade operations in Sydney and Melbourne which are distant more than five hundred miles from each other. In the end the High Court held that the constitutional definition was satisfied if, in two or more States, the unionists were making common cause to improve their conditions, even though the employers in one State were not concerned or affected by the wages paid in the other States and there was no interstate competition.¹⁸

Later, the court seemed almost to accept the principle that where there was a very close nexus between the wage standards in two States there were special obstacles in creating an interstate dispute. In one State a trade union was resisting a lockout which was designed to lower wages and which if successful would have immediately reduced the wage standard for the members of the same union throughout Australia. But it was held that the dispute had not extended and could not be extended beyond the State where the lockout was in progress although that State was in effect the selected battleground of the Australian employees and employers.¹⁹

¹⁷ Australian Tramway and Motor Omnibus Employees' Ass'n v. Comm'r of Road Transport and Tramways, 58 C.L.R. 436 (N.S.W. 1938).

¹⁸ Builders' Labourers' Case, 18 C.L.R. 224 (1914).

¹⁹ Caledonian Collieries, Ltd. v. The Australasian Coal and Shale Employees' Federation and Others (No. 1), 42 C.L.R. 527 (1930).

A question of vital importance arose in connection with the industrial activities of some of the State governments in industries which in other countries and in Australia itself are also controlled by private capitalists. Where in such industries disputes arose between the States or their instrumentalities and the workers, could the federal arbitration court make an award binding the State in relation to its industrial operations, *e.g.*, State railways, tramways, engineering shops, timber cutting? At first the High Court said no,²⁰ basing itself upon *McCulloch v. Maryland*²¹ and *Collector v. Day*.²² Ten or fifteen years later, a contrary view was taken in the *Engineers'* case.²³ There has been much comment on the *Engineers'* case,²⁴ but in essence the point was extremely simple. Undoubtedly the State governments concerned were parties to an industrial dispute extending beyond the limits of one State. There was nothing in the constitution or the Commonwealth act which precluded the Commonwealth arbitrator from settling every dispute of such character. If the States could not have been bound along with the other employer parties, then there could have been no settlement of the one industrial dispute in which all such employers including the States were concerned. It was therefore held that just as the Commonwealth can subject to customs duties goods imported by the State government, its arbitrator can bind State governments which are parties to industrial disputes. It is not surprising that as to the word "bind" the court used somewhat vague language and it did not discuss what would happen if the States refused to provide moneys to pay the wages awarded.²⁵

Another problem of crucial importance was whether, and to what extent, the arbitration court could at the instance of a trade union disputant prescribe the duties of employers who were parties to a dispute to persons (*e.g.*, non-unionists) who were not parties to the dispute. For some considerable time the view prevailed that, even though employers were paying non-unionist employees less than the union standard wage, and although such practice was ruinous to the unions' maintenance of standards, there could be no dispute between the union and the employers as to whether the non-unionists also should be paid in accordance with the union standard. The unions did not contend that the non-unionists themselves were parties to the industrial dispute, but they did contend that the employers who were undoubtedly parties to the dispute with the union could and should be made to comply with the unions' demand.

²⁰ *Railway Servants' Case*, 4 C.L.R. 488 (1906).

²¹ 4 Wheat. (U.S.) 316 (1819).

²³ 28 C.L.R. 129 (1920).

²² 11 Wall. (U.S.) 113 (1870).

²⁴ *Ibid.*

²⁵ *Australian Rys. Union v. The Victorian Rys. Comm'rs*, 44 C.L.R. 319 (1930).

Ultimately the unions' contention prevailed.²⁶ Students of this subject will readily observe that, in principle, there is no difference between this type of dispute and the classical dispute caused by a demand of preference to unionists. In the latter case the fact that those who are not parties to the dispute (the non-unionists) may be disadvantaged as the union is advantaged by gaining its demand does not prevent the subject matter in question from being the subject of dispute between union and employers. In the former case, the fact that those who are not parties to the dispute (the non-unionists) may incidentally obtain advantage if the employer is compelled to pay them in accordance with the union standard should have no greater effect.

Until eight years ago, the Commonwealth act contained provisions penalizing all persons concerned in strikes and lockouts in relation to industrial disputes extending beyond the limits of one State and in relation to the terms of the court's award. These penal provisions were frequently enforced, and the High Court gave a very broad construction to the constitutional power so far as penalty provisions were concerned.²⁷

Few, if any, cases of lockouts come within the notice of the courts. For this and other reasons, the penal provisions became decidedly unpopular, and, in 1931, most of them were, without any serious dissent, swept out of the statute by a Labor government. The main sanction against open defiance of the Court's orders by an organization of employers or employees is cancellation of registration, which means effective deprivation of the advantages of the act during the period of cancellation.

Questions frequently arose as to the legal position created where a federal award prescribing hours, wages, and conditions differed from those laid down either by the law of a State or by an award of a State industrial tribunal. One view which for a time threatened to prevail was that "arbitration" connoted settlement having regard to the existing law, and as the existing law was that of the State, no federal award could prevail over an inconsistent State law. But the opinion which has been accepted is that, as the award of the federal arbitrator is given by the act the force and efficacy of a Commonwealth statute, and as Section 109 of the constitution gives Commonwealth statutes superiority over State laws in cases of inconsistency, the superior law resolving any conflict as to hours, wages, etc., is to be discovered in the terms of the federal award. This result can be and was stated rhetorically by declaring that a decision of the federal arbitrator over whom the federal Parliament has no control can override the established social policy of a State, *e.g.*, as to standard hours for work.

²⁶ The Metal Trades Case, 54 C.L.R. 387 (1935).

²⁷ Stemp's Case, 23 C.L.R. 226 (1917); Walsh v. Sainsbury, 36 C.L.R. 464 (1925).

In one great case, the State of New South Wales had itself prescribed a standard of forty-four hours at a time when the federal standard was forty-eight. It was argued that as the federal award prescribed a *maximum* of forty-eight hours, it was quite consistent with such command that the State law should prescribe a working week of forty-four hours. But this argument was rejected in *Cowburn's case*.²⁸

In practice it is extremely difficult for the workers to obtain a shorter working week from the federal arbitrator. Some governments declare that the question of what is a fair working week should always be left to industrial tribunals and never determined by Parliament. On the other hand, many industrial judges are very chary of acting without some expression of opinion from the legislature.²⁹ *Cowburn's case*,³⁰ already referred to, prevents the States from directly prescribing a shorter working week which can bind employers of that State in relation to workers governed by federal awards—comprising more than fifty per cent of the organized workers of the Commonwealth. The State governments can pass legislation which provides for a shorter working week for workers within their borders who are not governed by federal awards.³¹ But a State which thus enacts a shorter working week may expose itself to increased competition from a "low wage" State.

In 1920 the Labor government of New South Wales reduced the standard working week from forty-eight to forty-four hours. Soon after, in November 1920, Mr. Justice Higgins indicated that the forty-four hours standard would probably be adopted by the Commonwealth court.³² When, however, Mr. Justice Higgins was about to consider the application of the shorter working week to the important engineering industry, the federal Parliament intervened and cut the ground from under his feet by providing that the existing standard of forty-eight hours could only be reduced by a majority of the three existing arbitrators. Undoubtedly the

²⁸ 37 C.L.R. 466 (1926). ²⁹ Higgins, *op. cit. supra* note 7, at 6. ³⁰ 37 C.L.R. 466 (1926).

³¹ Inasmuch as a federal award can only be made in relation to a dispute extending beyond the limits of any one state, the wage conditions in industries which are confined to one state are not as a general rule competent to be brought within federal jurisdiction. There are also many industries on a purely state basis. Further, the federal court, although having jurisdiction over industrial disputes, sometimes refrains from settling such disputes preferring to leave the matter to the state tribunals. Again, in some of the "higher wage" states, such as Queensland and New South Wales, the state branches of federal unions are successful in inducing the federal union to make demands upon employers in the rest of Australia only, leaving conditions in the remaining two states to be dealt with by the state laws and state industrial tribunals. From all these sources there arises an extensive jurisdiction still exercised by some of the state tribunals—particularly in New South Wales and Queensland.

³² 12 C.A.R. 181.

example of the New South Wales legislation considerably influenced Mr. Justice Higgins. Subsequently, in 1925, the Labor government restored the forty-four hour week in New South Wales, and the federal court was induced to accept the new standard, being, according to one authority, influenced "by the knowledge that, in some of the Australian States, the forty-four hours working week was largely in operation."³³

The fact that in some States there is still a large field for the operation of State awards has tended to produce some overlapping between the jurisdiction of federal and State arbitrators. For a time, this matter assumed considerable importance, and in 1929, the federal government proposed to withdraw altogether from the field of industrial arbitration, leaving the States exclusive control over industrial disputes except in two or three special industries. The proposal was defeated by an overwhelming popular majority and from that day up to the present it may fairly be said that all political parties accept the principle of federal arbitration in relation to interstate industrial disputes.

So far as the States are concerned, the systems vary considerably, but the New South Wales tribunal, though now called an industrial "commission" instead of an industrial "court" and although its jurisdiction extends to industrial matters without the necessity of establishing an actual dispute, still functions in very much the same way as the original tribunal of 1901. For all practical purposes, the trade union, registered as an industrial union, remains the unit recognized by the court as the sole agent or representative of the workers for the purposes of conciliation or arbitration. The State system works smoothly enough. For one thing, the company union, or "scab union" as it has been called is non-existent. If the court finds that a union is in any way controlled by employers it will not accord it recognition as an industrial union. Nor is there any real difficulty in the rivalry of *bona fide* trade unions. Here there is very little overlapping. But there may be an industrial union which covers all trades, occupations and crafts within an industry, while the craft unions, or some of them, still survive. In such a case an employee is not bound to choose between the unions. He may belong to both. When the industrial matter comes before the court, both industrial and craft unions (as well as the employers) may, in an appropriate case, be heard. In the Victorian system, on the other hand, the old principles have survived. Unionism plays little part in the operation of the wages boards with the result that there is an increasing tendency for trade unions to seek relief in the federal jurisdiction.

³³ Foenander, *Towards Industrial Peace in Australia* 249 (1937).

While lecturing in the United States in 1938, I was frequently asked how it was possible for a court to fix reasonable wages and conditions of labor. The assumption was that because it had not been done in the United States, it could not be done at all. One general answer is to refer such questioners to the many Australian volumes of printed reports containing the awards of federal and State arbitrators during the past thirty-five years, almost every award being accompanied by a statement of the reasons why the wage has been prescribed.

The volumes of reports to which I have referred will show clearly that just as it is possible to fix reasonable prices for railway fares and freights or unliquidated damages in courts of law, so is it possible to fix reasonable wages. In neither case is there any *a priori* impossibility. In each case the tribunal should have sound imagination as well as a thorough knowledge of the conditions existing throughout the trades and industries of the country. *Agitur eundo* if the court makes a mistake, it is always competent for it to make a suitable adjustment. Nor is there any particular difficulty in enforcing the awards of the court. By this I do not mean that strikes and lockouts are unknown. They will never be unknown in democratic countries where true freedom of association exists and where a tribunal has failed, or seems to have failed to redress a burning grievance. But the ordinary case of enforcement arises where an employer has failed to pay the prescribed wages or to observe some expressed industrial condition, *e.g.*, preference to unionists. In such cases the employer is proceeded against, either before the industrial tribunals or before the ordinary courts of the land, and orders for payment or penalties may be made.

I have no wish to overstate the advantages achieved by the arbitration tribunals in Australia. So much depends upon the particular arbitrator. In some respects, certainly, the departure of Mr. Justice Higgins from the federal court greatly weakened its authority. It no longer even claims for itself the emancipating ideal which Higgins always pursued. An analysis of the calculations strongly suggests that it is by no means certain that the existing "basic wage" is in all respects the equivalent of the Harvester standard fixed in 1907 by Mr. Justice Higgins. During the depression in 1931, the basic standard which Higgins had declared "sacrosanct" was reduced by ten per cent. Although this standard was subsequently said to be completely restored, the method of adjustment was very complex, and it seems to me that the present standard is slightly lower than that existing in 1907 although the actual money figure is, of course, higher.

Therefore it may be conceded that neither the Federal nor the State system of wage fixation by industrial arbitrators has fulfilled all the hopes

of earlier days. While the general standard of living has improved, little or nothing has been done to remove the great bane of the working class, their insecurity of tenure of employment. Moreover, during the World War, and for some time thereafter, the workers did not receive from the tribunals a wage which compensated them for the rapid increases in the cost of living. On the other hand, the Australian system has undoubtedly taken reasonable care of the lowest paid workers and has done much to prevent sweating in certain industries, especially in those employing women and children. Owing to the continuous control by the tribunals, there has never been any absolute line of demarcation between the unskilled and the skilled workers. In the usual case the same industrial union protects the interests of both.

The fairest way of testing the position is to ask, what would have happened in Australia in the absence of the wage fixing tribunals? The result might well have been disastrous. In the "low wage" States the undoubted tendency would have been to reduce the workers' standards to a lower level. Faced with the unfair competition which would have resulted (because of interstate free-trade) employers in the "high wage" States would have demanded equalization of conditions. There would have been very great industrial upheavals, and no one can be dogmatic as to the consequences. In all probability, the Federal tribunal has prevented great evils. More positively it has contributed to the successful unionization of labor, especially in the "low wage" States or where the State wage regulation is based entirely upon the Wages Board system. Gradually, by its awards, the federal tribunal has created an Australian standard, which, though in strict law applicable only to interstate disputes, is usually recognized in practice by almost every State tribunal. In a "low wage" State any tendency to lower an existing standard has usually resulted in the creation of interstate disputes which are settled by the federal tribunal in an award which elevates the standard in the "low wage" State at least to the prevailing federal level.

From a constitutional point of view federal control of labor relations in Australia presents a very interesting contrast to the position in the United States where the federal jurisdiction over labor relations has been based upon the power to regulate interstate commerce. As will have been noted, a similar law making power over commerce is vested in the Commonwealth Parliament, but no attempt has yet been made to exercise the power along the lines indicated by the National Labor Relations Act or the more recent Fair Standards Act. By not exercising the trade and commerce power in Section 51 (1) and by exercising the industrial arbitration

power in Section 51 (xxxv), the federal government of Australia has avoided direct responsibility for any unpopular federal award by saying that the matter is exclusively one for the constitutional arbitrator, not for Parliament itself.

In the United States the fundamental principle of the National Labor Relations Act is the right of association and of collective bargaining declared by Section 7. While this right is not in terms declared by any Australian statute, it undoubtedly exists and is more easily enforced because, for all practical purposes, only the *bona fide* trade union is empowered to act on behalf of the workers by invoking the jurisdiction of the federal arbitrator. In Australia, it is useless for an employer to refuse to bargain with or recognize the trade union, for the latter may by appropriate action seek and obtain the award of an independent tribunal. If an employer discriminates against a trade union, the tribunal may order the employer to give preference of employment to the members of the union. So with unfair labor practices. While Australian statutes do not define "unfair labor practice" in terms corresponding to Section 8 of the National Labor Relations Act, the industrial tribunals will readily suppress or even punish similar conduct.

Further the federal tribunal in Australia is now freed from any control by the courts as to the manner in which it exercises its jurisdiction. There is never any review of the facts and the law is reviewable only occasionally and in collateral proceedings. Thus Australia now accepts the principle that in essence the regulation of labor relations by industrial arbitration tribunals pertains to the administrative function, and in its very nature is incapable of review by courts of law whose competence to deal with such delicate matters of administration is seldom even asserted.

There are two very interesting parallels between what is happening in the United States today and what used to happen in the industrial courts of Australia thirty years ago. The first is this. No doubt as a result of the statutory method of enforcement of the decisions of the National Labor Relations Board, almost many decisions of that body, even as to the facts, will be re-examined in the federal courts. In industrial matters the delay that is thus caused is disastrous, because the great value of State intervention in labor disputes is the speed and finality of such intervention. Subjecting such administrative decisions to the uncertainty and delay of ordinary litigation imposes an unfair burden upon employers and employees alike. Similar delays were caused during the earlier years of the Australian federal tribunal when the employers always resorted to the High Court as the controlling judicial authority.

Another point of resemblance is, I think, of even greater importance. For some years after the Australian arbitration tribunals were created, unsatisfactory conditions of employment in some industries were exposed as a result of public investigations based upon sworn evidence and followed by convincing, not to say devastating, findings of unfair practices. Similarly the National Labor Relations Board, during the few years of its existence, has by painstaking investigation proved the existence of unfair practices in a number of American industries. In Australia exposure and publicity helped to stamp out the abuses by informing and helping to create a powerful public opinion. The National Labor Relations Board's reports should have a similar effect in the United States for the evidence and findings contained in some of their reports should, and will, I doubt not, make all Americans blush with shame and indignation. For sheer brutality some of the practices described in one or two cases are without parallel, certainly in Australia, and probably in any English speaking country.³⁴ Indeed the exposures contained in the judgment of the Board in the *Republic Steel Corporation* case raise questions of civil right which are far more fundamental than the mere improvement of labor conditions. Even though the legal profession in the United States does not share the opinion of distinguished lawyers in Australia that anarchy in labor relations should give place to law and order, still it should at least assist in the actual defence of those human rights and civil liberties the protection of which is said to be effectively guaranteed by the United States Constitution. For those who might desire the point to be elaborated, I merely refer to the moving utterance of Mr. Grenville Clark³⁵ in his recent address on "Conservatism and Civil Liberty."

I venture one prophecy only. When the people of the United States are as far removed in point of time as we in Australia are today removed from the passing of the early industrial arbitration legislation, most of them will look back upon the pioneer work of the National Labor Relations Board as Australians now recall the decisions of Mr. Justice Higgins, *clarum et venerabile nomen*.

³⁴ See, e.g., *Matter of Republic Steel Corp.*, 9 N.L.R.B. No. 33 (1938).

³⁵ Address at the annual meeting of the Nassau County Bar Ass'n (Mineola, N.Y., June 11, 1938).