Law and Industrial Arbitration
in New South Wales, 1890–1912

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This thesis is entirely my own work

A.D. Frazer

(statement required by Rule 15)
Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I’ve told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

Yet law-abiding scholars write;
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good-morning and Good-night.

W.H. Auden, Law Like Love.
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Abstract

The early history of compulsory industrial arbitration in New South Wales between 1890 and 1912 is examined from the viewpoint of a semi-autonomous legal sub-system. The concepts of legalism, juridification, justiciability and corporatism from the sociology of law and general social theory are discussed to raise problems associated with the adoption of legal concepts and institutions for the resolution of industrial disputes.

The failure of voluntary arbitration and collective bargaining in a highly class-polarised environment from 1890 to 1895 indicates a discursive opposition between conceptions of law and arbitration, which is attributed to the use of force and criminal law by the state. This opposition was broken by radical liberal collectivist approaches which justified benevolent state intervention and compulsion by the introduction of a strongly juridical arbitration system based on the legal recognition and promotion of collective groups and the creation of a special court. The resort to legal institutions was largely founded in the need to ensure legitimacy for the new system. The passage of the Industrial Arbitration Act in 1901 succeeded with the aid of the dedication and rhetoric employed by its sponsor, B.R. Wise (a former student of Arnold Toynbee) and a broadly liberal government with the support of the Labor party. While Wise's scheme displayed elements of interest intermediation, it was not corporatist in the sense accepted by Schmitter and others.

Many of the problems encountered with the first years of the arbitration court (delays, protracted litigation, judicial review by superior courts) were related to the adoption of a juridical model for the adjudication of industrial disputes. Several decisions by the Supreme and High Courts diminished the powers of the arbitration court, while imposing individualistic ideology associated with the common law notion of the contract of employment. The distinctively legal character of the early arbitration system is indicated by the strong participation of lawyers, the principles, reasoning and procedures adopted by the court, and the methods of enforcement of its awards.
The amendment of the arbitration system in 1908 to largely replace the court with industrial (wage) boards failed to produce desired changes away from a juridical system. Concessions to the Labor party and later amendments reduced any tendency towards mediation or conciliation by the boards. Adjudicative procedures were perpetuated by the boards, with the complicity of unions and employers, while reliance on the legal profession as board chairmen and the existence of an appeal court with extensive supervisory powers increased the influence of legal ideology in the operation of the system. By 1912 a resilient and distinctive quasi-legal arbitration system had developed.
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Abbreviations

Abbreviations other than those listed below are generally standard legal ones, for which a law dictionary (such as Osborn's Law Dictionary) should be consulted.

ABL Archives of Business and Labour, ANU, Canberra.
ADB Australian Dictionary of Biography.
AGJ NSW Department of Attorney-General and Justice.
ANU Australian National University.
ANUP Australian National University Press.
AO Archives Office of NSW.
AR Arbitration Reports (NSW, 1902-).
ARTSA Amalgamated Railway and Tramway Service Association.
AWU Australian Workers Union.
BPP British Parliamentary Papers.
CAA Conciliation and Arbitration Act 1904 (Cth).
CAR Commonwealth Arbitration Reports.
CLR Commonwealth Law Reports (1903-).
CPD Commonwealth Parliamentary Debates.
DL Dixon Library, State Library of NSW.
DLI NSW Department of Labour and Industry.
DT Daily Telegraph, Sydney.
GG NSW Government Gazette.
IAA 1901 Industrial Arbitration Act 1901 (NSW).
IAA 1912 Industrial Arbitration Act 1912 (NSW).
IDA Industrial Disputes Act 1908 (NSW).
IG NSW Industrial Gazette (1912-).
IWW Industrial Workers of the World.
LA NSW Legislative Assembly.
LC NSW Legislative Council.
L&RA Liberal and Reform Association.
ML Mitchell Library, State Library of NSW.
MUA Melbourne University Archives.
NLA National Library of Australia.
NMH Newcastle Morning Herald.
NSWPA NSW Parliamentary Archives.
NSWPD NSW Parliamentary Debates.
NSWPP NSW Parliamentary Papers.
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<td>NZPD</td>
<td><em>New Zealand Parliamentary Debates.</em></td>
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<tr>
<td>PLL</td>
<td>Political Labor Leagues (Labor Party).</td>
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<tr>
<td>PRL</td>
<td>Peoples' Reform League.</td>
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<td>RCS</td>
<td>NSW Royal Commission on Strikes, <em>Report, Minutes of Evidence and Appendices, 1891.</em></td>
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<tr>
<td>SAPD</td>
<td><em>South Australian Parliamentary Debates.</em></td>
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<td>SDC</td>
<td>Sydney District Council, Australian Labor Federation (1894–1900).</td>
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<td>SLC</td>
<td>Sydney Labor Council (1900–1908).</td>
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<td>SMH</td>
<td><em>Sydney Morning Herald.</em></td>
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<td>SR</td>
<td>State Reports (NSW, 1900–1960).</td>
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<td>UP</td>
<td>University Press.</td>
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<td>VPLANSW</td>
<td>Votes and Proceedings, Legislative Assembly of NSW.</td>
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<td>WN</td>
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Chapter 1

Introduction

As early as 1906 and later in a series of articles published from 1915, Henry Bournes Higgins, the president of the Commonwealth Court of Conciliation and Arbitration, described the Australasian experiment of determining industrial disputes by arbitration courts as the establishment of "a new province for law and order". That new province was the realm of relations between employers and employees. "Is it possible," he asked, "for a civilized community so to regulate these relations as to make the bounds of the industrial chaos narrower, to add new territory to the domain of order and law?" His answer was that it was both possible and necessary. In a famous passage he later depicted the introduction of compulsory arbitration as part of a great historical movement sweeping the world:

As slavery passed into serfdom, the rights of the lord becoming limited by law or custom; as serfdom passed into the contractual relation, where the contract is practically dictated by the employer, who has the tools and the capital; so the contract of employment is being gradually regulated by or under the State in the interest of the community.... even as the extension of the King's peace over the land led to the suppression of private wars among the barons and great men of feudal times, so the extension of the nation's power to industrial conflicts will suppress, we may hope, the private wars between great employers and great unions. The King's writ must run within the factory as well as without, and as to any injurious treatment of the King's subjects engaged in industry.3

Ever since Higgins' work was published, the phrase which forms its title has been used repeatedly by writers to describe, often mockingly, the institutional framework of the Australian industrial relations

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1 The articles formed the basis of Higgins' book A New Province for Law and Order (London: Constable, 1922) from which the phrase is widely known. In a newspaper article in 1906 Higgins said that by the creation of the court, "a new province was added to the realms of law": John Rickard, H.B. Higgins: the Rebel as Judge (Sydney: George Allen & Unwin, 1984), p. 171.


3 ibid, pp. 149-150.
system. Through familiarity, the metaphorical power of the phrase has been lost. Higgins and other liberals really did think that they were creating a new legal code entirely comparable to and harmonious with the established system of civil and criminal justice administered by the ordinary courts. The arbitration courts were not as we see them today, administrative tribunals setting wages as an arm of government economic policy: they were judicial bodies resplendent in full curial power and regalia. Their object was the meting out of industrial justice. In the passage just quoted, Higgins was comparing industrial arbitration with the great achievement of English government: the creation of a unified system of law under the Crown. Traditional legal history taught that justice attained its sublime maturity with the supremacy of the English common law through the compulsion of the royal writs issued by the court of King's Bench. To Higgins compulsory arbitration, enacted by parliament and administered by a court, was carrying on the cause of reason, justice and law. The allusion was not new: in 1903, when introducing the bill which ultimately became the Act under which Higgins operated, Alfred Deakin referred to compulsory conciliation and arbitration as introducing the "people's peace", which would bring "as great a transformation in the features of industrial society as the creation of the King's peace brought about in civil society." Exactly the same sentiments were behind the creation of the New South Wales Court of Arbitration in 1902.

This thesis is a study of the origins, establishment and early development of compulsory industrial arbitration in New South Wales. While examining this development in its general historical context, particularly the conflict of political groups and ideologies, it does not purport to be a general history. The peculiar characteristic of Australasian industrial relations, it has often been pointed out, is the adoption of a quasi-legal form for the determination of industrial disputes and fixation of wages, and it is the experience and delineation of this form in a particular place and time that is the focus of this study. Hence I do not examine in detail the court's impact on wage levels and differ-

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5 Deakin, CPD vol. 15 (1903), p. 2862.
entials, workforce segmentation (including that based on gender)\(^6\) or economic development. Rather, I concentrate on factors associated with the adoption of modes of legal regulation in industrial relations, particularly in a juridical form through the establishment of courts. The appropriation of specifically legal institutions, processes and ideologies helped to integrate the arbitration system into the existing structure of power relations, while their application produced characteristics which differentiated it from its social and legal environment. In addition, it extended the state's regulation of unions, transforming them into fully legal entities, while giving a distinctively legal flavour to industrial relations generally. In these respects, the arbitration system's development was consonant with the processes influencing the autonomy of the legal system from its social environment, and its integration into aspects of social life.\(^7\)

The passage of the New South Wales Industrial Arbitration Act in 1901 led to the establishment of a distinct arbitration system. This system was not the product of the Act or of the court which it created; rather, as James Holt has written in relation to the similar New Zealand system, "it was the interaction of the Arbitration Act with a particular economic structure, social pattern and political tradition which produced the arbitration system."\(^8\) Holt argues that this system was the product of an evolutionary process involving the interaction of forces unforeseen by its designers.\(^9\) Such a view is taken in this study. The delineation of any societal system requires study of the interactions with and separation from the environment in which it functions, as well as the development and maintenance of the internal

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\(^7\) See Niklas Luhmann, "The Autonomy of the Legal System" in *The Differentiation of Society* (Columbia: UP, 1982).


structure between its constituent elements.\textsuperscript{10} Systems approaches in industrial relations have often been criticised because they concentrate on formal institutions and processes rather than informal relations, and do not deal adequately with change.\textsuperscript{11} It is, however, more defensible to consider industrial arbitration as a system, since it centres around particular institutions and processes, while the actors are partially reconstituted for its purposes. A large part of the mechanism maintaining this system is legal, through the restriction of statutory functions and powers by external bodies (courts and parliament) and self-limitation by the system itself. However, once its boundaries are delineated, the system is capable of relatively autonomous development through the creation of rules and its own recursive practices. I argue that a crucial influence on the system's early development was its legal character. Conceived as a specialised and hermetic system supplanting the established legal framework of employment relations, it became instead a legal sub-system reinforcing those very concepts and relations which it was designed to replace. Gradually, however, it was transformed into a system distinct from (though closely influenced by, and subordinate to) the general legal system.

The juridical character of the early arbitration system has often been discounted, particularly by economic historians who are more concerned with its wage-fixing function, and by labour historians who have often treated it as an undifferentiated arm of the state. Yet wage fixation and the suppression of strikes were only part of the system's broader functions, which were originally conceived as the development and enforcement of discrete legal rights consistent with the aim of producing industrial justice. To understand the full significance of the establishment of industrial arbitration the whole of industrial law must be considered, particularly the contract of employment and the legal position of unions. It was the inadequacy of the common law, grounded


in individualistic notions of rights and capacities, which led to the creation of a regime based on collective legal entities. However the new industrial law did not displace the old: instead it was incorporated into many of the pre-existing precepts.

Discussions of industrial arbitration in the early twentieth century and later have tended to concentrate on the Commonwealth Court of Conciliation and Arbitration, neglecting and often ignoring the state systems. It is, after all, easier to discuss developments by reference to a single central organ than by having to contend with the confusion of seven distinct systems. And as the Commonwealth system nowadays plays the dominant role in wage fixation and industrial dispute resolution, it is understandable that economic historians in particular are most concerned with the evolution of that system. Because some of the largest and most influential trade unions quickly registered under the Commonwealth Act and were among the first to obtain nationwide awards, labour historians, too, have emphasised the federal court at the expense of the state systems. Hence very little has been written on the history of the operations and effects of the state arbitral tribunals. Even today, when nearly 50 percent of Australian workers operate under awards and agreements of state industrial relations systems, it can be said that "we do not have any significant body of literature assessing the work of the state systems of tribunals and laws. The Federal system attracts considerable attention from researchers and commentators simply because its jurisdiction is Australia-wide." There is no excuse for this concentration during the early history of arbitration. The development of Commonwealth powers in industrial relations was a slow process: the statute was passed in 1904 but the court did not deliver its first award until three years later. In its first five years the Court made only six awards. Until at least 1912 Justice Higgins' work was more of symbolic than industrial significance. The quantitative evidence suggests that in New South Wales the state system retained a position of preeminence well into the 1920s: until then the federal system had little impact on wage-rate changes or

12 Australian Bureau of Statistics, *Incidence of Awards, Australia, May 1985* (1988) ABS cat. 6315.0, p. 7. In NSW, 29.6% of workers are covered by federal awards and agreements, while 53% are covered by the state system. For the whole of Australia the figures are 32.6% for the federal system and 49.8% for state systems.

strike settlements. In 1915 it was estimated that 260,000 employees (roughly 46 percent of eligible employees) were working under state awards in New South Wales.14

The early history of arbitration in New South Wales provides a good illustration of the problems associated with the attempt to create a new system for the regulation of industrial relations, and the legal problems associated with it. That state's system originated in a long debate over the methods of industrial conciliation and arbitration. It was the first widely-functioning system established in Australia, becoming the model for legislation in other states as well as the Commonwealth. It was subjected to restrictions by the courts and modifications by successive governments as well as challenges by both employers and unions, yet retained a high degree of continuity. The introduction of compulsory arbitration poses a significant historical problem in itself, since it raises questions about the nature and influence of the Labor party and union movement at the turn of the century.

While there has been no extensive study of the history of compulsory industrial arbitration in New South Wales, there are several works which have discussed the subject, usually as part of an examination of a particular union or of Labor politics. The only works approaching a general history appeared in a special commemorative number of the New South Wales Industrial Gazette in 1953.15 Naturally, labour historians have also fixed their sights on the arbitration system, and the works of Fitzpatrick, Gollan and Turner contain useful overviews.16 Apart from attempting to explain labor's role in the establishment of arbitration, these are largely directed towards showing the anti-labour bias and repression of the system as an instrument of the capitalist state, which is considered more or less as a mouthpiece of the capitalist ruling class. They fail to consider the autonomy of the legal and arbitration systems and, like most historians, also recoil from direct

15 "Fifty Years of Industrial Arbitration", New South Wales Industrial Gazette 109 (1953) 754-848.
treatment of legal source materials. Doctoral theses by Macarthy and Chan also examined New South Wales as part of their general surveys of the arbitration and wages board systems from an economic and political viewpoint respectively. Numerous other historians have examined aspects of the relationship between the labour movement and the arbitration system, but they generally do not concentrate on the system itself except as a site of particular conflicts and an instrument of state power. The only noteworthy exception, with sociological as well as historical interest, is Rickard's *Class and Politics*, which uses the history of arbitration (particularly politicians', employers' and unionists' attitudes towards it) as one of the key signposts of the development of class relations. Again, though, this does not deal much with the autonomy and structural dynamics of the arbitration system itself.

**Legalism**

Legalism is a term generally used to describe, with disapproval, a particular attitude of reasoning and decision-making thought to be characteristic of legal institutions: strict observance of rules, excessive concern for correct procedures, and an analytical approach to problems that relies on categorisations made by fine distinctions. One writer defines it as "an inflexible adherence to strict legal formalities and, more particularly, as an undue and an unnecessary reliance on legal authority to uphold a proposition whether of fact or of mixed fact and law." Shklar sees legalism as a political ideology which treats law as a distinct entity, separate from politics and morals. It views morality as a matter of rule-following, and politics as the exercise of legal power.

The dislike of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counter-claims under estab-


lished rules, and the belief that the rules are "there" - these combine to make up legalism as a social outlook. When it becomes self-conscious, when it challenges other views, it is a full-blown ideology.20

Legalism, according to Shklar, is used to avoid moral and political questions by according significance solely to "following rules, pre-established, known, and accepted".21 Under the influence of legalism, exclusively legal approaches and solutions are considered superior to other perspectives, which are often regarded as partial, misconstrued and irrelevant.

In complex social interactions, legalism as an attitude and mode of behaviour is often inappropriate because it concentrates on the formal issues, rather than the real or substantive ones. It also tends to be rigid and one-dimensional in approach. Thus legalism in industrial relations is inadequate because it fails to take proper account of the multifarious interests and interactions of the parties, and does not recognise the broader range of interests and commitments which form the environment in which they operate. Legalism clearly represents a particular approach to law and its relationship to society, one which is not innate to law but which is itself historically and socially determined. It is most strongly evidenced by classical legal formalism, a juridical approach associated with positivism, individualism and analytical philosophy, which reached its apotheosis in the late nineteenth century. Horwitz has described legal formalism as "an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable".22 More broadly, legalism is the outcome of the bureaucratic type of legal domination. It represents Weber's nightmare of the "iron cage" of specialisation, bureaucracy and formal rationality, where individual discretion has been replaced by rules exercised with "a spirit of formalistic impersonality."23

21 Ibid, p. 104.
But legalism, taken as the adoption of practices most strongly exhibited by the legal system, also embraces behaviour which has only an associational relationship to formalist legal reasoning and power relations. Legalism is also used to describe the adoption of peculiarly legal practices, including attire, forms of address and technical language. These may feasibly be used by participants without subordinating themselves to the thought processes with which they are associated. The trappings of legal institutions may act as a facade used to mask and legitimise behaviour which is not legalistic. This function may not even be intentional: it may result from conventions or formal requirements not designed to be legitimative in the particular instance.

How is legalism manifested in industrial arbitration? Cupper's study of legalism in the Australian Conciliation and Arbitration Commission between 1956 and the 1970s provides a useful starting point. Cupper views legalism as the undesirable domination of the Commission's functions by the rule of law. A high degree of legalism is evidenced by: the reliance on arbitration rather than conciliation; the limitations placed on the Commission's powers by the constitution, parliament and the High Court; the formality of the Commission's proceedings, notably the retention of the trappings of the courtroom and the observance of precedents; the prominent involvement of lawyers in the Commission's work; and the penal nature of award enforcement methods. Cupper concludes that the level of the Commission's legalism declined during the 1960s and '70s, largely the result of a change in "arbitral style" marked by a greater emphasis on mediation by commissioners and parties. The participation of employer and employee organisations in this change was significant because it allowed the Commission to operate more informally without fear of censure by the High Court. The parties' acceptance of a change in the industrial relations climate, from confrontation to negotiation, encouraged commissioners to become more active in achieving settlements and reduced the need for punitive sanctions. Although this transformation has not continued unabated, the relative decline of legalism appears to be a long-term trend. Compared with the very early years of the arbitration system, when there was a strong adherence to the juridical model and legal procedures, the industrial tribunals today are recognisable less as quasi-courts than as

manifestations of the newer model of administrative tribunals exercising a broad statutory discretion.

Cupper’s study illustrates that legalism, taken as a discrete (though unquantifiable) value, is not solely dictated by the constitutional or statutory framework of the arbitration system: it is a characteristic of that system as a whole. The specific interests of and relationships between the actors (including the judges and officials), their connection with the economic and political environment, and the recursive practices generated by these structural relations over time — all contribute to the overall characterisation of the system as more or less legalistic. A high degree of legalism does not necessarily result from the adoption of a curial form and formal rules delimiting the tribunal’s powers. If the decision-makers and participants themselves develop practices which reduce strict reliance on the rules and mode of dispute settlement, and environmental influences are not too strong to inhibit the development of alternative processes, there may develop a system which maintains some appearances of strict legalism while possessing distinctive structural properties. Formal constitution and behavioural appearances, however, are strongly influential especially at the time of the system’s establishment, for that is the time when the foundations of the system’s customs and traditions are laid.

Juridification

As used principally by German social theorists, the term juridification (Verrechtlichung) has been to describe the process of bringing social relations within the sphere of legal power. The term was coined by Otto Kirchheimer to describe developments in labour law during the Weimar Republic. It has since entered the mainstream of sociology of law and social theory. Thus Habermas considers juridification as the increasing incursion of specialised legal regulation into social life: it "refers quite generally to the tendency toward an increase in formal (or positive, written) law that can be observed in modern society." Habermas distinguishes between the expansion of law into areas which had previously only been regulated informally and the increased density of law produced by specialisation and refinement.

25 Eg Luhmann, Differentiation of Society, pp. 124-125.
modern capitalist societies, juridification imposes the "rule of law", resulting in constitutionally limited authority and formal freedom and equality. But its effects on social life are similar to fetishism and objectification since the law carries with it the values of the economic and administrative structures for which it is a steering mechanism. The communicative action of the Lifeworld — shared understanding forming the basis for rationally motivated social activity — has given rise to institutional sub-systems which develop their own formal rationality and forms of integration through the media of money and power. In modern constitutional and capitalist democracies (economically constituted class societies) the system then reacts back on the Lifeworld via the medium of law. At its most advanced stage, juridification is an aspect of the "colonisation of the Lifeworld" by the functionally rationalised System: it is a process of invading and replacing the Lifeworld's social integration by system integration. Areas of social life that were formerly integrated by relatively informal communication (cultural traditions and socialisation) are increasingly organised by formal, specific and codified law according to the functional imperatives of the System. Thus social relations are reified into representations of legal categories and subordinated to system imperatives such as economic growth and political order. People who related informally now find themselves confronting each other as objectified legal entities. According to Habermas the replacement of social integration by system integration, through the process of juridification of the Lifeworld, has socially pathological consequences such as alienation and violence.

More specific studies have tended to concentrate on labour law as the prime example of juridification. Several writers have emphasised the ever-widening range of legal regulation of employment conditions in the nineteenth and twentieth centuries in many industrial countries, starting with factory legislation and extending to control of the relations of collective bargaining or the direct determination of wages. Simitis considers juridification as the state's use of the law


as a "steering mechanism", and regards its development in industrial relations as an inevitable consequence of industrialisation in democratic societies.²⁹ Beginning with a reactive phase of protective restrictions to prevent specific abuses (e.g., limitation of the working day, enforcement of payment, minimum wages), it then enters an integrative phase when the diverse regulations are co-ordinated with state policy with the aim of reducing or preventing social conflict. In this phase a corpus of labour law is developed, which includes such aspects as the control of collective bargaining and unfair dismissal, but it is integrated with aspects of social welfare and industrial policy (unemployment, training, employment growth, injury compensation). Statute law is the normal vehicle of this integrative phase of juridification, but indirect methods which grant a degree of autonomy within legal boundaries and regulation are also used. Thus in many countries collective bargaining is legalised and collective agreements are legally recognised and enforced, but only within limits determined by its conformity with state policy. The form of regulation may be by either procedural or substantive rules, but both are progressively more concrete and precise. Simitis hypothesises that substantive rules tend to predominate when state regulation quickly follows industrialisation, or when trade unions are relatively weak.

The juridification of industrial relations has been criticised for resulting in pervasive administrative control over individuals, which invades and colonises the Lifeworld of individual employees. Also, under integrated juridical intervention trade unions have been "domesticated", with their objects and activities incorporated into the goals of state policy. But according to Simitis this process cannot be simply reversed by reducing the legalism of the state and unions. Incorporation results from juridification at the level of individual as well as collective labour relations: it is inevitable when the state begins to regulate employment conditions and accords legal recognition to unions, since the legal controls imposed by the state license activity under conditions which integrate it with state policy. "The very legal regulations which allow workers collectively to exert an effective influence on their working conditions force them simultaneously to become part of an organisational and bargaining system laid down by

the legislature and the judiciary."30 The delegation of autonomy to unions exposes them to increased legal and administrative scrutiny. The state is obliged to ensure that collective powers are exercised in accordance with the public interest, which is in practice equated with government policy and processes.

This view contradicts the approach taken by many theorists of labour law, particularly in Britain where following Kahn-Freund particular legal regimes concerning industrial relations have been characterised as either abstentionist or interventionist. Continental systems, such as West Germany’s labour laws and courts, said Kahn-Freund, were interventionist in their establishment of codes which regulated in detail the activities of trade unions and the means by which collective bargaining could take place. In Britain, on the other hand, the law simply created a framework within which parties could largely regulate their own affairs: it was a system of "collective laissez-faire".31 Indeed, it was fear of the integration or incorporation of the union movement into the state that led Kahn-Freund to advocate voluntarism so strongly. As he saw it, the British trade unions had gained social rights within a climate of legal autonomy, but without reliance on the state. This insulated them from possible state incursions, for "What the State has not given, the State cannot take away."32 This assumption has increasingly come to be questioned and criticised in the face of increased regulation of individual employment conditions, restrictions on industrial action and the blurring of the boundary between individual and collective rights.33

It is clear that the Australasian form of industrial arbitration is interventionist according to Kahn-Freund’s typology, so juridification

30 Clark, "Juridification of Industrial Relations", p. 79.
must at least be treated as problematic. The work of Simitis and Habermas seriously questions the assumption that because the law does not actively regulate a particular area of social or individual activity, its effects are not felt. To this may be added the cumulative effect, or density, of regulation from sources as varied as the general law (eg contracts), collective labour law, factory laws, union rules and attitudes, the administrative policies of employers and customary practices entrenched in a workplace or industry. The legal pluralist approach drawn from the anthropology of law teaches us that all these must to some extent be regarded as "law". The degree of autonomy possessed by workers, either individually or collectively, is thus quite limited.

For our purposes the process of juridification is seen most strongly in the law of associations, particularly trade unions. These autonomous organisations were already rationalised according to principles of constitutionalism (rules, formal meetings, office bearers), but when direct regulation by law occurred they were formally reconstituted according to legal principles (contracts, trusts or corporations) and their powers circumscribed by the perceived functional imperatives of the system regulating them. Thus when workers' organisations were incorporated into the arbitration system they were subordinated to conceptions of "industrial interests" and legitimate powers and functions which accorded with the operational imperatives of the system. These imperatives derived not so much from the system's statutory framework as from generalised legal and administrative norms of the system itself. As a result, the unions were restructured as juridified entities with their realm of possible actions lying within a framework of legality and illegality. As the result of their subordination to system imperatives, unions themselves became bureaucratic. With the reconstitution of power relations between classes into legal relations, industrial action became less the spontaneous and autonomous activity of groups of workers, and more a formalised process. The unique problems of individual, craft, trade or industry were also "rationalised" by subordinating them to abstract and impersonal bureaucratic principles.

Judiciality and Justiciability

What is a court? What are the distinctive characteristics or functions of a judge? How does arbitration differ from judicial determination? Are there some types of disputes, or means of resolving them, for which adjudication is inappropriate? Can industrial disputes and matters be resolved by an adjudicative tribunal? Such questions are even more contentious today than when the Arbitration Court was established.

Nineteenth-century Anglocentric jurisprudence employed a prototype of a court as a permanent institution in which an independent judge applied pre-existing legal norms. Following adversary proceedings in which the litigants contested retrospective legal relations between them (inter partes), the judge reached an authoritative and conclusive decision, subject only to an appeal to a higher court. The result was dichotomous, a zero-sum game: one party was accorded a legal right and the other a corresponding duty or liability. The victor could then enforce the decision by legal compulsion, which ultimately carried the threat of confiscation or incarceration for non-compliance.35 Judicial and legislative functions were sharply distinguished. Unlike legislative bodies, courts simply discovered and declared the law, which they applied retrospectively. Legislative bodies invented law, thus making or changing future legal relations. Even when a judge exercised powers conferred on an ordinary court to determine questions involving statutory rights or claims to property, its decisions would not be treated as those of a "Court administering justice between litigants" if it was not required to determine "ordinary civil rights" by reference to existing rules: it was not a true judicial decision.36 Conversely, an arbitral or quasi-judicial tribunal might have duties imposed on it by law to act according to specific rules of procedure and to observe the rules of natural justice in order to ensure that it acted fairly (especially if its decisions affected the legal rights of the disputants), but would not be regarded as a judicial body if was not specifically established as such by law.37 A quasi-judicial body would be considered as exercising legislative, rather than judicial, functions, if it acted prospectively, affecting future rights, or imposed rules of

36 Théberge v Laudry (1876) 2 App Cas 102 (PC); Moses v Parker [1896] AC 245 (PC).
37 Royal Aquarium and Summer and Winter Garden Society v Parkinson [1892] 1 QB 431 (CA).
conduct which involved enduring obligations rather than settled liabilities.

The Australasian model of industrial arbitration did not fit well into this typology. On the one hand, there was a legally-constituted court headed by a holder of judicial office, a judge of the established courts. The court adopted many of the rules and procedures of the ordinary courts, and conducted proceedings in an adversarial manner with formal claims and answers, examination and cross-examination of witnesses. Yet its decisions determined future as well as past rights of the parties and might, through the application of a common rule, even determine legal rights and liabilities of persons who were not parties to the action. With no established substantive rules to follow, the arbitration courts developed their own rules and then applied them, or not, as they chose. Their decisions were binding, but apparently not conclusive since awards could be varied or superseded. In many respects, therefore, they appeared to be exercising legislative functions. But in comparison with the wages boards developed in Victoria, which were statutory bodies charged with devising minimum wages and conditions that took effect as delegated legislation, arbitration courts were, at least notionally, judicial in character.\textsuperscript{38} Even until fairly recently, opinion has wavered over whether compulsory industrial arbitration is a judicial or legislative activity. This problem did not usually arise with voluntary collective arbitration, since the arbitrators generally adjudicated on the terms of the collective agreement whose terms provided the basis of their powers and functions: they simply determined pre-existing rights by interpreting the rules contained in the contract.

Since the advent of legal realism and sociological jurisprudence, such clear-cut functional and essentialist distinctions are less apt to be made. Instead, judicial determination is often seen as one end of a continuum of types of dispute resolution which may be distinguished by the degree of formality and external involvement by a "third-party neutral". A judge is simply a special kind of adjudicator occupying an office and presiding over an organisation with unique status and powers conferred by law. An arbitrator performs a similar function,

\textsuperscript{38} Australian Boot Trade Federation v Whybrow & Co (1910) 10 CLR 266 per Barton J at 289.
though usually with less formality, status and powers. Behavioural studies of courts have shown that much of their work is administrative rather than adjudicative, while even judges are nowadays willing to admit publicly their law-making functions.

Though the functional distinction between a court and other adjudicative tribunals may be one of degree rather than kind, it is still true that courts are identified with disputes that are characterised as "legal". There are some kinds of disputes which courts themselves have held to be non-justiciable, or not amenable to legal process. The doctrine has been used to confine the courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." Courts have often refrained from deciding questions which do not disclose a real and concrete dispute over legal claims, or which are considered inherently political matters properly within the power of the executive or parliament, even when there has been jurisdiction to decide them. Such matters might involve legal questions, but are not exclusively so. Decisions of non-justiciability are often motivated by the court's concern for its authority and legitimacy, but there may also be the feeling that the dispute does not admit of an adjudicated result.

Lon Fuller has argued that there are indeed some kinds of disputes which are not well handled by adjudicative tribunals. Fuller distinguishes adjudication from other types of social ordering (e.g. negotiation and election) by the opportunities which it affords the parties to a dispute to present evidence and reasoned arguments in support of their claims. These opportunities are usually guaranteed in formal and institutional rules of natural justice. The adjudicator bears a corresponding responsibility to make decisions based on rational grounds. Adjudication is associated with the determination of rights because rights are claims supported by reasoned argument; so problems submitted to adjudication become converted to questions of right,

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fault or guilt by the institutional process of adjudication itself. Adjudication is an inappropriate form for determining problems or relations which would be more conducive to social order when decided by informal and flexible collaboration rather than by a means that is "institutionally committed to acting on the basis of reasoned argument". Thus adjudication may be effective in resolving competing or reciprocal relations but not associative ones.⁴¹

Fuller also argues that adjudication goes beyond its effective limits when it attempts to deal with problems that are predominantly polycentric — those which consist of a web of interrelated questions, the answer to each of which affects the state of the others. Such problems usually exist in a fluid state of affairs, when the optimal choices as well as the conditions for optimality are constantly changing. Some of his examples of polycentric problems deal with labour arbitration: thus the fixing of wage rates for a factory involve relativities between different occupations and grades; the profitability, productivity and industrial harmony of each permutation must be considered. With polycentric problems, a reasoned decision based on the rational argument of each party on every choice is practically impossible. The best means of decision may be by a mixture of negotiation and adjudication, or by informal administrative discretion: but then the reality of representation and reasoned argument are diminished. If a "mixed" form of decision-making is adopted (eg an arbitrator combining adjudication with negotiation), the emphasis placed on formal substantive rules such as precedent will strongly affect the limits that are reached by adjudication. If precedent is rigorously followed, the arbitrator’s powers of accommodation and flexibility are vastly reduced.⁴² If precedents are interpreted liberally rules may be built up over time; but then the arbitrator runs the risk of appearing biased and arbitrary in particular cases.

When polycentric problems are handled by a form that is essentially adjudicative, Fuller postulates that one or a combination of three negative outcomes will result. Firstly, the solution will fail, being ignored or overtaken by events; secondly, the adjudicator will try successive solutions, ignoring judicial proprieties (and appearing biased or unprincipled); thirdly, the problem is reformulated in terms

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⁴² ibid, p. 398.
that are amenable to a solution by adjudicative procedures.43 This last possibility is frequently encountered in law: informal and complex social relations are abstracted and transpositioned into legal relations involving the unidimensional conflict of rights. Legalism and juridification are, after all, most strongly felt when legal solutions are imposed on essentially non-legal problems.

In a similar vein David Lockwood suggested that there are really two conflicting theories or approaches to industrial arbitration, one based on rights and justice, the other on convenience and compromise:

The idea of arbitration has, to some, the inevitable connotation that 'rights' are involved; and if this is so, then compromise is likely to be regarded as the solution of the timid, or worse, of the unprincipled. With such experience the prestige of arbitration cannot but suffer and its functions atrophy. Again, action based on the opposite premise - that arbitration is a process in which 'politics' is the rule - can lead to a constant search for partial arbitrators and the black-balling of those who quaintly persist in acting as if the merits of the respective claims were really relevant to the ultimate decision.44

Lockwood thought that "institutional conflicts" over power in industrial relations were least susceptible to arbitration because they questioned the power of the arbitrator. Interest disputes over the contents of a collective contract were also difficult to resolve by arbitration, which was perhaps best suited to rights disputes concerned with the interpretation of an existing contract or award. The success of arbitration depended on the degree to which the parties consented to the rules to be applied in reaching a determination. Lockwood was talking of voluntary arbitration but the problem is, if anything, even more acute with compulsory state arbitration. Because the parties cannot simply walk away from a dissatisfying tribunal they will attempt to persuade or coerce the judge to adopt their approach. Frequently consent is absent in compulsory arbitration, though for reasons of legitimacy and effectiveness the parties' acceptance may be present in the mind of the arbitrator when rules and principles are framed.

These concerns were expressed in different ways by commentators on the early compulsory arbitration systems. Usually the problem was identified as legalism or judiciality - the fact that a lawyer, or more particularly a judge, was making the decisions. Frequently, though,

43 *ibid* , p. 401.
this question was equated with that of arbitrability. Ramsay MacDonald did so in his comparison of arbitration courts and conciliation boards:

On the whole, the Voluntary Conciliation Board settles disputes which have arisen owing to the movements in markets; the Arbitration Court settles disputes created in order that reference may be made to it. The Arbitration Court is an institution which creates work for itself, and its decisions tend more and more to show the agitating and political power of one side. It therefore works in grooves; it is more 'legal' than a Board of Conciliation; and it brings the judicial function — it is presided over by a judge — into an unhappy contact with the political function. It passes its own 'laws' and then it interprets them. This happens not owing to the special character of the plaintiffs and defendants, but to the kind of work given it to do. A judge is not the person to settle wages and industrial conditions. Some judges may be good industrial arbitrators, but they are not that as judges.45

Nevertheless, judicial arbitration is an almost irresistible model of solving industrial disputes for those with a consensual pluralist conception of society, since it offers the image of the restoration of equilibrium between employers and employees at the very source of social order: the law.46

Finally, we must ask whether adjudication actually resolves disputes, in the sense of successfully bringing them to a conclusion. The adjudicator may offend one or both the parties in the way the decision was reached, or the process of bringing the dispute into a formal and public arena may set the parties even more at odds. Judicial determination may best be seen not as resolving conflict but redefining it in terms of a normative order which it authoritatively pronounces. The issues are abstracted, reified and transpositioned in terms of legal relations.47 The success of this process depends a great deal of the legitimacy of the judicial tribunal and the apparent correspondence of the legal doctrines to lived social relations. In an adversarial process, the court and the opposing parties initially form a triad, with the judge standing in between the contestants; but once a decision has

been reached the triad threatens to turn into a dyad, with the judge appearing to have "taken sides" with the winning party.\textsuperscript{48} Particularly if the losing party has a strong conviction of the inherent justice of his or her claim, the judge's standing as fair and impartial may then be questioned.

\section*{Corporatism}

Corporatism as a social and political outlook developed during the late nineteenth century when, in response to the dislocation caused by the individualism and competition of early industrial capitalism, many thinkers of diverse persuasions emphasised consensual collective (corporate) values supposedly embodied in the organic unity of a romanticised pre-industrial past. To many the term is equated with fascism, but in recent years corporatism has been used by political scientists as a perspective for analysing policies such as various European forms of the welfare state, or the "social contract" in Britain during the 1970s. It is now seen mainly as an "approach to the analysis of organised interests and their relationship with the state."\textsuperscript{49} The most common usage is as a system of interest representation and state policy formation contrasted with pluralism. Instead of individuals representing their interests to the state through numerous independent, voluntary and competing groups as in classical pluralism, under corporatism the state instead recognises or licenses a few exclusive (often hierarchical, compulsory and monopolistic) associations which represent functionally differentiated interests. In return for enjoying a high degree of autonomy and self-regulation (which may include controlling and disciplining their members) and a monopoly in representing the identified interests of their members to the state, perhaps even contributing directly to the formulation of state policy, these associations are expected to assist in the implementation of state policy by ensuring their members' compliance.\textsuperscript{50}


Corporatist groups, however, do not necessarily represent the real interests of their members. The term "interest intermediation" has been devised to emphasise that the association may express its own institutional interests and misunderstand, misrepresent or redefine the interests of its members. The association's officials may become divorced from the mass membership and, through their privileged access to state power, come to identify group and institutional interests with the goals of the state. The association may even become so closely enmeshed with state policy that it functions more as an arm of government in allocating resources and instilling social control, than as a representative body. Corporatist groups threaten to become "quasi-state" instrumentalities, intermediating between the state and the individual through formalised corporate group interests on the one hand, and consensual state goals on the other. However, even when there is a high degree of institutional integration of groups into the state, resistance and conflict can break out under more democratic forms of corporatism when individuals become dissatisfied with the distancing of corporatist institutions from their constituencies. So corporatism does not necessarily entail class incorporation.

The character, conditions and extent of incorporation or co-option of corporatist groups into state functions depend on many factors, including political traditions and the degree of direct social control by the state. The distinction is usually made between statist corporatism under which power is centralised and authoritarian, and societal corporatism which is more open and diffuse. Corporatism is capable of existing to different degrees, depending on the extent to which corporatist structures are adopted throughout a society, and whether state policy is actually formulated and implemented through pressure or consensus ("concertation"). Corporatism has also been considered as existing at different levels, whether at the macro level of the society and polity, the meso level of sectors and industries, or the micro level of particular enterprises and projects.

Corporatism has been used particularly in analysing state regulation of industrial relations. Many theorists of corporatism see the state adopting corporatist strategies through its need to reproduce the

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51 Philippe C. Schmitter, "Modes of Interest Intermediation and Models of Societal Change in Western Europe" in Schmitter and Lehmann (eds), Trends Toward Corporatist Intermediation, p. 93, n. 1.
conditions of capitalism (capital accumulation and productive co-operation), especially in its advanced stages. Corporatism develops in the intermediation of producer groups (notably trade unions but also business and employer associations) because the state is so dependent on them for these crucial goals, and because it can best do this by the co-ordination (and co-operation) of capital and labour. A high level of state control of unions through legal regulation, and the existence of tripartite structures, are considered significant elements of a corporatist industrial relations system.52

A particularly apposite use of the concept of corporatism in industrial relations is Crouch's typology of industrial relations models. The first, market liberalism, is individualist and market-based, characterised by the individual employment contract. There is a separation of politics and economy paralleling that between public and private, and the state's function in industrial relations is to ensure a free labour market, which involves repressing industrial organisation and collective bargaining. Liberal collectivism is an extension of laissez-faire principles to collectivities; though the state is still largely abstentionist in its industrial policies, it allows voluntary collective bargaining. Corporatism, on the other hand, reverses the segregations of liberalism, conflating the political and the economic. Tripartite state structures are developed in which the interests of labour, capital and government are represented corporately for the formulation of consensual state policy. Corporatism is thus the converse of liberalism both in its individualist and collectivist phases.53 But Crouch also recognises that corporatism is variable in form and degree. In particular, he postulates a hybrid form of corporatism and liberal collectivism active in Britain, which he terms bargained corporatism. Under this system, unions are largely integrated into state processes and their leaders pursue state goals such as wage restraint, but are also able to obtain gains in order to placate the demands of their members. Commitment to the state's economic and industrial policy is bargained for particular concessions as well as participation in policy formation. Capital is also integrated into state policy formation, typically resulting in voluntary


tripartite incomes policies and state-established conciliation and arbitration schemes.\(^54\)

Although corporatist analysis has mainly been used to describe recent trends in industrial relations, it has also been applied historically. Thus Gerry Rubin has described the imposition of compulsory arbitration of industrial disputes and the regulation of wages and employment by tripartite tribunals in the munitions industry in Britain during World War I as a temporary and rather haphazard strategy of bargained corporatism in which the state, because of its high dependence on capital and labour, was forced to concede the claims of both.\(^55\)

Corporatism has been given currency in Australia by the "Accord" between the Hawke Labor government and the ACTU. This has led to questions whether the Australasian model of compulsory industrial arbitration is inherently corporatist or exhibits strong corporatist elements. This was argued by Scherer who, in an influential essay, described the Australian industrial relations system as a "form of state syndicalism". Under compulsory arbitration, trade unions have been limited to pursuing wage increases on the basis of justice claims which they have had to accommodate to macroeconomic considerations. Thus both in terms of policy and structure, unions have become strongly dependent on the state; in fact, they are virtually governmental bodies akin to local government: "Australian unions are a part of the state, but in the sense of local governments with entrenched traditions of autonomy. They are creatures of the state, yet not subservient to it — unruly principalties rather than vassals."\(^56\) In turn, argued Scherer, the arbitration tribunals have become an executive committee of the labour aristocracy, a part of the state which represents the interests of industrially powerful organised labour. Such unions have thus


created a portion of the state where their interests are strongly represented, though within a framework of the "national interest".

The similarity between Scherer's analysis and corporatist theory is striking: in fact he eschewed the term "corporatism" mainly for its traditional authoritarian overtones. His analysis may be seen in terms of a bargained societal corporatism where autonomy and tension remain between the unions and a specialised and independent state organ, whose function has become that of intermediating the interests of its clients, the unions and the government. Far from being controlled by the arbitration tribunals and incorporated into the state, the unions have largely succeeded in dominating wages policy formulation and implementation. Palmer has also provided an analysis of compulsory arbitration, this time explicitly in terms of corporatism, though with opposite conclusions about the functional incorporation of unions into the state. Adopting Crouch's schema which opposes corporatism and liberalism, Palmer argues that the Australian arbitration system was infused with a corporatist ideology from the beginning, and was introduced as the result of bargained exchanges between labour and capital which produced a system with a high level of corporatism.57 Connell and Irving's account of working class organisation from the 1890s to the 1930s is also infused with a strong corporatist theme: once labour mobilises, "the policies of the state are adjusted and new state forms created to integrate a subordinate class." In their view, this integration took the form of accommodating labour leaders to the power structures of capital and the state, which distanced them from the rank and file, while at the same time institutionalising mass mobilisation within compulsory arbitration, which narrowed class struggle to demands over wages and conditions.58 Markey has recently advanced a similar outlook.59


59 Ray Markey sees the Labor Party, with its populist and utopian ideology of Laborism, as the chief engine of the incorporation of the working class through the policies of New Protection, including compulsory arbitration. The Labor leaders accepted arbitration because of their "corporate outlook" and willingness to accept state control of unions in return for their guaranteed existence:
Because the relationship between the state and trade unions (which may be considered as organised interest groups) is crucial when assessing the legal character of industrial arbitration, the corporatist perspective is pertinent to this study. The recognition and licensing of unions by the state by means of granting limited corporate status, and their regulation through rights accorded under awards, have definite corporatist overtones. Corporatist theory also emphasises the importance of regulative strategies other than legal coercion. These were as important as penal sanctions in shaping the arbitration system during its early history. These issues will be considered further at the end of chapter 5.

Chapter 2

The Origins of Industrial Arbitration, 1870—1890

Common Law

The law of employment which developed between the fourteenth and eighteenth centuries was based on a paternalist relationship between master and servant. In return for wages and perhaps lodging, the servant was bound to obey the directions of the master on pain of criminal penalties and forfeiture of wages. The relationship was one of inherently unequal status, involving the master’s *dominium* over the servant. In accordance with the household economy prevailing in pre-industrial society, it was classified as part of the law of domestic relations up to the end of the eighteenth century. During the industrial revolution this approach was radically altered. With the ascendancy of political economy and legal formalism, employment relations came to be conceived as being between free and equal parties contracting for the sale and purchase of a commodity — labour-power. During the period 1800-1825, the old law of master of servant was subsumed under the general doctrines of contract law by the courts which interpreted the employment contract to include many of the incidents of servitude.¹ The employer’s right to control the employee’s work was the dominant characteristic of the contract, distinguishing the contract of service with its relation of master and servant from contracts to provide specific (eg professional) services. Thus the capitalist’s domination over labour and control of the labour process, so necessary in capitalist production, was retained within a framework of freedom and equality. This duality (whereby, in the words of Pashukanis, "the 'republic of

the market' masks the 'despotism of the factory'")\(^2\) was expressed in the ideology of "freedom of contract" which stressed the formal legal right of the individual employee to choose both employer and conditions of employment through contractual bargaining, and of the employer equally to do so.

Even in strict law this ideology did not reflect actual relations. The separation of the spheres of exchange and production was represented in employment law by the differences between the obligations of employees in hiring and service. Formal inequalities persisted in England through the Masters and Servants Act of 1823, which reproduced the old discipline in a contractual form: a servant in breach of contract was guilty of a crime, while a master's breach attracted only civil liability. A similar statute, adapted to local conditions, was enacted in New South Wales in 1828.\(^3\) The 1857 Act, which effectively reigned in New South Wales throughout the period of this study, provided that a servant who entered into a contract of service and refused to commence service, was absent without reasonable cause, or was guilty of other misconduct or ill behaviour in the execution of the contract, was liable to forfeiture of wages, a fine of £10 and/or imprisonment for fourteen days. If a master failed to pay wages, he could be summoned before two justices (or a single stipendary magistrate) and ordered to pay such amount as seemed reasonable and just. Any person who employed a servant who had deserted from service, or who induced a servant to breach an employment agreement, was liable to a penalty of £10.\(^4\)

The individualist contractual form and economic principles also gained ascendancy in the law of industrial disputes and the legal position of trade unions. The Combination Acts made concerted industrial activity a crime in England from 1799 until the Acts were repealed in 1824, but restrictions were reintroduced in 1825 which were designed to ensure a free market in labour by prohibiting certain

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\(^3\) Masters and Servants Act 1823, 4 Geo IV, c. 34 (Eng); Masters and Servants Act 1828, 9 Geo IV, No. 9. The colonial statute was passed because of doubts as to whether the English Act applied in the colony, although it soon emerged that it did, by virtue of the Australian Courts Act 1828 (9 Geo IV, c. 83, s. 24).

\(^4\) Masters and Servants Act 1857, 20 Vict, No. 28, ss. 2, 5, 9. This Act was consolidated as the Masters and Servants Act 1902, No. 59, although the substantive provisions were unchanged.
activities that attempted to regulate employment. The Combination Act of 1825 contained an offence of interfering with employment relations by violence, threats or intimidation, and added the crime of "molesting or in any way obstructing" a worker. These offences were often interpreted quite widely, so that the threat to strike could be considered intimidation; the molestation provision especially was used frequently in England against even peaceful picketing until it was replaced in 1859. In addition, the 1825 Act embodied a statutory crime of conspiracy, which could be used to punish a wide range of trade union activities which might interfere with employment relations.

Apart from the criminal prohibition of many of their actions, trade unions also suffered from being regarded as contravening the ancient civil doctrine of restraint of trade. The courts, on public policy grounds, refused to enforce contracts or trusts which interfered with free trade in labour, and unions which adopted the principle of making such agreements as one of their objects were regarded as having unlawful purposes. Such unions could not invoke the aid of the common law, for example to recover funds which were embezzled by an official. This doctrine also had repercussions on the criminal liability of strikers, for apart from criminal conspiracy under the 1825 Act, several judges maintained the former position that members of a trade union which sought to restrain trade were guilty of common law criminal conspiracy and took the view that strikes per se were criminal at common law.

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6 *R v Duffield* (1851) 5 Cox CC 404; *R v Rowlands* (1851) 5 Cox CC 436. The changes made by the Molestation of Workmen Act 1859, 22 Vict, c. 34, were held not sufficient to legalise picketing: *R v Druitt* (1867) 10 Cox CC 597. This decision led to further reforms in 1875.


In England these restrictions were radically transformed between 1871 and 1876, when trade unions were first specifically legalised by negating the restraint of trade doctrine and many peaceful activities were legitimised. Conspiracy by combination and breach of employment contracts by workers were decriminalised. The Trade Union Acts of 1871 and 1876 removed the common law illegality of unions under the restraint of trade doctrine, but did not make them fully legal entities: unions were not given true corporate status, nor could their rules be legally enforceable against members. These Acts simply established a means for registered trade unions to hold property through trustees and for the trustees or officers to sue on behalf of the union.

Although the Trade Unions Acts were adopted in New South Wales in 1881, most of the other reforms — particularly the amelioration of the criminal law — were never implemented. Thus the law relating to strikes which subsisted in New South Wales during the period of this study consisted of the common law and statutory criminal prohibitions developed in England from 1825, together with the harsh interpretations by the courts whose harshness had ultimately led to the English law reforms of the 1870s. The result was that, depending on the attitude of the judges towards the legitimacy of combined action, most forms of industrial action by members of a trade union were very likely criminal. However, the Trade Union Act 1881 did at least provide that combination was not itself criminally or civilly unlawful. As in England, trade unionists objected to the criminal constraints but were not particularly concerned at their civil disabilities, preferring to have as little to do with the law as possible.


10 Trade Union Act 1871, 34 & 35 Vict, c. 31; Trade Union Act Amendment Act 1876, 39 & 40 Vict, c. 22.

11 J.H. Portus, *The Development of Australian Trade Union Law* (Melbourne: UP, 1958), pp. 96-97; Edward I. Sykes, *Strike Law in Australia* 2nd edn (Sydney: Law Book Co, 1982), pp. 113-115, 142ff. Most important of the provisions never adopted was s. 3 of the Conspiracy and Protection of Property Act 1875 (Eng) providing that acts done in concert could not be criminal conspiracies which, if done alone, would not be criminal. The "watching and besetting" provisions of that Act, covering picketing, were included in the Crimes Act (s. 545B) in 1929.

12 Apart, that is, from the provisions of industrial arbitration statutes themselves.
Up to 1890, the main concern of the labour movement was that the Trade Union Act did not allow unions to recover unpaid subscriptions by civil process, and even on that point unionists were divided.  

Significant legal obstacles also hampered the enforcement of collective industrial agreements which either attempted to establish working conditions directly or which created a mechanism for the conciliation and arbitration of future disputes. Under the restraint of trade doctrine such agreements between a trade union and an employer were not valid contracts at common law. The Trade Union Acts did not make these agreements enforceable because the statutes specifically excluded agreements regulating conditions of employment (whether between union members, an employer and employees, or between two trade unions) from those contracts which they legitimised. Nor would it have been assumed by the courts that industrial agreements were intended to create legal relations and therefore constituted legal contracts. The absence of any cases where collective agreements were sought to be enforced legally suggests that the parties themselves were of this view.

At common law an agreement between a trade union and an employer or employer association could not automatically determine the terms of individual employment contracts. Contractual doctrines (offer and acceptance, consideration and privity of contract) meant that individual members of the negotiating bodies could not be bound by, or receive the benefit of, such a contract without directly agreeing with its terms. Thus industrial agreements were void at law unless they were incorporated into the terms of each individual contract of employment, either by express consent of both employer and employee or by implication such as established and unambiguous custom. This would have been difficult to prove in the absence of a uniform written agreement. A union official might perhaps be appointed as the agent of the

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13 TLC Minutes 6 May 1890, ML A3823.
14 Trade Union Act 1871, ss. 4, 23 (Eng); Trade Union Act 1881, 45 Vic, No. 12, ss. 4, 31 (NSW). Note that "trade union" under the Act included employer associations.
members, but practical difficulties would have precluded this solution on a large scale. The employment relation was inherently individualistic and any method of collective engagement, such as sub-contracting or partnership arrangements involved in "butty gangs", took the worker out of this relation. In short, there was no practicable way in which a large group of workers could collectively create a binding agreement with even a single employer which governed the conditions of their employment. Thus enforceable collective agreements for the arbitration of employment disputes were impossible under common law.

Conciliation and Arbitration

Arbitration, by which contracting parties in the case of a dispute as to the precise obligations involved in a contract agreed to submit to the decision of a third party, was an accepted method of extra-judicial dispute settlement incorporated into many mercantile contracts by the eighteenth century. Thus it should not surprise us that arbitration was applied to the resolution of disputes between masters and servants once the law of employment had assumed the contractual legal form. From 1800 English labour statutes included general provisions allowing the arbitration of disputes over the interpretation or performance of individual employment contracts. The advantage of this procedure was that it circumvented a common law action for breach of contract, with all its attendant cost, delays and formal limitations. Associated with the transformation of statutory employment law in the early 1820s, a general labour arbitration Act was passed in 1824. It was designed to replace the arbitration provisions of the 1800 Combinations Act which had allowed magistrates to deliver awards. The 1824 Act allowed either party to have a matter determined by arbitrators who were chosen by both master and servant from a short list drawn up by a magistrate; if the arbitrators failed to agree the matter would be decided by the magistrate, although the parties could also agree to adopt some other mechanism.\(^\text{17}\) The statutory procedure partially adopted the model normally used in civil arbitration, under which arbitrators chosen by the parties attempted conciliation by framing an agreement which bound the disputants; if they could not agree the arbitrators chose a

\(^{17}\) Arbitrations between Masters and Workmen Act (1824) 5 Geo IV, c. 96. On early arbitration statutes, see Chris Fisher, The English Origins of Australian Federal Arbitration: To 1824 (Canberra: RSSS, ANU, 1986).
neutral umpire to decide the dispute. The 1824 Act, like its 1800 predecessor, was directed to the settlement of disputes over past events: the magistrate could only settle future wages and conditions if both master and servant agreed.

This mechanism was not adopted in Australia, but arbitration of individual employment contracts was provided in the New South Wales Masters and Servants Acts from 1840. Section 10 of the 1857 Act allowed magistrates to determine summarily any "complaint, difference or dispute" between master and servant and make any order or award that seemed appropriate. There are no surviving records of cases under this provision, and most likely it was rarely used.18 Because these arbitration provisions were based on the employment contract, they only applied to disputes between individual employers and employees, and only when there was a contractual relationship between them. The contractual conditions as to consideration and privity of contract would mean that other persons and bodies could not become involved as parties to such arbitrations.

For the collective arbitration of industrial disputes there was not only the precedent of individual employment arbitration, but a living example in commercial arbitration. In a sense, arbitration was the late nineteenth-century solution to the problems associated with the shortcomings of formalised law. It was hoped that the process of conciliation and (if this was unsuccessful) arbitration would replace law in many areas. The ideal of conciliation and arbitration was part of a general ideology emphasising the harmony of interests and the triumph of reason over force. Its advocacy and increasing use in international, commercial and industrial relations reinforced this ideology, while the different applications cross-fertilised each other.

The advantages of using arbitrators rather than courts were three-fold: they were usually quicker, technical issues could be decided by experts, and the proceedings and awards were flexible, not being limited by the obdurate rules of common law. But to have any legal

significance they must be enforceable. When private arbitrations in commercial matters became increasingly popular from the seventeenth century, they were accorded recognition and control by the legal system. Thenceforth agreements or submissions to arbitrate assumed a contractual legal form; awards were enforceable because the parties had agreed to abide by the decision of the arbitrator, or because they had submitted to a court which referred them to arbitration. In the nineteenth century, commercial arbitration increasingly developed as an alternative to law, but was gradually incorporated into the unified and centralised legal system. Judicial control over arbitrations was asserted by creating a body of law regulating the conduct and procedures of arbitrators. The most significant development was the provision from 1854 that a court could stay proceedings if a plaintiff had already agreed to have the matter determined by arbitration. This, together with the ability (since 1698) to have an award enforced as a court judgment, meant that, on the parties' prior voluntary submission to them, arbitrators became quasi-courts. These British developments were followed in New South Wales by regulating the procedure to be adopted in civil arbitration by statutes which laid down the appointment, powers and duties of arbitrators and umpires under the supervision of the Supreme Court. If these procedures were followed, the award could be enforced as a rule of the Court; conversely, if an arbitrator failed to act in conformity with the statute, the Court could set aside the determination and order a new one. Civil arbitration clauses were sometimes included in private contracts, particularly for the determination of future technical disputes over the performance of the contract. Arbitration of civil disputes was also introduced in several


21 Common Law Procedure Act 1854, 17 & 18 Vict, c. 125, s. 7 (Eng): Common Law Procedure Act 1857, 20 Vic No 31, s. 2 (NSW).

22 Arbitrations Facilitation Act 1867, 31 Vic, No. 15 (NSW).

23 Eg Deane v Niccol (1885) 6 NSWLR 145; Sahl v MacDonnell (1886) 7 NSWLR 385.
Another area in which arbitration figured prominently in the late nineteenth-century consciousness was international arbitration. From the Alabama award of 1872 to the establishment of the Permanent Court of International Arbitration in 1899, the last quarter of the century was hailed as an age when the submission of sovereign powers to international law and arbitration showed every promise of replacing warfare in the settlement of international disputes. The Alabama case between Britain and the United States was particularly significant because it showed that international arbitration was flexible: novel legal claims could be settled, while states would accept ad hoc rules. After its success, international associations promoting arbitration were established, several bilateral treaties included arbitral clauses, and the number of arbitrated settlements increased fourfold.

International arbitration had a subterranean connection with labour questions because discussions about industrial disputes were invariably framed within a set of metaphorical simultaneous equations: strikes equalled war; while conciliation and arbitration equalled peace. The language of war and peace was so common as to be taken for granted by both the actors and the historian, yet it indicates the half-stated assumptions of the time. According to this outlook, industrial disputes were not (as we tend to regard them today) isolated events, a stage in the bargaining process, or an inevitable part of conflict between labour and capital. Rather, they were considered a dangerous, wasteful and preventable evil resulting in widespread loss and suffering, an indicator of serious threats to social cohesion which might escalate and spread globally. This image was reinforced by the growth of international socialism as well as international co-operation between trade unions, notably in the London dock strike of 1889 when the Australian unions and public largely enabled the dockers to hold out until their victory. There was also a high degree of industrial unrest in many countries during the late 1880s and early 1890s when suddenly strikes

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24 Public Works Act 1888, s. 36(5) (purchase money or compensation for resumed lands); see also Lands Compensation Act 1890, ss. 17, 21–22 (Vic); Licensing Act 1890, s. 44 (Vic).

seemed to be sweeping the world. In America the Homestead strike of 1892 and the Pullman strike of 1894 were significant for their scale and the brutality of police suppression, but also because they occurred in enterprises that had, through capitalist benevolence, supposedly moved beyond hostility between employees and their employers. These strikes were widely reported in Australia.

**Collective Industrial Arbitration**

The history of modern industrial arbitration begins with effective systems of collective agreements between labour and capital. Several such schemes were proposed in Britain in the 1830s and 1840s, drawing inspiration from the French *conseils des prud'hommes* — local labour courts formalised by the Code Napoléon for the settlement of individual labour and other trade disputes by representatives of employers and employees, with a government-appointed chairman.26 The leading figure in the movement for collective conciliation and arbitration in Britain was A.J. Mundella, a Nottingham hosiery manufacturer. From a visit to France in 1860 he gained some knowledge of the *conseils*. On his return to England, Mundella successfully established an arbitration board in his own trade and for the next two decades toured the country advocating similar arrangements in other industries. Many such boards were established, mainly in the northern coal, iron and textiles industries.27 The British system of collective conciliation and arbitration was, like commercial arbitrations, a dual system of negotiation and determination. The conciliation process was generally undertaken by an equal number of representatives of employers and employees in relatively informal meetings. If they were unable to come to a unanimous decision, the unresolved issues were then placed before arbitrators appointed by each side who attempted to settle them. If the arbitrators failed to agree, the matter often went for final determination before a mutually-agreed and disinterested umpire. Over 80 percent of these umpires were either lawyers, politicians or local JPs.28 Any element of

compulsion stemmed from the parties agreeing that the umpire's decision was final.

There were several legislative attempts to bring voluntary conciliation and arbitration within the sphere of uniform legal regulation. The first was Lord St Leonards' Act in 1867, which followed a parliamentary select committee on "equitable councils of conciliation" in 1856. This Act allowed the establishment of elected local conciliation councils which, when licensed by the government, had all the powers of arbitrators under the defunct Arbitration Act of 1824. Lawyers were allowed to participate only with the mutual consent of the parties. Like arbitrators under the former Act, the councils could not adjudicate on future wages, and the Act was not used. However, several voluntary conciliation schemes in particular industries had proved successful, including that promoted by Mundella which, in relying on agreement between organised labour and capital, was rather a system of collective bargaining. A different scheme advocated by a county court judge, Sir Rupert Kettle, created joint industry boards which not only settled disputes but determined future wages and working conditions which were then incorporated into individual employment contracts. While Mundella's approach relied on extra-legal bargaining and conciliation, Kettle's was one of arbitration by an independent umpire, and was likened to the creation of a private court with decisions having legal consequences. Nevertheless, in 1872 Mundella succeeded in having passed an Act which adopted Kettle's scheme of making agreements legally enforceable as between individual employers and their employees: disputes over an agreement (presumably drawn up by collective bargaining) would be heard by the arbitration body which it designated, and the agreement together with any arbitrated award would be evidence of the contents of the employment contract in any legal dispute. Like the earlier Act, it too was a failure. Voluntary conciliation and arbitration continued, but without state sanction or involvement. In England, at least until the Board of Trade gained the power to encourage boards of conciliation on its own initiative in

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31 Arbitration (Masters and Workmen) Act 1872, 35 & 36 Vict, c. 46; Amulree, Industrial Arbitration in Great Britain, pp. 87-88.
1896,\(^{32}\) the state's role was the entirely passive (and futile) one of providing a legal framework by which agreements and awards could be conceived juridically.

During the 1880s the prevailing view in England was that compulsory arbitration was not conducive to industrial peace, and a continental solution not in keeping with English traditions. The comparison was frequently drawn between French trade unionists, who considered the state to be the engine of economic improvement, and the English, who rejected state intervention in the affairs of trade unions. There were exceptions, of course: in 1885 the President of the Trades Union Congress declared that the time had arrived for compulsory arbitration, but the labour movement did not support these views.\(^ {33}\) Among the middle-class intelligentsia, the great advantage of conciliation and arbitration was its non-coercive, non-combative, non-adversarial — in other words, its non-legal — character. The English economist Stanley Jevons saw the conciliation and arbitration movement as a growth of private law, replacing the old state prohibitions of labour organisation. Now the question for the state was not how to restrain combination but "the manner in which the State can regard the voluntary and unauthorised legislation of the labourers themselves." He preferred the voluntary and permissive English solution to the more interventionist continental method, and disapproved of the 1867 Act as creating "courts of law in disguise."\(^ {34}\) In the United States too, conciliation and arbitration were regarded as a panacea for labour problems by many middle-class reformers, but compulsion was deemed an unnecessary and dangerous incursion of law into private relations.\(^ {35}\)

Early Industrial Arbitration in Australia

Several Australian trade unions in the 1870s and 1880s participated in the formulation of agreements with employers over wages and conditions. Up to 1890 most unions in New South Wales provided in their rules for informal conciliations by their secretary or committee of

\(^{32}\) Conciliation Act 1896, 59 & 60 Vict, c. 30.


management as a preliminary to an official strike, but only those in the coal mining, smelting, ironmoulding, marine engineering, printing and confectionary trades endorsed arbitration of industrial disputes. The few unions both willing and able to obtain from employers agreements for conciliation and arbitration were in the same position as those merely seeking collective agreements: adherence to this means of resolution depended upon the willingness of employers to obey it, which in turn was a function of the nature of local class relations within the industry, the state of the labour market and the profitability of the employer.

The prime example of voluntary conciliation and arbitration was the Newcastle coalmining agreement, which was often cited in the 1890s as the exemplar of the scheme in action. In 1872 an agreement was obtained after a strike by the miners during a period of labour shortages, and was jointly conceded by the coalmine owners, who had formed themselves into a cartel known as the Vend to control prices and production. Once the agreement came into force, the union largely became a co-ordinating body for referring matters to arbitration, gaining recognition of the union by the employers in return. A document drawn up in 1873 which consolidated the coalmining agreements stated that all future disputes between any of the parties would be referred to a conference where the miners would be represented by their local delegates and the owners by their managers; if no amicable settlement could be obtained, the matter would be referred to a five-member council of arbitration consisting of two members appointed by each "party" and a jointly-appointed umpire. Both sides were allowed to present evidence from nine representatives, and a decision by the council was to stand for twelve months. Any signatory could withdraw from the agreement at a year's notice. This system of an

36 RCS, Literary Appendix, pp. 133-153 (responses to questionnaires issued by the Commission).


38 See, eg, Special Delegate Meeting, 21 Nov 1874, Minutes Book of Coal Miners Mutual Protection Association of the Hunter River District, ABL E165/28/5.

39 Memorandum of Agreement between Associated Colliery Masters and Coal Miners Association of Hunter River District, 1 Dec 1873, ABL E207/10.
informal conciliation followed by a formal adjudication by a council or board of arbitration, particularly the provision for a mutually-agreed "umpire", followed the practices established in commercial arbitrations. The difference, of course, was that the industrial agreement and arbitrations under it were legally unenforceable. The adoption of the form of legality associated with commercial arbitration did not, therefore, resolve the problems of compliance.

There were many differences between the miners and coal owners over the form of the agreement between 1881 and 1886; in 1888 it broke down when the miners attempted to negotiate a new version and were rebuffed by the employers. The thirteen-week strike that resulted had a devastating effect on the economies of the eastern states and produced demands for state action, which duly arrived in the shape of contingents of police and an artillery unit from Sydney. Sixteen miners were arrested for riotous assembly during confrontations with police over the employment of non-unionist "scabs" brought in by the proprietors. There were several attempts by prominent citizens to conciliate on behalf of the society at large, and one of the mine managers complained that these attempts by "outside parties to affect a settlement" were delaying the miners' submission and return to work.40

When the miners finally did submit, a union plebiscite narrowly approved a new agreement which introduced a different procedure to replace the discredited former arbitration system. Instead of a board comprising members from each side, a single referee with no personal interest in the coal trade was to be appointed by the Chief Judge in Equity. This "Referee's Court" was to be assisted by one assessor appointed from each side "for the purpose of affording him assistance upon any technicalities which may require the knowledge of experts" but who were to have no part in the formal decision-making. The procedures of this body were to comply with the statute regulating commercial arbitrations.41 When presented with a perceived threat to the social order, and in particular their authority, the employers appealed to individualistic notions of employment relations, stressing "freedom of contract". They also resorted to a form of arbitration

40 J.Y. Neilson to F.W. Binney, 2 Sept 1888, ABL E207.
which reduced the participatory and representative role of the union, prescribing instead an acceptable alternative of judicially-endorsed neutrality and independence from "interest".

Probably the first proposal in the colony for a central conciliation board to settle strikes was put by George Dibbs before the Trades and Labor Council (TLC) in 1882. Dibbs was a mercantile agent who had won a parliamentary seat for West Sydney in 1874 as a "supporter of local business and city interests" but had been defeated in 1877 after being branded as an enemy of the working class for supporting assisted immigration. As Chairman of the Australasian Steam Navigation Company, he played a leading role in the 1878 seamen's strike over the employment of Chinese labour and was accused by Henry Parkes of provoking the union. Attempting a political comeback, he wrote to the TLC proposing a conciliation scheme and was invited to address a special meeting on 12 October, when the 22 delegates present listened to him with "wrapt attention". Dibbs' scheme was premised on an opposition between law and conciliation. He hoped that by establishing a "council of wise men", labour disputes could be settled harmoniously without resort to warrants, police and the courts "upon principles that shall be entirely outside the taint of the law — upon the unwritten law of a common interest ratified by mutual consent." Citing the French conseils des prud'hommes and the English Act of 1867 as precedents, his scheme called for six labour members drawn from trade unions affiliated with the TLC chosen by employers and an equal number of employer members chosen by the employees, with a mutually-agreed chairman. He admitted the difficulty of enforcing the council's decisions, but argued that moral suasion and the mutual interest between labour and capital would force parties into compliance. If moral force and the pressure of other unions against their brethren or wayward employers failed, "legal remedies, if practicable, would be useless."

The scheme was not generally well-received by the TLC. It was regarded as requiring the abrogation of the unions' ultimate weapon — the strike — and therefore opponents thought it inappropriate for the

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42 Bruce Mansfield, "George Dibbs", ADB vol. 4, p. 65.
43 TLC Minutes, ML A3830/148.
44 George R. Dibbs, Address to the Trades & Labour Council, October 12, 1882 (Sydney: Samuel E. Lees, 1890), p. 8. His speech was also reported in SMH 13 Oct 1882, p. 5.
45 ibid, p. 11.
unions of the colony. Dibbs' main supporter in the TLC, E.W. O'Sullivan, believed that the proposal could be modified so that it did not violate the principles of trade unionism "for they would still have their organisation to fall back on if necessary." His critics pointed to the defects of recognition and enforcement of the tribunal's decisions, and argument ranged over the details of composition of the proposed council, departing from Dibbs' original proposed rules. One of the main obstacles must have been the notion of a chairman appointed by both capital and labour, and it seems that the matter was discussed as the establishment of a court with a chairman nominated by the government. O'Sullivan later claimed that he had proposed a court with equal representation from labour and capital, chaired by a Supreme Court judge, and one of his supporters at the time said that "a conciliation court was essential". In the end, the idea was defeated by 12 votes to 7, probably by a combination of desire to retain the strike weapon and opposition to quasi-governmental boards of conciliation. The TLC did not entirely oppose conciliation, for the following year it set up a committee to investigate the subject, though it never reported. In 1889, responding to an initiative by the Employers' Union, it inquired into the board established between the Melbourne Trades Hall Council and the Victorian Employers' Union, finally moving to create a similar board whose gestation was terminated by the Maritime strike of 1890. The Intercolonial Trades Union Congress also passed resolutions calling on colonial governments to establish boards of conciliation and arbitration in 1886 and again in 1889.

Just before the Newcastle strike of 1888 began, members of the New South Wales Parliament had already been exercising their minds over the legitimate role of the state in industrial disputes. In March Joseph

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46 SMH 20 Oct 1882, p. 8; TLC Minutes, ML A3830/152.
47 NSWPD vol. 49 (21 Nov 1890) p. 5500.
48 SMH 17 Nov 1882, p. 5.
50 List of Committees, TLC Minutes, ML A3823. The committee, consisting of six members, was appointed on 2 August 1883 and met four times until it was reconstituted as the "Courts of Conciliation and Arbitration Committee" in September.
Carruthers introduced a bill designed to establish a conciliation board empowered to inquire into any dispute and, if both parties agreed, make an enforceable award. The chairman, chosen by the Government for his impartiality and for "having a judicial mind", would be complemented by members elected by employers and employees as well as representatives of each of the parties to a particular dispute. Carruthers saw misunderstanding and lack of mutual good-will as the cause of strikes; they would not occur if there was some means to conciliate the parties and bring them to their senses. The scheme was presented as the establishment by the state of a legal framework of co-operation and conciliation to enable the parties to come to an amicable agreement, though the machinery would exist for an arbitrated decision if this was prevented by an obstacle of misunderstanding. Carruthers denied that this scheme involved compulsion:

I recognise this fact - ... that you cannot and dare not make arbitration compulsory - that if you attempt in any way to forcibly interfere in the relations existing between labour and capital, and endeavour to force the parties to go before a tribunal, you interfere in an improper manner between labour and capital.53

The Premier, Henry Parkes, supported the spirit of the bill but felt that the views of both employers and employees should be obtained, so a select committee was established. The opinions it discovered were so desultory that the proposal was dropped. Only F.W. Binney, secretary of one of the Newcastle coalmining companies, was in favour, stating that the appointment of a chairman by the government was tantamount to appointing a judge and that compulsion might be adopted if voluntary arbitration failed to work or "if disputes arose of very serious moment, and involving more than the interests directly concerned". The miners' leader, James Curley, on the other hand, was opposed to compulsory arbitration because "there are many ways for parties, if they feel inclined, to get out of the award" and believed that a government-appointed chairman would not be impartial as there were so many coal owners in the government.54

The presentation of the state as public guardian and protector of the interests of "third parties" had failed to impress either employers or unions. These images were negated for the unionists by governments' willingness to support employers in strikes; many workers also

53 NSWPD vol. 32 (17 Apr 1888) p. 4019.
54 Select Committee on Trade Conciliation Bill, Mins of Ev, VPLANSW vol. 8 (1890), pp. 10, 11-12.
regarded the police, law and the courts as instruments of vested employer interest. Both unionists and employers also resisted the notion of state-sponsored schemes for the settlement of strikes because conciliation and arbitration had been characterised as a private, voluntary and extra-legal matter. Still, like the practices of voluntary arbitration, the proposed scheme of 1888 was impregnated with invocations of law as the symbol of impartiality, peaceful settlement of disputes and respect for individual rights. A system of discursive oppositions between reason and force, private agreement and state interference, mutual co-operation and legal coercion, had already been established and would persist in New South Wales politics for the next decade.
Chapter 3

The Failure of Voluntary Arbitration, 1890—1895

Crisis and Intervention

From about 1887 the Australian economy had begun to enter a phase of depression caused by the reduction of British capital investment, stagnation in the productive sectors and the burden of private and public overseas debt. It was no mere cyclic trade recession. According to N.G. Butlin, these long-term factors resulted in a "fundamental sectoral disequilibrium" which led eventually to the restructuring of the Australian economy towards the industrial sector.\(^1\) The fragility of the economy, jarred by speculative investment, was portended by the collapse of the Melbourne land boom and many building societies in 1889. In November 1890 came the shocking fall of the large British bankers Baring Bros; in Australia the attention of financiers was drawn to the magnitude of government indebtedness and export prices of wool fell dramatically. In 1893 panic by depositors caused the Australian banking system to falter, with many banks closing their doors forever and the rest undergoing restructuring. In short, the early 1890s were perceived, with good reason, as a period of economic crisis and social instability.

This period was also punctuated by related crises in labour relations. The Newcastle miners' strike of 1888 was a precursor to a fitful struggle campaigned by unions in the 1890s over collective agreements, the recognition of unions and the principle of compulsory unionism. As Ray Markey has recently shown, the emergence of "new unionism" in Australia, with its adoption of militancy and activism rather than a passive friendly society role, was associated less with socialist doctrines than with responses to changing relations of production and workforce composition, and its militancy tended to

decline once the unions gained one of their main objectives, the recognition by employers of their role as representing all workers in negotiating agreements. While adopting the language of socialism and class struggle, the new unionists such as W.G. Spence were in reality populists who sought to avoid class struggle. Their rhetoric was, however, effective in convincing the capitalists that from 1890 the nature of the employment relation itself was at stake and prompting them to organise along oppositional class lines.

By far the most significant of the "Great Strikes" from 1890–94 was the Maritime Strike of 1890. It was constantly used in discussion about conciliation and arbitration in the 1890s as the greatest example of the evil to be eliminated. Lasting for three months and affecting 50,000 workers, this strike temporarily shattered the image of peaceful cooperation between workers and capitalists and replaced it with one of tension, hostility and the need for state intervention. Since the beginning of 1888 the newly-formed Amalgamated Shearers' Union, organised by W.G. Spence, had been campaigning to unionise shearers and obtain agreements with the pastoralists, thereby expunging the practices which enabled employers to dock wages arbitrarily and enforce inequitable terms of employment contracts under the Masters and Servants Act. The union was tolerated by many pastoralists in the late '80s, since it at least offered a form of labour organisation necessary for an itinerant workforce. Spence's goals were greater: he hoped that, by negotiating standard employment contracts for the ASU's members, the union could shore up its membership through centralised hiring practices and uniform employment conditions. In part the union's demands represented a replacement of individualistic, contractual employment relations with collective ones: it would effectively become an employment agency for its members. At the heart of the ASU's programme was the enforcement of the "closed shop" whereby unionists

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4 Spence, RCS, Q. 1997, p. 69.

would refuse to work with non-union labour and would thus progressively establish the union agreement as the industry standard." In May 1890, with the aid of the Queensland wharfside unions, the ASU secured a major victory in a test case over shearing by non-unionists at Jondaryan station in the Darling Downs. The pastoralists agreed to the principle of the closed shop at a conference organised by the Brisbane branch of the Australian Labour Federation, but their compliance was taken as proof that conciliation inevitably meant concession and defeat. From this time until the end of the strike in November, employers refused to recognise the unions and rebuffed all offers of conciliation or mediation.

At the same time a dispute was brewing over the affiliation of merchant marine officers with the Victorian Trades Hall Council and their association with the TLC. The steamship owners found this repugnant, since it allowed the possibility that the officers might take orders other than in a purely professional capacity and other than from their employers. The employers chose to make this a cause célèbre by asserting their right to govern the terms of employment; unionists responded by seeing it as a question of the workers' right to organise. The marine officers walked off their ships in August, at the same time as "black" wool arrived in Sydney. Within a few days many workers in the maritime, land transport and coalmining industries were on strike to support either the shearers or the officers, magnifying the causes of the dispute into one almighty fight over unionism versus freedom of contract.

In this struggle the impartiality of the state, and of the law itself, came to be questioned. Among workers, great resentment was felt over the use of police to protect strikebreakers and the enforcement of the

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6 W.G. Spence, RCS, Qq. 1603, 1611.
8 Cf N.B. Nairn, "The 1890 Maritime Strike in New South Wales", Historical Studies 37 (1961), p. 2. Nairn argues that freedom of contract, which he describes as "a relic of an idealised past" for most employers, was not the cause of the strike. While strictly true, this ignores the ideological significance of the opposing notions, the fears as to the future which the propaganda of each camp created in their opponents, and the aggressive anti-unionism of a core group of pastoralists: see Merritt, Making of the AWU, p. 134ff.
criminal law, particularly the Masters and Servants Act. Adrian Merritt's study of this legislation has shown that it was frequently used by workers, especially in the primary sector to recover wages. But this was not its image in the late nineteenth century; rather, it was a potent symbol of the partiality of the state and law. The penal provisions of the Act — which only applied to employees — were used with a fair degree of vigour between 1887 and 1894, as table 3.1 indicates.

Table 3.1
Proceedings by Apprehension and Summons under the Masters and Servants Act, NSW, 1881-1894

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Source: NSW Statistical Register, 1881-1894.
Notes: 1 This series was reorganised from 1895.
2 Proceedings on summons included criminal charges against employees as well as civil cases against employers (mainly for recovery of wages). There are no figures for convictions on summons.
3 The conviction rate is the percentage of arrests resulting in conviction.
4 In 1894 cases remanded, withdrawn, struck out or not initiated and prosecuted by police were omitted.

Arrests under the Act were not higher during the Maritime strike, although there was a large increase in the number of summonses (which also included actions by employees for recovery of wages). The criminal provisions of the Act were most clearly used in 1891, the year of the

shearers' strike, although there was also a fall in the conviction rate. The dramatic decline in recorded use of the Act in 1894, when cases which did not proceed to verdict were excluded from the official figures, suggests that the criminal provisions were invoked more as a scare tactic than a method of punishment. John Merritt records that the shearers who went out in 1890 did so in the belief that they would be prosecuted under the Act; many were, the usual penalty being £10 or two weeks in gaol — the maximum penalties allowable for absenting. The example was set by Alfred Lamb, a member of the employers' committee and MLA, who successfully prosecuted four of his employees under the Act for striking. Adrian Merritt's study shows that there were significant rises in the number of prosecutions for absconding in the central west, southern tablelands and far west in the period 1886-1890 (when the ASU became active) over the previous quinquennium. By contrast, employees' use of the Act in wages cases was relatively low during this period, but rose sharply over the next five years — probably to recover wages withheld for striking. The executive of the ASU hoped that a clause of its standard agreement would oust the operation of the Masters and Servants Act, but they were proved wrong in a case taken before the Supreme Court in November, which decided that a shearer could only leave with the consent of the owner. The Act was also used against strike organisers for inciting workers to desert. Arthur Rae was so charged in the Riverina during the 1890 strike. He told the magistrate that he would "just as soon go to hell to look for ice as come into that court and look for justice."
The arguments and rhetoric used by public actors on both sides in the Maritime strike reveal a clash of conceptions of the basis and purposes of law. The strikers' language was deeply impregnated with evocations of liberty and justice which were founded in notions of popularly accepted and natural rights. While deriding the legal system as class despotism, they also appealed to legal notions in support of their claims for justice. The manifesto issued by the labour delegates' conference on 13 September argued that as trade unions were legal institutions they were entitled to recognition from employers. The shearers especially saw themselves as fighting for legal equality which was denied them by a legal system devised by the capitalist class in its own interests. They also appealed to rights established by custom, such as combination and the recognition of unions by employers, as well as socialist-inspired moral claims.

In response to the unions' campaign, which included conciliation to take employment disputes out of the realm of law, capitalists strongly defended their position by reasserting their strict legal rights, which were underpinned by the doctrine of freedom of contract. To many capitalists, the dispute became a struggle for their rights as employers in the face of union action which seemed determined to dictate the terms of employment. This was especially the case with the pastoralists, who were worried that the incursions of the union agreement and the closed shop would negate their right to manage their properties. The unions, in seeking to supplant freedom of contract, were acting despotsically against property rights and the law itself. At a meeting called by the Employers' Union and Steamship Owners' Association to establish an Employers' Mutual Defence Association and held in Sydney on 2 September, employers spoke repeatedly of the "crisis" caused by the unionists' "tyrannical" demands. George Maiden of Goldsborough Mort was greeted with cheers when he called upon employers "to prevent the country from being overrun with tyranny", while A.A. Dangar claimed that "it is the aggressive tyranny of the Unions that has brought us into our present position". According to James Burns of Burns Philp, employers had been "dictated to by the labor bodies on every point, until our business has been taken entirely out of our

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control". Although the chairman of the meeting was inclined to believe that the crisis would be ended by "the mediation of wise and prudent counsel" and hoped that Parliament would pass legislation to prevent the recurrence of such troubles, the meeting resolved to fight the challenge to the rights and authority of employers by united and resolute action.

Quickly the debate developed into one concerning the duties of the state. In such a climate, no longer could simple abstention be regarded as neutrality. Should the state intervene to uphold the rights of the employers in the control of their property, the fulfilment of their commercial arrangements and the satisfaction of their employment bargains with the strikers? Should it rather stand apart, allied to neither class, as befitted a representative government in a democratic system? Should it act rather as a neutral umpire, in its capacity as the agent and protector of the public interest? Or should the state, as the guarantor of equal rights, intervene to protect the weaker party, the locked-out workers and their striking sympathisers?

With some erstwhile liberals, favouring strong state action, even military intervention, to suppress the strikes, it became increasingly difficult to steer a middle course. Despite his long antipathy towards trade unionism Parkes, to his credit, attempted to do so. Parkes managed to abstain from taking the harsh action demanded by the merchants: he ruled out prosecution of the strike leaders for conspiracy and refused to relinquish power over the police and military to McMillan, who was acting in his place. Parkes was not averse to force if necessary; but he did not then think it necessary, and he later praised the restraint of the special constables in the face of taunts from the strikers. McMillan, though, reacted strongly to vivid reports of the wool dray procession and "riot" at Circular Quay on 19 September; he prescribed strong medicine to stamp out the setting up of a "semi-revolutionary government" which could not continue "without absolute disorder and anarchy ensuing." On hearing this, Parkes rebuked him by declaring that "as the government of this country, we have to govern for the men out on strike as well as for the persons

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19 ibid, p. 10.
who are their employers." McMillan resigned from the cabinet in protest, the Governor refused to accept his resignation, and Parkes apologised, after a fashion. As a result of this incident, the Freetrade government was vilified by both sides of the dispute: labour harangued its alleged "lay 'em low" policy, while capital berated its impotence. The contretemps between Parkes and McMillan was presented as the product of Parkes' fixation on the next year's elections, but there were real differences in their attitudes towards government. For Parkes, even-handedness was not a matter of policy to be adopted or abandoned: it was essential to the task of administration. Order was McMillan's prime concern, even at the expense of state neutrality. But the episode really shows how sensitive was the government's public stance in a climate so charged with tension. The schismatic power of this question was obscured by the shearing strikes in the next three years, when it was easier for those supporting the employers to raise the spectre of violence, civil commotion and outrages to property.

As the strike progressed, initial middle-class sympathy for the strikers turned to hostility, and the figure of a "third party" to the dispute emerged in the form of the general public which urged conciliation on both sides. The metropolitan daily press was at first sympathetic towards underpaid workers but railed against the closed shop and became increasingly condemnatory of the strikers, though they also criticised employers for refusing to negotiate. Although it was the ready availability of "free labour" and the weakness of the unions that eventually decided the outcome of the strike, the press presented the defeat of the unions as the result of their loss of "public sympathy". This force was to be the sanction behind a proposal introduced into parliament by George Dibbs at the end of the strike for the establishment of "courts of conciliation". Dibbs strengthened his idea that if strikes occurred when the means to prevent them existed, "public sympathy will not go with the strikers, and public

21 SMH 20 Sept 1890, p. 10; DT 20 Sept 1890, p. 5; Bulletin 27 Sept 1890, p. 15. McMillan's remarks followed a deputation from the Chamber of Commerce which brought a volunteer driver with a gashed head (from flying blue metal) to emphasise the severity of the situation.


opinion will weigh largely in bringing the capitalist to do what is right." Joseph Carruthers carried the idea even further: it was the public who were the victims of these large and protracted strikes, and the public was entitled to have them settled. As Parliament was subject to the will of the public, it became their duty as legislators to find some redress by establishing "some legitimate tribunal", such as a court, from which a satisfactory solution could be obtained. Mindful of the state's collusion with capital, E.W. O'Sullivan, now a Protectionist MLA for Queanbeyan, hoped that the present proposal would "not be of a very arbitrary character" and that its decisions would not be enforced in a despotic manner.

The Royal Commission on Strikes

Dibbs' proposal was never introduced as a bill, probably because it was felt that the contest should be fought out by the parties without state interference, especially as it became increasingly apparent that the unions' defeat was only a matter of time. Instead, the government took up the call by Andrew Garran, an MLC and former director of the Newcastle Wallsend Coal Company, for a royal commission into the strikes. The seventeen-member commission, with representation from both employers and employees presided over by Garran, was appointed by the Parkes government on 25 November. It was commanded to investigate "the causes of conflicts between Capital and Labour" and "the best means of preventing or mitigating the disastrous consequences" of strikes, including an economic examination of conciliation boards and other bodies overseas. In fact, the main part of its work consisted of interrogating witnesses as to the causes of the recent strike and obtaining their views on the efficacy of conciliation. The labour witnesses it examined represented those unions most directly involved in the strike, while the employers who were called mainly came from the shipping, pastoral and coalmining industries.

25 NSWPD vol. 49 (1890) p. 5495.
26 NSWPD vol. 49 (1890) pp. 5503, 5501.
27 RCS, Report, p. 3.
Throughout the proceedings, it was Garran who took the lead in questioning witnesses, and it was his experience of the Newcastle agreements that framed the discussion of conciliation and arbitration. His approach distinguished these two processes by differences in both character and functions. Arbitration, being a formal adjudication of parties' claims which passed judgment on the rights and wrongs of the disputants, he regarded as a judicial function which would need to be exercised by an independent and highly-regarded tribunal. Conciliation, as an informal discussion of mutual interests with a view to friendly agreement, was necessarily non-judicial in character. This set of oppositions seemed to slide easily into a metaphorical difference between a court and a lesser state body. While examining W.C. Windeyer, a Supreme Court judge, Garran stressed: "I do not call a Board of Conciliation a judicial tribunal; I want to keep the distinction clear between a Board of Conciliation and a Court of Arbitration." He also accepted the proposition often put to the Commission that the two bodies should not be identical, since the best people to sit on a board of conciliation were not well-suited for arbitration "which requires a more judicial frame of mind". When Garran asked the judge whether it was not desirable to call upon the existing courts to settle labour disputes, Windeyer strongly demurred, saying that "it would not be judicious" since "it is extremely desirable that the judges should stand entirely aloof from any appearance of taking part in such matters." Garran clearly agreed with this view that ordinary courts strictly applying precedents were inappropriate forums for disputes between bodies of employers and employees, but continually stressed in his questioning of witnesses the desirability of having a court "established by law" to inspire public confidence.

The Commission's report, which was largely written by Garran, proposed that the state establish a Board of Conciliation chosen from the bodies of employers and employed, though it left open how they would be chosen and whether the Board would be permanent or ad hoc. It recommended that there be a permanent section of the Board, with at least three members including a government-appointed President, to act as a Court of Arbitration, thus separating advocacy and judicial

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29 RCS, Q. 6415.
30 RCS, Q. 6424.
31 RCS, QQ. 6434\frac{1}{2} - 6435.
32 See, eg, his exchanges with S.W. Griffith, RCS, QQ.7174-7178, and Edmund Barton, RCS, QQ. 9334-9352 (both lawyers).
functions. The report stressed the judicial function of the permanent appointees in being empowered to give decisions and thus argued for the independence of arbitrators who should be chosen "mainly for their judicial temperament and ability." But as the trade union witnesses had made it clear that they would not accept the decisions of a body which did not include representatives from unions, the Royal Commission reluctantly recommended that the composition of a Court of Arbitration would, under the circumstances, be not very different from that of a Board of Conciliation. The position of the government-appointed chairman of these bodies could be isolated from the representation of "class interest": he would exercise a "purely judicial function" as an umpire when the votes of the arbitrators were tied.33

On the question of compulsion, the report separated initiation of the conciliation process, the hearing by the Board or Court, and enforcement of the Court of Arbitration's award. It held that the Board should not at first have the power to initiate conciliation, arguing that "in establishing a tribunal for settling disputes that are not in themselves criminal, we think it best that the State agency should be called into action rather than act of itself."34 Such power might become necessary at a later date, though, and was justified by the state's right to interfere to prevent colossal and socially-disruptive disputes. A party should, however, have the right to call upon the Board's assistance unilaterally, which would practically result in compulsion on the other party to appear or have an adverse award recorded against them, but no penalty other than public opprobrium was contemplated to force a reluctant party to a hearing. The Commission recommended against compulsory enforcement of awards, as the proposed court was not an ordinary court of law and did not therefore rely on legal sanctions to instil obedience; nor could it compel employees or employers to contract for a certain wage, since both parties could legally give notice and terminate their employment relationship. It felt that instead, the pressure of public opinion and the probity of the tribunal, which would be "clothed with the authority of the state", would lead to most awards being accepted voluntarily.

According to Burton and Carlen, the primary function of official discourse on law and order, as found in reports of royal commissions and government enquiries, is "to allay, suspend and close off popular

34 RCS, Report, p. 34.
doubt through an ideal and discursive appropriation of a material problem" during periods of manifest crises in state legitimacy. This is undertaken, they suggest, by rephrasing the problem into a format suitable for strategies of state control; by instilling the image of the state as administratively rational and democratically legitimate; and by reproducing discourses of confidence, which reaffirm the state's competence, coherence and continuity. To fulfil its appointed task and reach its conclusions that strikes could be prevented under a system of conciliation by a state-appointed tribunal, the Royal Commission under Garran had to overcome several obstacles. There was a polarisation of social ideals between collectivist and individualist conceptions of rights, and disagreement over the justice of the capitalist wage system. Temporarily at least, there was little ground for a common political discourse on labour relations. Also, the strike had been widely presented as the breakdown of rational bargaining and agreement, which was interpreted as the failure of conciliation as a practical system. Agreements and conciliation had become so strongly identified with the unions' demands that they were discredited as a solution for many employers, while the breaking of existing agreements led to suspicion by unionists that they were at all effective, especially when unions were not recognised by employers. And the impartiality of the government and legal system had been called into question by the apparent willingness of the state to assist employers in the employment of non-unionists.

The Royal Commission on Strikes attempted to deal with these problems by allaying doubts with an ideal representation of conciliation and arbitration as reason and justice, thus aligning it with laudable social goals. Its report dismissed the claim that the conflict was between labour and capital by denying that employers were necessarily capitalists, since the sources of employers' capital were mainly financial institutions. It divided the causes of strikes into those over wages and those fought over the recognition of trade unions and, while admitting that conciliation and arbitration would not immediately solve disputes over unionism, asserted by an act of faith that in settling wage disputes they could diminish antagonism and thus work towards solving the larger conflicts. In the language of Burton and Carlen, the

36 *RCS*, Report, pp. 26, 35.
report elided individual disputes and wider, class-based conflict by a process of discursive closure. It also worked to restore faith in a state remedy to the rephrased problem. At the same time, it legitimated the form of state intervention by evoking images of representation and judicial impartiality, while reinforcing confidence and continuity by stressing the extra-legal and voluntary nature of its recommendations which would be limited by the individualistic employment relation.

The Trade Disputes Act

Parkes had already promised to introduce legislation to remedy the effects of trade disputes before the Royal Commission's report was published in June 1891. After the June elections which returned him to office and created 35 Labor members of parliament, he renewed his pledge by foreshadowing a bill which, in referring to "councils of conciliation and courts of arbitration" appeared to follow the Commission's report.37 The bill received a first reading on 5 August but as the government resigned on 22 October (after being defeated over the Coal Mines Regulation Bill by the vote of the Labor members) it was never debated. The new Dibbs ministry introduced a bill in February 1892 which the Attorney-General, Edmund Barton, claimed was not materially different from the one drafted under the previous government.38 Debate on this bill centred on three questions: whether the award of the Council of Arbitration should be made compulsory; the method of appointing members to the Council; and the salary, tenure and qualifications of the President. Virtually all the non-Labor speakers agreed that public opinion would be sufficient to ensure compliance with awards, and that it was impossible to provide for a form of legal compulsion which did not destroy the rights of both employers and workers. They pointed to the difficulty of forcing large bodies of employees to engage in employment against their will, and the futility of ordering employers to pay wages which would force them out of business. The Labor members were divided on the issue. Most supported the bill as it stood and could not see how either side to a

37 NSWPD vol. 52 (29 Jul 1891) p. 434. The Governor's speech at the opening of the session referred to "courts of conciliation" and "tribunals to conduct and determine cases of arbitration": NSWPD vol. 51 (19 May 1891) p. 2.
38 NSWPD vol. 57 (10 Mar 1892) p. 6358. This statement was endorsed by Reid: ibid, p. 6364.
dispute could be forced to arbitrate, let alone abide by an award. However Alfred Edden argued that unless there was some means of compelling masters and men not only to go to arbitration but to abide by its consequences the bill would be "mere waste paper." Since it was invariably the workers who sought arbitration, he did not think they had any reason to fear a state system.39

The question of compulsion was also introduced in discussion of whether a single party to an unsuccessful conciliation should be able to bring the dispute before the Council of Arbitration. The bill enabled a unilaterally-requested arbitration after both parties had consented to conciliation, but the opposition objected that this would discourage resort to the Council of Conciliation if a decision could be afterwards imposed by arbitration. Barton replied that a compulsory hearing in such cases was necessary if public opinion was to be used to police the Act because only by arbitration could the issue be forced into the public arena, and maintained that it was not a matter of compulsion because an award could still not be legally enforced.40

The bill originally provided for the appointment of arbitrators by the government from lists provided by the Trades and Labor Council and Employers' Union. It was an expedient method of choosing arbitrators from both labour and capital but Barton, like many Labor members, also believed that a body like the TLC should be recognised and assisted in achieving the federation of labour. Ultimately, the only way of preventing labour disputes was thought to be the establishment of a central executive which would authorise strikes, thus allowing moderate and respectable representatives of labour to put a brake on union extremism.41 The nomination plan was objected to by both Labor and non-Labor MPs because it deprived unaffiliated societies of the right to participate in the appointments. The TLC at this stage consisted of a small number of city-based craft unions; it was not representative of labour or unions. Barton eventually agreed to the replacement of this method with nomination by unions of both employers and employees which were registered under the Trade Union Act. Throughout the discussion, the instalment of confidence through broad representation and participation were evidently regarded as crucial to the success of the admittedly experimental Act.

39 NSWPD vol. 57 (1892) p. 5559, 5561.
40 NSWPD vol. 58 (1892) pp. 6544–6545.
41 Barton, NSWPD vol. 57 (1892) p. 6498; W.C. Wall, ibid, p. 6468.
The aspect of the bill which aroused most dissension, mainly from the Labor members, concerned the President's conditions of appointment. Originally, the President was to be appointed for ten years at an annual salary of £2,000, while the conciliators were to hold office for three years and the nominated arbitrators for seven. Barton defended the long tenure and high remuneration as necessary to ensure the appointees' status, qualifications, and freedom from accusations of interest. To emphasise the President's judicial position and protect him from arbitrary removal, he was to hold office under the same conditions as District Court judges, during ability and good behaviour. A high salary was necessary to attract someone well-qualified for the job, and to compensate the appointee for relinquishing other employment or pecuniary interest, which was necessary to shield the office from allegations of bias. R.B. Walker claims that these conditions were intended by the government to attract a judge or senior barrister to the position; but while Barton denied that he thought it necessary that the President should be a lawyer, neither did he regard a legal background as a disqualification.

Many, including the labor members, objected to a long and highly-paid appointment because they regarded the position as only part-time. Most disputes, they believed, would be settled by conciliation. Thomas Davis proposed that one of the judges be allowed to do the work, perhaps at an increased salary. He nominated the Chief Judge in Equity because "he is always deciding cases between companies". Several witnesses before the Royal Commission had declared that the Chief Judge in Equity was a suitable umpire for trade disputes, no doubt because equity judges were thought to decide cases on abstract principles of justice rather than according to strict legal rules. Barton agreed that someone like the then incumbent, Sir William Owen, would be an appropriately fair-minded man. As the President was to have

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42 NSWPD vol. 57 (1892) p. 6361; vol. 58 (1892) p. 6613.
44 T.M. Davis, NSWPD vol. 57 (15 Mar 1892) p. 6471. Davis was a prominent activist during the Maritime strike, a former member of the Royal Commission on Strikes and labor whip in parliament: Bede Nairn, ADB vol. 8, p. 240–241.
45 NSWPD vol. 57 (10 Mar 1892) p. 6361. At the time, Owen was an exception on the five-member Supreme Court bench in not having been a member of either house of parliament. He was regarded as non-partisan in party politics, and on 26 April 1892 was appointed to chair a Royal Commission into claims brought by W.F. Schey
the same powers as a Supreme Court judge, at least for the purpose of maintaining order before the Council, a judge would not have appeared entirely out of place. It was agreed that the qualities of independence and fair-mindedness which seemed naturally to attach to judges of superior courts, were necessary, and the President was characterised as sitting in a "judicial capacity". But several members argued that a person with a narrow legal training would be unsuitable: as O'Sullivan put it, "it is not so much a question of the interpretation of the law as of the judging of evidence." O'Sullivan, in common with Parkes and many other speakers, mostly Labor, wanted to exclude lawyers from proceedings because they would unnecessarily complicate, prolong and confound proceedings.46

Originally the President was to be appointed by the government, in order to represent the general interests of the community. Francis Cotton, a Labor member, encapsulated this view when he said that the President "would be vested with authority from the whole of the citizens in order that he might, in an absolutely judicial character, sum up the final award."47 Carruthers took issue with this belief that only the state could represent public interest. Citing the evidence before the 1888 select committee which he had precipitated, as well as the general practices of private arbitration boards, he stressed that disputes could not be settled unless both parties had confidence in the umpire. His amendment that the President should be elected by both arbitrators or, failing their agreement, appointed by the Chief Justice, was partly accepted. In the Act the government was to appoint the President only if the two other members of the Council of Arbitration could not agree on a nominee.48

The Trade Disputes Conciliation and Arbitration Act received the royal assent on 31 March 1892. Like similarly "experimental" legislation passed in Australia during the decade, it contained a sunset clause which limited its operation to four years. Under the Act, disputes could be referred to a council of four conciliators drawn from the full

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46 O'Sullivan, *NSWPD* vol. 57 (1892) p. 6481.
47 *NSWPD* vol. 57 (1892) p. 6479.
48 Carruthers, *NSWPD* vol. 57 (1892) p. 6510; Trade Disputes Conciliation and Arbitration Act 1892, No 29, s. 13.
Council of Conciliation, two each being selected by the employer and employees concerned. Disputes could be referred to the Council of Arbitration by a single party after an unsuccessful conciliation, or by both parties if there had been no such prior conciliation. Either party could agree to be bound by the Council of Arbitration's award in the same manner as a commercial arbitration pursuant to the order of a judge, and if both sides agreed to be bound the award could be made a rule of the Supreme Court on the application of either.\textsuperscript{49} The Council of Arbitration would conduct its proceedings "as in open court", being governed by the principles of equity and good conscience.\textsuperscript{50} Both Councils were empowered to summon witnesses to give evidence on oath, enforceable by a warrant from a justice of the peace which imposed a penalty of up to two months' imprisonment. In addition, members of the Councils could enter and inspect workplaces without a warrant; anyone hindering them was liable to a fine of £500 recoverable before a stipendiary magistrate.\textsuperscript{51} So the Councils had wide powers to conduct proceedings once they were underway, though the powers of enforcement were undertaken by the ordinary courts rather than the new tribunals. Whilst an award could be made legally enforceable by agreement, none of the Councils' decisions were to directly have the force of law.

Ironically, in the same session that Parliament rejected compulsory arbitration in industrial disputes, it passed without murmur a bill which allowed it in complicated civil matters. Rather than leaving investigations of a prolonged or technical nature to a jury, the Arbitration Act of 1892 enabled a Supreme Court judge to refer factual questions to an arbitrator agreed on by the parties or an umpire appointed for the purpose, without requiring the consent of either side. The arbitrator's investigation and award were to be enforceable in the same manner as ordinary court proceedings and orders, while the giving of false evidence was punishable by the law of perjury.\textsuperscript{52} Commercial arbitration references were henceforth incorporated into the normal judicial process. The easy acceptance of this innovation, even the displacement of the jury, was the result of the characterisation of

\textsuperscript{49} S. 21.
\textsuperscript{50} S. 19.
\textsuperscript{51} S. 22.
\textsuperscript{52} Arbitration Act 1892, No. 32, ss. 12, 14-18, 22. This Act largely copied the Arbitration Act 1889, 52 & 53 Vict, c. 49 (UK).
The Defeat of Voluntarism

The Trade Disputes Act was a singular disappointment. In the first twelve months of the Councils' existence there were eight applications for arbitration and six for conciliation, all by employees' unions. During their whole two-year life there were 24 cases in which the Councils offered their services either on their own motion or at the behest of unions. Only two of these were settled, one by conciliation and another by arbitration. Both these cases involved the southern coalfields, and both occurred soon after the Councils were established. While they were hailed at the time as victories for voluntary state arbitration, it was later claimed that the agreement reached by conciliation fell apart within three months, while the arbitration was contrary to the evidence and led to another strike within a year. In every other case that the councils took up, the employers refused even to entertain the initial step of conciliation. While 55 trade unions participated in the election to nominate the employees' representative on the Council of Arbitration, only four employer groups did likewise. One of these, the Builders and Contractors' Association, did not endorse the use of the trade disputes machinery, blaming the potential interference with employers' civil rights on union militancy which had created an atmosphere inconducive to conciliation. In September 1892 the employers' and employees' representatives had agreed to nominate Andrew Garran as president of the Council of Arbitration. Both he and the clerk of awards set upon a campaign to encourage unions to bind themselves to the processes of the Act by provisions in their rules. Only five unions agreed to do so, while ten others sent in replies that asserted the uselessness of a measure which did not make arbitration

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53 Reid, *NSWPD* vol. 54 (1891) p. 2354.
hearings compulsory and criticised the description of the scheme as a law when the tribunal had no power to enforce its decisions.\textsuperscript{57} The first major test of the Act was the Broken Hill strike of July-November 1892. In 1889 the highly-unionised miners at Broken Hill had successfully struck to enforce the closed shop. In the following year, during a further stoppage which formed part of the Maritime strike, the principle of union recognition was reaffirmed in return for a promise not to engage in any more sympathy strikes. Unlike disputes in the rest of the colony, the 1890 strike at the Barrier was a low-key affair; it concluded with "friendly relations" between the miners and managers being maintained.\textsuperscript{58} As part of the settlement made on 25 September 1890, the Amalgamated Miners' Association and the mining companies' association agreed that further disputes would be referred to a board of arbitration, with a final and binding decision being made by an umpire who was to be a judge of one of the colonies' supreme courts.\textsuperscript{59} Miners enjoyed relatively high wages under the agreement, but with declining world silver prices the mine managers agreed at a meeting on 6 May 1892 to reduce labour costs by extending the contract system of task-work.\textsuperscript{60} After seeking an amendment to its conditions, which was refused by the union, the mining companies unilaterally terminated the agreement in June without referring the matter to arbitration, justifying their actions as the exercise of rights under the principle of freedom of contract and refusing to surrender the management of the mines to an arbitral tribunal. When the miners struck the next month, they in turn presented the issue as the defence of the agreement, claiming that the men were on strike "to uphold the grand principle of the settlement of disputes by conference and arbitration, as embodied in the agreement. They are on strike against strikes, with their excitement and suffering and tendency to create lawlessness and disorder."\textsuperscript{61} Although the miners were willing to

\textsuperscript{57} Report ... by the Clerk of Awards, p. 1017.
\textsuperscript{58} Mins of informal meeting, 5 Sept 1890, Broken Hill South Silver Mining Co Ltd, Minute Book no. 1, MUA uncat, p. 68.
\textsuperscript{61} Barrier Miner 7 July 1892, p. 2.
confer, they were adamant that it would be under the agreement, which embodied the principle of union recognition. Unemployment was rife and the mining companies were now in a stronger position than two years before. They determined to reverse their earlier concessions by refusing to employ miners on the basis of union membership. The president of the miners, Richard Sleath, learned something of the shareholders' mood when he addressed a general meeting of the Proprietary in Melbourne at the end of July. The directors and shareholders, he argued, were the dishonourable aggressors because they "struck against existing conditions." He was met with derision, and the meeting left it clear that the shareholders were willing to forego their dividends rather than abandon their rights as Englishmen and the sacred principle of freedom of contract by submitting to "union tyranny."

At the beginning of the strike, the Councils of Conciliation and Arbitration had not yet begun operating, and initially the miners were confident of forcing the companies to private arbitration. In August the mine managers began opening the mines by recruiting strike-breakers from the capital cities, and after a few weeks the miners' hopes of victory began to fade. On 15 October the AMA's delegate in Sydney enquired about the steps required for an application for conciliation under the Trade Disputes Act. An application was lodged naming as conciliators Richard Sleath and another AMA official, W.J. Ferguson. Both had been arrested for conspiracy that same day. An identical application was lodged the following week, but was later withdrawn. After consulting with Barton, on 5 November Garran drafted a letter from Dibbs to the mining companies' association in Melbourne urging resort to the Act by arranging a conciliation conference and agreeing in advance to be bound by an award of the Council of Arbitration (which would have made the award legally enforceable). The secretary of the association curtly replied that the companies were resolutely opposed to any conference or arbitration by the Councils and were determined to continue running the mines with non-unionists, adding

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64 Report ... by the Clerk of Awards, pp. 1019-1020.
65 G.R. Dibbs to William Knox, 5 Nov 1892, Col Sec Special Bundles, AO 4/904.
that they no longer considered there was a dispute with their employees since the strikers had all been sacked.\(^{66}\)

While the strike demonstrated the futility of the new Act when one side was intransigent, it also became a celebrated instance of the law being used to repress unionism. The mine managers requested 500 extra police to suppress the strikers' obstruction of mine operations, violent picketing and interference with the recruited contract workers "to assist in the exercise of our lawful rights."\(^{67}\) To their surprise, the New South Wales government refused most of these requests but sent more police (eventually they numbered 285) as well as a senior stipendary magistrate, Whittingdale Johnson, to Broken Hill. The Sydney press carried daily reports of the "lawlessness" at the Barrier, while the police superintendent telegraphed reports of armed bands, caches of stolen explosives and violent incidents, some of them true. The Crown Prosecutor advised Attorney-General Barton that there was a strong case against the strike leaders for conspiracy and incitement arising out of speeches at open-air meetings. No doubt mindful of the outcry that had accompanied the conviction of shearers for conspiracy under the English Combination Act of 1825 in Queensland the year before,\(^{68}\) Barton instructed him that in conspiracy cases he should "[t]ake every care [that] all cases [are] conducted with absolute fairness and no proceedings [are] taken under any statute which may be contended to be antiquated or disused. Continue [to] rely on common law as much as possible."\(^{69}\) The arrest of the strike defence committee (including Sleath and Ferguson) on 15 September followed an increase in assaults which were allegedly inspired by the speeches. The arrests came as Reid was planning a no-confidence motion, and John Cann (former president of the Barrier branch of the AMA and Labor member for Broken Hill) moved to amend it by specifically censuring the government's treatment of the strike. While the TLC and

\(^{66}\) William Knox to Sir George Dibbs, 11 Nov 1892, Col Sec Special Bundles, AO 4/904.

\(^{67}\) Mins of directors' meeting, 8 Jul 1892, Broken Hill South Silver Mining Co Ltd, Minute Book no. 1, MUA uncat, p. 259; John A. Briggs to J. Wheeler, 9 Jul 1892, Broken Hill South Silver Mining Co Ltd, Melbourne Manager's Letter Book vol. 3, MUA uncat, pp. 893-894.


Labor members were unanimous in believing that the government deserved to be punished, not enough were willing to put Reid into office.\textsuperscript{70}

Johnson was concerned that a jury drawn from the Barrier would never convict the accused, so the trial was moved to the grazing town of Deniliquin. The eight accused were tried on charges of incitement to riot and conspiracy, before Acting Justice Backhouse and a jury of 11 farmers and one woolscourer. Two were acquitted but six were convicted of conspiracy in late October and sentenced to periods ranging from three months to two years, all with hard labour. Sleath and Ferguson received the harshest penalty. Their defence — that they had thought picketing was legal — was no excuse, said the judge: a harsh penalty was necessary to disabuse others of this mistake and to uphold order in the sparsely-policed areas.\textsuperscript{71} Within the labour movement, initial shock was quickly replaced by fury. The sentences were denounced as "unjust and tyrannical" and protest meetings across the colony described the convicts as "martyrs to the cause of unionism". Both the unjust "feudal" laws and the government, who were alleged to be conspiring with the mine owners, were condemned at a demonstration by the Queen's statue in Sydney organised by the Socialist League under the auspices of the TLC. The movement of the trial to Deniliquin and its handling was criticised as outright jury rigging, and Fred Flowers of the Labour Electoral Leagues announced that "the time had arrived when they should object to the perpetration of inequitable laws made during the times of our forefathers and who had no voice in the working of their laws." The crowd was barely prevented from storming Parliament House, though whether it was to confront the ministry or the Labor members (who refused to comment on the case) was not made clear.\textsuperscript{72}

Incensed at the failure of the Trade Disputes Act during its first major test, Cann sought leave to bring in an amending bill for compulsory arbitration and the enforcement of the Council of Arbitration's awards. Cann had been one of the many Labor members who, during the debates over the Trade Disputes Act earlier in the year, could not


\textsuperscript{71} \textit{SMH} 25 Oct 1892, p. 5; \textit{SMH} 28 Oct 1892, p. 5; \textit{WN Covers} 2 (12 Nov 1892), pp. 25–26. The prisoners were released the following July, after a long public campaign.

\textsuperscript{72} \textit{SMH} 1 Nov 1892, p. 5; \textit{SMH} 2 Nov 1892, p. 6.
see how arbitration could be made compulsory short of gaolings en masse, but the dispute at the Barrier had converted him. His bill was not designed to interfere with the existing law on conciliation, which would remain entirely voluntary. Either party to a dispute, whether it had previously been referred to the Council of Conciliation or not, could apply to the Council of Arbitration to "try" the case. The Council would then proceed to make a binding award despite the absence of any of the parties. On the application of either party the award would be made a rule of the Supreme Court, enforceable for any contravention within 28 days of the award by a fine of up to £500 for an organisation and £20 for an individual. To retain individual freedoms, no award was to interfere with customary notice of termination of employment; thus workers dissatisfied with an award could give notice and seek work elsewhere.

Cann’s bill received all but universal condemnation from all sides of the chamber; although they supported the principle of compulsory hearings, even his fellow Labor members (with whom he had not conferred on the matter) were hostile to the enforcement of awards by penalty. This, they argued, was simply reinforcing the unequal legal position of employers and employees and adding to the existing "compulsory" laws, such as criminal conspiracy and the Master and Servant Act, which were unfairly harsh on workers. An alteration of the basis of the employment relationship by the abolition of these penal laws, rather than their multiplication, was regarded by labour politicians as the best means of putting the parties on a level footing. Although many speakers professed themselves in favour of compulsory conferences and arbitration hearings to force disputes into the public arena, arbitration was still largely seen as an extra-legal matter. Barton summed up this antinomy of law and arbitration nicely: Cann’s bill, in providing for judgment and enforcement of an award without consent,

means a departure from the principles of arbitration and conciliation as we understand them, and a resort to the old-fashioned

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73 *NSWPD* vol. 57 (23 Feb 1892), p. 5559.
idea of settling these matters ultimately in a court of law - the very part of the business which when we passed our conciliation measure last session, we thought we had left behind us on our track for ever.\(^76\)

George Black, from Cann's own party, saw no difficulty with compulsion by legislation where the good of the community was concerned, but still clung to enforcement by public opinion.\(^79\) Cann responded to this approach by agreeing to drop the penal clauses while adhering to the principle of compulsory hearings, and when this proposal came to a division the result was close, being defeated by 44 votes to 30 with eleven of the ruling protectionists supporting the motion.\(^80\)

The problem of getting employers and unions to confer was also troubling Garran and the other members of the Council of Arbitration. They drafted an amending bill which was submitted to Barton in September 1893.\(^81\) It contemplated allowing the Council to hear a dispute and deliver an award even though one party had failed to participate in conciliation under the Trade Disputes Act after reasonable notice. It also permitted the Clerk of Awards to request disputants to appoint a council of conciliation; if neither side complied, and the President deemed it of sufficient public importance, the dispute could be referred to the Council of Arbitration for inquiry and award. The President could appoint managers to present each side's case and summon witnesses. Thus the draft bill went quite as far as Cann's amended bill. It also included attempts to incorporate the reference of disputes to the Council into contracts of employment in limited areas. Employees in essential services (government service, railways, gas and water) were to be prohibited from breaking their contracts of service, with a penalty of three months' imprisonment. It would be a sufficient defence if the accused could prove that at the time of the breach there was a dispute which the employer had not referred to the Council of Arbitration. Furthermore, it was to be a term of all employment contracts in

\(^76\) *NSWPD* vol. 62 (1893) p. 3493.

\(^79\) *NSWPD* vol. 62 (1893) p. 3518.

\(^80\) The full voting pattern was: *For* Freetrade 2, Protectionist 11, Labor 17; *Against* Freetrade 19, Protectionist 15, Labor 9, Independent 1. (Based on classification in Colin A. Hughes and B.D. Graham, *Voting for the New South Wales Legislative Assembly, 1890–1964* (Canberra: Dept of Political Science, Research School of Social Sciences, ANU, 1975), pp. 1-18.)

\(^81\) T.B. Clegg to Secretary, Attorney-General's Dept, 21 Sept 1893, Bill to amend the Trade Disputes Conciliation and Arbitration Act, Col Sec Special Bundles, AO 4/906.3.
government employment, the railways or contracting for public works, that disputes would be referred to the Council: breach of this term would expose the employer to damages in contract. Barton determined to submit the draft bill to cabinet, but it had not been reached by the time he was forced to resign his portfolio in December. His successor, Charles Gilbert Heydon MLC, did not seem interested in the subject.

During the budget debate the following April, the councils came under criticism from Labor members who complained that their cost (£2,700) was out of proportion to their usefulness.82 The same criticisms were heard during the budget debate in February 1894: this time, labour representatives argued that the Trade Disputes Act was a total failure and demanded at least compulsory hearings. Reid, the leader of the freetrade opposition, intimated that if amending legislation was not introduced, he would vote to abolish the vote for the councils.83 Dibbs suggested that the debate be postponed. Cann and McGowen then saw the premier to discuss amendment of the Act. They agreed that enforcement of awards was impossible, but accepted the substance of the earlier amendment proposals: if one party refused to appear, a nominal representative could be appointed and the arbitration proceed.84 A bill was apparently drafted, but Dibbs had still done nothing to implement it by the time he lost the election in July.

By then the latest battle in the annual shearing war had broken out. This time the Pastoralists' Union was determined to crush unionism for once and for all. One of the main points in contention then was the new shearing agreement devised by the Pastoralists' Union, which included a clause that the performance and interpretation of the contract was to be conclusively determined by the squatter. The AWU complained that this was enslavement backed up by the Masters and Servants Act.85 The pastoralists again refused to confer with the union and a strike ensued from the intransigence of both sides. It proved to be the most violent of all the "Great Strikes". Blacklegs were abducted, woolsheds were fired and the Darling river steamer Rodney was sunk, while 175 strikers were arrested, and 87 gaoled, for offences including

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82 NSWPD vol. 65 (20 Apr 1893), pp. 6307-6312.
83 NSWPD vol. 69 (8 Feb 1894), p. 626; ibid (14 Feb 1894), p. 709.
84 Cann, NSWPD vol. 69 (28 Feb 1894), pp. 1127-1128; Dibbs, ibid, p. 1129.
85 Worker 16 Jun 1894, p. 1; Merritt, Making of the AWU, p.235.
riot, assault and arson. Spence approached Garran and Clegg at the Council of Arbitration on 21 June. Clegg appealed to the pastoralists to submit the dispute to the Council, but his entreaties were rebuffed and he had to report that nothing further could be done since they did not possess compulsive powers. Convinced that justice and public opinion were on its side in the strike, the AWU began to press the new government to redress the state's partiality towards capital by introducing compulsory hearings under the Act.

When Reid's legislative program was announced in August, it included the promise of a bill amending the Trade Disputes Act and "embodying the principle of a compulsory investigation of the merits of trade disputes, upon the application of those concerned on either side". The government also attempted to distance itself from either side in the continuing shearsers' strike. When the ultra-conservative National Association urged it to provide more police for the western districts, Reid regretted that the Pastoralists' Union had not replied favourably to the AWU's offer to conciliate before the strike began. He intended to introduce the amendments before the next shearing season, but the AWU and union movement were becoming increasingly impatient: whenever a dispute arose which highlighted the inadequacies of the present system, governments refused to act for fear of displaying partiality towards unionists. With a dearth of experienced non-unionist shearers and the finance companies wanting the sheep shorn at any price, the result of the strike was more a compromise than an outright victory for the pastoralists, though the union believed it had won by attrition.

After nearly four years of almost constant battle and defeat, conducted during an economic depression, the labour movement's

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87 Worker 7 Jul 1894, p. 1; Spence, NSWPD vol. 96 (14 Dec 1898), p. 3315.
88 Worker 11 Aug 1894, p. 3; Coghlan, Labour and Industry, vol. 4, p. 2105.
90 SMH 6 Sept 1894, p. 5.
92 Merritt, Making of the AWU, p. 246.
increasing conversion to some form of compulsory arbitration from 1894 is understandable. By then, union membership had plummeted, as had affiliations to the TLC. So parlous was the state of unionism that in July the TLC was forced to reorganise itself as the Sydney District Council (SDC) of the Australian Labor Federation to stave off extinction and escape its debts. The employers' steadfast policy of locking out unions had meant that some of the largest were reduced to mere rumps covering a few workers in particular shops. Other unions were forced to broaden their coverage, while many semi-skilled and even craft unions disappeared altogether. This decline was not to be reversed until the end of the century. In this climate, strikes continued but were consistently unsuccessful, and unionists found they were unable to maintain the former agreements, several of which had included provision for voluntary conciliation and arbitration. One of the few exceptions was the "tame" marine engineers' union: the Sydney shipowners, with the disapproval of the intercolonial association, met with the engineers' delegates in 1893 and agreed to an arbitration on a proposed reduction of wages. Another arbitration on reduction of staff was held in September 1894. The arbitrations were made possible by rivalry between the steamship owners and the difficulty of getting highly-skilled engineers; even so, it was assumed that the reductions would occur. Several owners supported voluntary arbitration to postpone the various compulsory schemes that were being mooted.

In spite of its consistent failures, the Council of Arbitration continued to pursue its goals as best it could. In October the printers were involved in a strike over wage reductions and Clegg wrote to the Typographical Association and the master printers offering the services of the councils. While the union was prepared to arbitrate, the employers refused: the recent introduction of linotype machines had created a sufficient surplus of desperate printers. The failure of the strike led to the destruction of the closed shop throughout the trade. Also in October the Council of Arbitration's term was renewed.

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94 Special Meeting, Sydney, 6 Oct 1893; Meeting, Sydney, 19 July 1894; Meeting, Sydney, 9 Oct 1894; Meeting, Victorian SS Owners' Association, 9 Oct 1894, Australasian Steam Ship Owners' Federation, Minutes, ABL E217/1, pp. 15, 78, 85, 87.

and Garran took this opportunity to review its history. He blamed the failure of the councils on the commercial collapse which had disturbed the "social equilibrium". Still, the depression must end and the demand for conciliation and arbitration would increase with prosperity. Public opinion, he thought, had become educated to demand equitable relations between employers and employees, to accept that the settlement of strikes could not be left to the purely voluntary actions of the parties and that "a judicial settlement of the difficulty is the best known preventive." The natural step, then, was to allow one side to insist on the investigation of the dispute. Garran emphasised that this was no more than occurred with ordinary courts, where non-appearance was exceptional. He admitted this was an experimental step, "but under the circumstances novelty is unavoidable."96

The supply vote for the councils again came before the Legislative Assembly in December. Reid wanted the councils to continue until he could introduce the amendments, but many in the house saw the bodies as a complete waste of money. Relying on Reid's promise to introduce a compulsory system, the Labor party and independent labour representatives combined against both Reid and Dibbs to negative the vote. Although George Black demurred, arguing that it was easier to amend the Act than create a new one, the labour members, in Watson's words, saw the board as "worse than useless, it is a perpetual argument against arbitration."97 The Labor members' action soon came under criticism from the trade union movement. Some members of the SDC had encouraged or approved of the abolition, but a dispute was simmering in the northern coalfields so in January the SDC called on Reid to refer it to arbitration. Now there was no state arbitration machinery at all, and the SDC expressed regret (with some dissension) over the Labor party's action.98

At the end of 1894 Garran called the councils together for the final time. In his valedictory speech he prophesied that it would not be long before the state again set up the means for industrial conciliation and arbitration, for the demand for justice was too strong to resist. The

96 SMH 9 Oct 1894, p. 3.
97 NSWPD vol. 74 (11 Dec 1894), pp. 3266-3287. The voting was 45 to 37, with core free-traders and a few protectionists voting against the abolition. Black absented himself from the chamber during the vote.
98 SDC Minutes 20 Dec 1894, ML A3835/52; Australian Workman 12 Jan 1895, p. 2; SDC Minutes 17 Jan 1895, ML A3835/61-62; Australian Workman 2 Feb 1895, p. 2.
last two years had changed the views which he originally expressed in the report of the Royal Commission on Strikes. Experience showed that some form of compulsion was necessary:

All we desire is that a hearing should be enforced. Let either party to a trade dispute be empowered to call for a hearing, and then we shall get what we do not get now, a tolerably fair estimate of the merits of the case.... The machinery at present set up may be brought to a standstill. But the wheels will be set revolving again, or new machinery will replace it. I have pointed out the change which I think desirable, and which to me seems to be entirely justified by our experience. I am unwilling to go further and attempt the enforcement of awards. The probabilities are that we shall be able to do without going to such an extreme. At any rate, we have no experience to prove that it is necessary, and in the absence of such proof we should not be too quick to make new crimes.99

His prime concern, as ever, was the liberty of the individual subject, but the lawlessness, disruption and cost of strikes had reached the point when a conservative reformer like Garran could find limited state intervention entirely justifiable. This juncture had also been reached by many in the labour movement, to whom state intervention in industrial matters had formerly been regarded with great wariness. At the end of February 1895 the annual conference of the Labor Electoral League resolved to include "the principle of compulsory arbitration in industrial disputes" in the party's platform, although it was not actually included for another three years.100

In March an amending bill was finally introduced by Jacob Garrard, the holder of the new portfolio of Labour and Industry. It was largely copied from the draft prepared by the Council of Arbitration.101 Apart from allowing an arbitration hearing to take place in the absence of one side, with a person being appointed to present their case, the bill allowed the Governor to refer a dispute to the Council of Arbitration, or to appoint it as a special board of inquiry with the powers of a royal commission. Once a dispute was before it, the council would be

99 SMH 29 Dec 1894, p. 5; R.R. Garran, Prosper the Commonwealth (Sydney: Angus & Robertson, 1958), pp. 57-59.
able to summon witnesses and order the production of documents. This last power was the one most criticised by the opposition, who feared that business secrets would be exposed to an employer's trade rivals. Dibbs condemned the measure as class legislation pandering to the labour movement. With the Labor party and independent labour members wholeheartedly supporting the bill, it was pushed through the lower house with an amendment that the production of books and papers would only be required if the president was satisfied that it was reasonably necessary. The bill then went to the Legislative Council in April, where it was introduced by Garran. It had always been expected that it would face a hostile reception in the upper house, particularly the clause allowing the compulsory production of documents, but all were surprised when it failed to find even a seconder. It later emerged that Want, the Attorney-General and only other minister in the chamber apart from Garran, had been absent from cabinet during the discussion of the bill, and excused himself from the vote on conscientious grounds.

The early 1890s were a time of great disappointment for labour law reformers. Not only had the shortcomings of the Trade Disputes Act failed to be remedied, but attempts to dilute the harshness of the criminal law against strikes, as revealed in the gaolings in Queensland during the shearer' strike of 1891 and the conviction of the Broken Hill six for conspiracy, were also stillborn. Prompted by the use of the criminal conspiracy provisions of the 1825 Combination Act in Queensland and the threat of its use in New South Wales, Hugh Langwell (an independent labor member for Bourke and original member of the ASU) had introduced a bill for its repeal in August 1891. Although there was opposition and some doubt as to its effect, the bill sailed through the lower house without amendment, but foundered in the Legislative Council in the face of trenchant opposition. Parkes' Minister for Justice, Albert Gould, suggested that the English reforms of 1875 be implemented, but his proposal was abandoned when the government lost office a month later. In March 1893 B.R. Wise introduced a more comprehensive bill to alter both the common and statute law by

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102 NSWPD vol. 76 (2 Apr 1895), p. 5006.
103 NSWPD vol. 76 (17 Apr 1895), p. 5331; Reid, NSWPD vol. 83 (8 Jul 1896), p. 1405.
retaining the sections of the 1825 Act which legalised combinations and declaring the circumstances in which concerted action was illegal. His bill was designed to be a code of crimes and freedoms in industrial disputes, assimilating the English statute and common law. While it drew heavily on the English Act of 1875, it placed less stress on motives and relied more on the general criminal law. It was supported by the government and the labour members (although it did not entirely satisfy their demands) and passed with a few amendments. The upper house, though, took the opportunity to enact their fantasies. The bill was amended to allow merely assembling to be treated as intimidation, to infer malicious motive from the consequences of an accused’s actions, and to lengthen the term of imprisonment to a year. Otherwise, the bill was changed to conform to the English Act. The reform was then dropped by the government; with it disappeared all hope of getting rid of the "vile old law that once was made when George IV was king".

By 1895 liberals attempting to steer the state on a middle course through the "labour question" had reached unknown latitudes. Voluntary state arbitration, in the form proposed by the Royal Commission on Strikes, had been shown to fail in two large and particularly contentious disputes. The climate of industrial relations was hostile to such a solution. Organised labour and capital were antagonistic on the possibility of negotiation, while the economic environment constantly generated disputes over reduced wages but precluded their resolution by collective bargaining on an equal footing. Yet the ordinary criminal and civil law was no answer either: the fining and gaoling of workers who regarded their cause as just and themselves as law-abiding could lead too easily to problems of legitimacy for the legal system and governments. In Spence's words,

In times of excitement men who are peaceably inclined may under extreme provocation commit a breach of the peace. So far as breaking the law is concerned, it all depends on what kind of a law it is as to whether or not it is right or wrong to break it. If the law is made as a trap to catch men and crush them in the interests not of true liberty but of gross tyranny, then breaking

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it may become a necessity of our existence and be forced upon us in defence of true liberty.107

Labour could not be silenced or ignored, as many capitalists demanded: its representatives sat in the cross-benches of the legislature holding the key to power. The answer to the labour question, if there was one, must come from somewhere else.

107 *Worker* 15 Dec 1894, p. 3.
Chapter 4

Liberal Collectivism and State Intervention

Liberal Collectivism

English political theory in the late nineteenth century was mainly a contest between individualism and collectivism. These two categories were not precise; rather, they existed in a true dialectical relationship, each being defined in terms of its opposition to the other. Both shared the liberal tradition of commitment to liberty, hostility to privilege and enthusiasm for reform.1 Debate over these objects generally resolved into a conflict between minimalism and activism in state functions. Individualists believed that the state was necessary only to provide the conditions in which the greatest possible individual liberty could be exercised. The most vocal exponent of individualism, Herbert Spencer, believed in an evolutionary law propelling civilization away from militarist authoritarianism and towards an industrial society in which state action was sparse and diffuse. Thus "over-legislation" to protect the weak was both futile and immoral. In Spencer's view, the state was an external force imposed upon society by the need to maintain order; its interests, being alien to those of a society of autonomous individuals, should therefore be checked to prevent the corruption of social evolution.2 Advocating the application of laissez-faire to social as well as economic problems, Spencer was more a vestige of the Manchester school of political economy and the mid-Victorian faith in self-help.3 Other individualists, such as Henry


3 Spencer's first book, Social Statics (1850) expressed the views which he continued to expound in a sociological form for a further
Sidgwick, were more willing to support regulatory and protective legislation; their major affinity with Spencer and his followers lay in their opposition to collectivism. By the 1880s, individualists saw themselves as fighting a rearguard battle against what they saw as an onslaught of collectivist opinion and "socialistic" legislation.

Collectivism too embraced a range of approaches and convictions, justifying Dicey’s maxim that it was "rather a sentiment than a doctrine". The greatest prophet of the "New Liberalism" was the Oxford philosopher T.H. Green. Although much of his work was obscure, it exerted an enormous influence, both directly and through his many followers. Green's theological rationalism and philosophical Idealism combined to regard individuals as capable of personifying and expressing the spirit of God and Reason. God was immanent in Man as the principle of reason and morality; piety, the ethically good life and responsible citizenship united in a duty towards social improvement.

Green's ethics relied on a Kantian insistence on a universal and absolute duty towards the interests of others in order to attain self-fulfilment. The purpose, or telos, of Man lay in the realisation of his higher self as a moral other-regarding being. Social existence and therefore human consciousness depended upon co-operation; the active pursuit of the common good was the means by which this consciousness could be realised in its highest moral form. Politics was simply the means of achieving the conditions in which this moral life could be lived.

Based on his ethical theory, Green constructed a political philosophy which contested the Lockean notion (adopted by Spencer) of society originating in a contract made between individuals with pre-existing rights. This idea, he argued, resulted in "the inveterate irreverence of the individual towards the state, in the assumption that he has rights

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4 Collini, Liberalism and Sociology, p. 22.
against society irrespective of his fulfilment of any duties to society". For Green society was a consensual community whose general will was ideally represented by the state. Action by the community through the state was necessary to transform social conditions which impeded the opportunity for every citizen to realise himself through others. The value of laws and institutions was to be determined only by the extent to which they allowed individuals' capacities of will and reason to be realised. Laws could not enforce morality; they could only ensure the social conditions in which it could be practised. The legal enforcement of social duties was, however, closely associated with the development of a spirit of conciliation and co-operation.

Against individualist notions of freedom as absence of restraint or ability to exercise one's will, Green advanced a concept of positive freedom. True freedom was an ideal which could only be approached by self-realisation through the rational choice of moral actions. Freedom was not an end in itself but a means to an end, "the liberation of the powers of all men equally for contribution to the common good"; hence "the mere removal of compulsion, the mere enabling a man to do as he likes, is in itself no contribution to true freedom." Property laws which prevented the propertyless from realising their capacities gave an illusory freedom. Similarly, shibboleths such as freedom of contract which, when exercised, resulted in oppression, might be restricted in the interests of all, since "the freedom to do as they like on the part of one set of men may involve the ultimate disqualification of many others, or of a succeeding generation, for the exercise of rights." Since freedom for Green meant pursuit of humanity's higher nature through the common good, he was not averse to the use of compulsion by the state to achieve it. In matters like compulsory education, temperance and child labour laws, like Rousseau he thought that people might have to be forced to be free. Moreover, while it was a function of the state to uphold contractual freedom, it should also prevent the enforcement of contracts made between parties of greatly unequal

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11 *ibid*, §210, p. 209.
and which, "instead of being a security for freedom, become an instrument of disguised oppression.”

Green was no socialist and his politics did not extend far beyond support for protective legislation that was already being pressed by the radical wing of the Liberal Party in the 1880s. He did not oppose the capitalist system so much as the gross inequalities of distribution which, by perpetuating a class of propertyless, effectively prevented a large number of citizens from achieving true freedom. The solution to this problem lay not in fundamental changes to economic relations, but state action such as land law reform which could enable the poor to become capitalists themselves. Despite his collectivist leanings — his sympathy for group action and state intervention — his philosophy retained deep individualist underpinnings. Yet Green’s theory contained great potential for travel in far more radical directions, especially when coupled with the argument that universal manhood suffrage had made the state the receptacle of the general will. Such journeys were made by his followers, beginning with Arnold Toynbee.

Toynbee shared Green’s religious and moral commitment to public duty, preaching a gospel of state-led social reform and industrial cooperation. Toynbee published little in his short reign at Balliol from 1878 until his premature death in 1883. His posthumous Lectures on the Industrial Revolution were widely read at the time and exerted great influence among the British intelligentsia at home and abroad; but it was at Oxford (where his devotion and selflessness were venerated long after his death) that his influence was most strongly felt. The fullest impact of his ideas was felt only by the few who were personally associated with him. One of these remembered that "only in conversation could one thoroughly appreciate the opulence of his intellect or fully feel the glow of his inspiration." His moral fervour and sense of great duty infected his disciples throughout their lives. His closest friend, Alfred Milner, noted that those who came under Toynbee’s direct influence "were deeply impressed with their individual duty as citizens, and filled with an enthusiasm for social equality,

which led them to aim at bridging the gulf between the educated and the wage-earning classes."\(^{15}\)

Toynbee sought to transcend the class divide by constructing a new political economy firmly based on Green's ethics instead of a dogmatic faith in free competition and an individualistic *homo economicus*. He stressed the contribution of social developments to industrial progress, and advanced the idea of a planned economy, though he thought this would be achieved by industrial co-operation rather than by government regulation.\(^{16}\) Still, he did not shrink from advocating state interference wherever the pursuit of private interest was damaging to the common good. The conditions for state action laid down by Toynbee were close to Green's in this respect:

First, that where individual rights conflict with the interests of the community, there the State ought to interfere; and second, that where the people are unable to provide a thing for themselves, and that thing is of *primary social importance*, then again the State should interfere and provide it for them.\(^{17}\)

Yet Toynbee was willing to go much further than Green in accepting state intervention: the state was justified, he thought, in breaking down inequalities in the distribution of wealth through public ownership and the promotion of co-operatives which would secure material independence to workers. For this reason he described himself as a socialist, although he abhorred the revolutionary solutions of Marx or the *étatisme* of the French socialists. Whether by association or by state legislation, the socially deleterious effects of competition must be checked to protect the weak. Toynbee lauded the Gladstone government's Irish Land Act as state activism to redress the bargaining inequalities between landlords and tenants. The 1881 Act, regarded as the high-water mark of collectivism, replaced an earlier ad hoc system of arbitration with a special judicial tribunal which recognised statutory rights and was required to set a "fair rent" for tenancies.\(^{18}\)


\(^{17}\) Toynbee, "Are Radicals Socialists?", *Lectures*, p. 216.

\(^{18}\) Land Law (Ireland) Act 1881, 44 & 45 Vict c. 49. The legal machinery for constituting the Land Commission as a judicial tribunal independent of the ordinary courts may have been an inspiration for compulsory industrial arbitration legislation in Australasia.
Toynbee's liberal collectivism is manifest in his solution to the "labour question": the creation of true equality and progress through co-operating interest groups. He was not ready to abolish the employment relationship and socialise industry; his solution lay in collective organisation and co-operation through trade unions. While individual workers were insufficiently possessed of knowledge, mobility and resources to bargain equally with their employers, they could achieve this equality by banding together. Trade unions, in effect, were the workers' capital, enabling them to maintain their selling price of labour.\textsuperscript{19} The old radical liberal program had recently been completed with the legalisation of trade unions and industrial action under the Acts of 1871 and 1875,\textsuperscript{20} so relations between labour and capital had finally reached the stage where equality could be achieved by the participation of trade unions in industrial bargaining.\textsuperscript{21} With the increasing organisation of labour, industrial conciliation was not only possible but necessary: without it, strikes would become disastrous. Trade unions offered the means for enforcing conciliation agreements and arbitrated awards by influence on their members. But with their state-guaranteed freedom came responsibilities: unions should not limit competition by excluding workers from membership or abuse their position by raising wages above levels that industry could ill afford.

Toynbee followed the recent developments in industrial conciliation closely: they showed that the unions desired peace and were capable of achieving it. He made the changes in relations between capital and labour, indicating the sublimation of particular interest to the general good, a leading motif of his work. His lectures on the industrial revolution drew heavily on Henry Crompton's panegyric on the voluntary boards of conciliation and arbitration in the north of England.\textsuperscript{22} Crompton had argued that because they continued the process of industrial freedom begun by the early Radicals and economists, trade unions were central to the process of industrial reconstruction. Through them, combination was at last creating independence for the working classes; and conciliation, which involved recognition of this independence by the employers, was the central means of achieving a

\begin{itemize}
  \item \textsuperscript{19} Toynbee, "Wages and Natural Law", \textit{Lectures}, p. 170.
  \item \textsuperscript{20} Trade Union Act 1871 (Eng); Conspiracy and Protection of Property Act 1875 (Eng): see ch. 2 above.
  \item \textsuperscript{21} Toynbee, "Are Radicals Socialists?", \textit{Lectures}, p. 211.
  \item \textsuperscript{22} Alon Kadish, \textit{Apostle Arnold: The Life and Death of Arnold Toynbee, 1852-1883} (npl: Duke UP, 1986), pp. 98-100.
\end{itemize}
new regime of mutual understanding and co-operation in industry. Toynbee expanded this argument into a general theme on the nature of industrial progress. Reworking Maine's famous dictum that the movement of progressive societies has been from status to contract, he added a higher and later phase: the movement of industrial societies has been from unrestricted bargains to contracts regulated by the state in the interests of the whole people.

Industrial conciliation and arbitration remained a central part of the changes Toynbee thought both likely and necessary if capitalism were to fulfil its promise of universal freedom and well-being. The industrial revolution brought about the destruction of paternalist ties between master and man, replacing them with an impersonal "cash nexus" that treated labour as simply another commodity. While this was harmful in the short term, industrialism was ultimately saved by democracy which created employers and employees as equal citizens. The old unequal unity was gone forever, replaced by a new, equal and democratic one. Modern democracy, with its equality of rights between employer and workman, together with universal education which could create a common culture, had made it possible "to preach the gospel of duty to the whole people." Toynbee was convinced that it was this common conception of duty that would allow industrial disputes to be resolved harmoniously, although he did not foresee an end to conflicting interests:

If I might trust myself on the unsure ground of prediction I would point out that Boards of Conciliation may grow into permanent councils of employers and workmen, which, - thrusting into the background, but not superseding Trades-Unions and Masters' Associations - for these must long remain as weapons in case of a last appeal to force, - should, in the light of the principles of social and industrial science, deal with those great problems of the fluctuations of wages, of over-production and the regulation of trade, which workmen and employers together alone can settle.

It was the ideas of true freedom achieved by collective co-operation and backed by state intervention that Toynbee impressed upon his followers.

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25 *ibid*, p. 201.
Liberalism in Australia

As in Britain, liberalism in Australia meant many things. Australia had, in Bruce Smith, its own defender of individualism against the heresies of T.H. Green. Largely following Spencer, Smith proffered that "there is no part of the civilised world in which the term 'Liberalism' has been more constantly, or with more confidence, misused than in the English colonies". Most politicians who held sway in the 1880s were sympathetic to the individualist strain of liberalism; though with broader state functions in Australia they were in practice less abstentionist. Economic depression and industrial turmoil in the 1890s brought an end to this tradition of colonial liberalism; it was replaced by an implicit acceptance of state intervention to assuage social and economic problems. In the 1890s there also arose a new group of liberals who were more willing to extend the sphere of the state. Generally they called themselves progressives, less often radicals; often they were labelled socialists by their opponents or their intermittent allies in the labour movement. They were exclusively middle-class, often lawyers, and ineradicably bourgeois in outlook. One of them, William Pember Reeves of New Zealand, went so far as to identify a "Progressive movement". The Progressive, in common with the socialist, was a believer in publicly-controlled state enterprise, and wary of competitive capitalism (which was being succeeded by foreign trusts and combines); but "the middle-class Progressive is still half a Liberal."

A major factor of this emergence, as Reeves acknowledged, was the advent of the Labor party in parliament. In most colonies the labour movement gave valued support to liberal governments; in New South Wales the party's whims dispensed the gift of office. The presence of Labor on the cross-benches and at the hustings produced a need to identify liberalism publicly with the demands of the labour movement and thereby gain its support. It also clothed radical liberals in the

26 Bruce Smith, Liberty and Liberalism (Melbourne: George Robertson, 1887), p. iii. This book, republished in Britain in 1888, was a leading text of individualism.
29 Reeves referred to the reforms attained by "the alliances or fusions of Radical and Labour groups": ibid, p. 96.
mantle of respectability when compared with the (relative) extremism of Labor's socialists. Also, the radical liberals were part of a broader search for solutions after 1890, of which socialism too was a part. In truth Australia possessed few New Liberals in the English sense; they formed but part of the non-socialist reformers of the fin de siècle. Michael Roe has given us a glimpse of the diverse provenances of those who embraced some flavour of progressivism in their quest for social reform. Common among them was a faith in state intervention for the common good.

In Victoria, where Labor was not so strong, the liberals were more cohesive as a party. Liberals like Deakin, Isaacs and Higgins were far from state socialists, yet saw liberalism as more than the erosion of privilege. Increasingly they became converted to the ideal of the state as a positive force to protecting the weak from exploitation and achieve greater equality of opportunity. Higgins, for example, started the decade of the '90s as a fairly orthodox liberal, but gradually converted himself to a more radical position. Politicians in New South Wales, where fiscalism still muddied the waters of affiliation and belief, are more difficult to categorise. Barton and Carruthers have been proposed as examples of radical liberalism, though neither ascribed to collectivist principles or governmental activism for social justice. McMinn claims that Reid "instinctively shared the Oxford Idealist view that a measure of economic security and social justice is a precondition of real personal freedom" — and that he aimed to achieve this by fiscal reform. His policy of replacing tariffs (which he condemned as


32 In 1892 Higgins supported freedom of contract, yet two years later he was advocating compulsory conciliation: John Rickard, *H.B. Higgins: the Rebel as Judge* (Sydney: George Allen & Unwin, 1984), pp. 63, 70-72.


34 W.G. McMinn, *George Reid* (Melbourne: UP, 1989), p. 107. John M. Ward also describes Reid an advocate of New Liberalism, which allowed for "strong state intervention in a limited range of economic and industrial matters": "Colonial Liberalism", p. 92. Compare the assessment of Rickard (Class and Politics, pp. 143-144) that Reid was a loyal child of "free-trade liberalism" who "combined a strong advocacy of democratic rights with an orthodox
regressive) with land and income taxation, and his reforms to local government and the public service qualify Reid as an advanced liberal. But apart from a brief period early in his reign when the ministry was "filled with the spirit of reform", the motif of his premiership was moderation. A populist, he still held inviolate the individual freedoms of property and contract. Yet Reid's premiership does indicate a recalibration of the political barometer in the mid-1890s. Men like McMillan, who a few years earlier were considered liberals, were now being branded as conservatives, though their policies had changed little. McMillan continued to advocate reduction in government spending, and believed that "the less the Government do, except in acting as policeman in trade disputes, the better for the community." With Reid in power, the centre was shifting towards greater state intervention as the Liberal party tried to accommodate or incorporate Labor's demands.

In Sydney there was at least a loose network of progressive liberals. At the university there was G.A. Wood who had attended Balliol when Toynbee's posthumous influence was still strong. On his arrival in 1891 he was befriended by fellow academics Walter Scott, Mungo MacCallum and Francis Anderson. All were committed to the expansion of the university's liberal arts curriculum and its involvement in extra-mural studies, and were deemed progressive in political beliefs. Anderson in particular was a prophet of the state as saviour, embracing Green's philosophy (though not the more radical expositions of his followers) in an admixture of individualist ethics and statist social philosophy.

that labourers have a right (call it natural or social, or whatever you please) to protection if they 'are too weak to obtain it for themselves by contract.'\textsuperscript{39} Yet he also supported the right of workers to the state's protection from the tyranny of their fellow workers. If the new liberalism showed a strong sympathy for the labour movement it equally displayed an antipathy towards militant unionism and class antagonism.

The Colonial State

Because of its traditionally high level of government expenditure and activity, Australia was fertile ground for the solutions offered by the new liberalism. Numerous visitors to the colonies commented on the "colonial socialism" of the antipodes. After a visit in 1896 Henry Walker, an English conservative, deplored their "tendency towards State socialism". Having become accustomed to state support, "Australasians have been led insensibly to magnify the efficacy of its intervention and to welcome every enlargement of its sphere of action."\textsuperscript{40} Less condescending was the French radical Albert M\'etin, who coined the famous phrase "socialism without doctrines" to explain the pervasive government involvement in the economy and society compared with Europe. He was tempted to describe this development as "a new evolutionary process which should end in state socialism"; but though he found some statements by politicians to support this view (notably from Reeves and Kingston), he observed that such sentiments were not held by those in power in Melbourne and Sydney. In most colonies, he noted,

it is not in the name of a principle nor in the application of a theory, but in response to practical necessities, that the state has intervened in areas reserved everywhere else for private enterprise.... Only in recent years have some young, educated politicians perceived the end towards which their country is moving: they have accepted and justified it by importing and acclimatizing European theories.\textsuperscript{41}

\textsuperscript{39} Francis Anderson, "A Modern Philosopher - Green of Balliol" (1890) in The Union Book of 1902; Being the Contribution of the Sydney University Union to the Celebration of the Jubilee of the University (Sydney: William Brooks, 1902), pp. 195-196.

\textsuperscript{40} Henry de R. Walker, Australasian Democracy (London: T. Fisher Unwin, 1897), pp. 249, 251.

The socialist reputation of the antipodean colonies rested on the unusual nature and extent of state activity.\(^\text{42}\) The nineteenth-century view has been confirmed by a recent comparative study which shows that in terms of per capita government expenditure, "the Australasian pattern is unmatched anywhere in the world."\(^\text{43}\) The accepted function of the state in Australia between 1860 and 1900, and even earlier, was a partnership between government and private capital for economic development. From the 1890s, though, government activity increasingly involved provision and regulation for social welfare. Apart from its absolute increase (from a small base), in relative terms this form of activity was even more significant in the face of the depression, reduced foreign investment and consequent government stringency. The New South Wales government, as the colony's largest employer, was continually pressured by the labour movement to display leadership in the provision of pay and conditions. This formed a large part of the dispute over the employment of "day labour" versus "contract labour" in public works, which became one of the major labour questions of the late 1890s.\(^\text{44}\) During the 1890s depression the government at first used public works as sporadic unemployment relief, but gradually state activities became more institutionalised. A government labour bureau was established in 1892 to distribute welfare to the chronically unemployed, but as the decade progressed it increasingly became a co-ordinator of public employment and a full-scale casual labour exchange — to the chagrin of many conservatives, who saw this as far beyond the legitimate functions of the state.\(^\text{45}\) A labour settlement was also set


\(^{43}\) Lance E. Davis and Robert A. Huttenback, *Mammon and the Pursuit of Empire: the Political Economy of British Imperialism, 1860-1912* (Cambridge: UP, 1986), p. 122. The authors estimate that, even excluding railways, average annual per capita state expenditure in the Australian colonies between 1860 and 1912 was at least twice the figure for the UK in all areas.


up at Pitt Town in 1893 to settle the unemployed on the land; its failure led to it being converted into a state labour farm in 1896 under the control of the labour commissioners.

The state was more centralised, too, in Australia. Local government always took a lesser part in regulation and public works than in Britain. Its place was taken by government departments or by statutory boards and officers. Unlike Britain, where such instrumentalities were replaced by direct ministerial responsibility, the number and importance of administrative boards increased during the century. Reliance on independent bodies and tribunals was induced by fear of patronage and self-interest of politicians. The form taken by such bodies suggests a distinct preference for a "judicial model". The judicial tribunal was the form of state intervention least susceptible to criticism: the aura of judiciality was usually enough to counter objections to the expansion of state power, since that power was divorced from governmental control. Objections were channelled away from the scope of intervention into mundane questions of cost and appointments. The prime examples of this in New South Wales are the establishment of the Railway Commissioners in 1885 and the creation of the Land Court in 1889 to oversee decisions of the local land boards, replacing ministerial discretion in the control of alienated Crown land. The Railway Commissioners served as a model for an interventionist yet democratic state: they were appointed for a fixed term and, like judges, could only be removed by both houses of parliament. A similar model was adopted from New Zealand for electoral redistributions in 1892. In 1895 the Reid government established the Public Service Board to investigate departments and oversee appointments and promotions on the basis of competitive examinations. Royal Commissions and boards of inquiry have always played a more significant role than in Britain. Not only was state power more concentrated in Australia, it was more transparent. In a new society with responsible self-government the

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fiction that power was exercised by the Crown could not be maintained, and diminished along with the fiction that the Crown was immune from legal actions.49

Faith in the strong interventionist state is also indicated by the form of socialism adopted by the working class in Australia during the 1890s. By far the greatest source of inspiration was Edward Bellamy's utopian novel Looking Backward. Workers frequently nominated it as a model of social organisation and a solution to the labour problem.50 The novel relates how, in the dying years of the nineteenth century, the capitalist monopolies became concentrated in a single syndicate, the Great Trust. Realising at last the logic of public ownership, the people peacefully nationalised it into an all-embracing, democratic state bureaucracy. "When the nation became the sole employer, all the citizens, by virtue of their citizenship, became employees, to be distributed according to the needs of industry."51 The agglomerated industries, which formed the basis of workforce organisation through membership of hierarchical unions, are "directed" by a central bureaucracy which allocates the workforce by setting industrial conditions. That Australian workers should have preferred Bellamy's vision, with its authoritarian regimentation, to Morris's communitarian reply in News from Nowhere52 says much about their faith in the state, as well as the limits of their individualist beliefs.

Precedents: South Australia, New Zealand and Victoria

A component of the picture of colonial socialism was the image of the colonies as "laboratories of social reform". In the 1890s, this image is mainly attributable to the achievements of two administrations, the Liberal régime in New Zealand from 1890 and Kingston's South Austra-

49 Finn, Law and Government in Colonial Australia, pp. 4-5, 45-49.
lian ministry of 1893–99. Through them came such innovations as pensions, minimum wage laws, early closing, government financing of closer settlement, and above all compulsory industrial arbitration. The preconditions for these innovations can be found in the long colonial tradition of state activism, with its high government spending and bureaucratic centralism. The inspiration and driving force behind the introduction of compulsory industrial arbitration in Australia was collectivist or radical liberalism, though much of its acceptance was owed to the labour movement. The architects of the industrial arbitration system were three radical liberals: Kingston, Reeves and Wise.

The first concrete proposal for compulsory conciliation and arbitration came from Charles Cameron Kingston in South Australia, a former Attorney-General who had strong connections with the colony’s United Trades and Labour Council (UTLC). The Maritime strike hit South Australia’s already depressed economy especially hard, spawning proposals for conferences as well as some more permanent machinery for conciliation. On behalf of the UTLC, Kingston had asked the employers to agree to refer the dispute to a mutually-agreed tribunal, but received no satisfaction. So in December 1890 he introduced a bill "to encourage the formation of Industrial Unions and Associations, and to facilitate the settlement of Industrial Disputes". He later claimed that it was original and not based on any particular model, although he had glanced at various Canadian and Victorian schemes which provided for voluntary industrial conciliation. Rather, he identified his main inspiration as his experience of commercial arbitrations, and thought he would venture in that direction, "having some experience of the provisions which are usual in arbitration." Because South Australia

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did not have a divided legal profession, he would have been more aware than most lawyer-politicians elsewhere of daily practices in commercial law.56

Kingston was a radical democrat whose commitment to liberalism led him to embrace state intervention and social collectivism. In 1891 he declared publicly, "I wish to be classed as a State Socialist — as one who recognises it is right for the State to interfere for the good of society".57 He strongly believed in the right of unions to organise and to obtain recognition from employers and the public. The formation of unions by both labour and capital, he thought, would tend to produce agreements and reduce the possibility of disputes.58 But the impact of strikes, which now affected the rights of the whole community, mandated action by the state to "provide a better means of getting to the right."59 He had an unshakeable faith that disputes could be settled by a judicial finding on the merits of the dispute.

Kingston's original scheme envisaged three types of conciliation boards. The state board of conciliation, a permanent and general body, was to be constituted by three representatives each of employers' and employees' organisations, with a government-appointed president. It would have cognisance of all industrial disputes referred to it by compulsory conciliation conferences, by the Minister or under an industrial agreement.60 The need for specialist trade knowledge would be met by allowing the state board to refer matters to industry-based sub-committees. Local boards could also be established for particular industries, if generally desired by local employees and employers in the industry. Both state and local conciliation boards would resolve disputes by agreement and, if this was not possible, arbitrate "according to the merits and substantial justice of the case."61 In time, Kingston hoped, precedents would develop which would assist the boards procedurally and ensure consistency in their decisions.62

56 Kingston practised as a barrister and solicitor from 1876, taking silk in 1888: John Playford, "Charles Cameron Kingston", ADB vol. 9, pp. 602, 605.
58 Kingston, RCS, Q. 6624, p. 234.
60 Industrial Unions Bill 1890, in RRCS, Conciliation Appendix, pp. 71-75, cl. 40-42.
61 ibid, cl. 45.
62 Kingston, SAPD (17 Dec 1890), col. 2508.
were also private boards which could be constituted by a registered industrial agreement between organisations and/or individuals; subject to the agreement, they were to have the same powers as public boards. To administer the scheme, an Industrial Registrar would be appointed to head a new Ministry of Industry. The Registrar's functions included encouraging conciliation, registering unions and adjudicating disputes over their rules, conducting elections for membership of conciliation boards, and filing and enforcing agreements and awards.  

The bill relied on the registration of unions for implementation and enforcement. Groups of employers and employees could register by lodging their rules with the Registrar; they were also required to furnish a list of members twice a year to aid enforcement. Once registered, an organisation and its members were subject to the jurisdiction of the conciliation boards and were bound by any industrial agreements and awards pertaining to them. Members of registered organisations could only resign after three months' notice, while during their membership they were bound by the union's rules on pain of a £10 fine. Unions could enter into industrial agreements for the determination of industrial matters and the settlement of industrial disputes by private conciliation boards or otherwise. Once filed with the Registrar, agreements became binding on signatory unions and their members; contravention could mean a heavy fine.

The Minister would have power to refer disputes between registered organisations to a public board for compulsory conciliation, which could then make a binding award. Agreements and awards were effectively judicial pronouncements, since the ordinary courts were enjoined to treat them as their own judgments. Process could be issued to attach the property of subject organisations, for which purpose they were to be regarded as incorporated companies. Individuals or organisations participating or assisting in strikes and lockouts within the jurisdiction of a conciliation board were guilty of an offence punishable by heavy fines. Finally, there was provision for the compulsory provisions

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63 Industrial Unions Bill 1890, cl. 74, 76; SAPD (17 Dec 1890), col. 2509.
64 Industrial Unions Bill 1890, cl.19; Kingston, SAPD (17 Dec 1890), col. 2506. The Register's decisions could be reviewed and varied by means similar to the control exercised over the Railway Commissioners.
65 Industrial Unions Bill 1890, cl. 14(3)(c), 21; 31, 36.
66 ibid, cl. 58, 60. Unions and associations could also be sued in their registered names: cl. 82.
to be extended to all unions, or to prohibit a union being formed without registering, by a proclamation following addresses by both houses of parliament. Kingston admitted that the legislation was experimental and should be implemented cautiously; this last provision would be invoked only if voluntary registration proved inadequate.\textsuperscript{67}

While Kingston's bill contemplated the fixing of future conditions of employment through industrial agreements, arbitration was intended "to find out who was in the right and who was in the wrong, to reconcile the parties if possible, and if not, to put it down in black and white, and give them the means of enforcing it."\textsuperscript{68} Thus the settlement of industrial matters such as pay and conditions were solely the preserve of industrial agreements, while conciliation boards (public or private) could only settle disputes. The settlement of industrial disputes was seen as a matter of determining commutative justice between the parties in specific past events, just as a court would do in settling legal disputes, rather than prescribing the future content of the underlying matters in the dispute.

Kingston's bill was only foreshadowed in 1890. Still a backbencher, he presented it again in November 1891 after making changes in response to criticism. Now a dispute could be referred to the state board for report only, without binding effect. Also, the state board would be able to simply issue a report on a dispute if it did not deem an award appropriate.\textsuperscript{69} The government's cool reception was met by making awards enforceable against only those who had agreed to abide by them. The bill in this form passed the lower house but was deferred by the Legislative Council. The following year it was taken up by the new Holder ministry which also removed the clause allowing parliament to compel unions to register. Even in this diluted form the bill attracted opposition from both capital and labour. The Broken Hill strike, which closely involved South Australia, had shown how trenchant both sides could be: unions and employers alike feared any curtailment of their freedom in such a climate. Again the bill was blocked by the upper house.\textsuperscript{70}

\textsuperscript{67} \textit{ibid}, cl. 65-69; Kingston, \textit{SAPD} (17 Dec 1890), col. 2507.

\textsuperscript{68} \textit{SMH} 27 Mar 1891, p. 6 (speech to TLC in Sydney).

\textsuperscript{69} Kingston, \textit{SAPD} (4 Nov 1891), col. 1879.

After forming a government in 1893, Kingston embarked on a broad program of progressive legislation. His Conciliation Act of 1894 included the previous concessions: awards were enforceable only for registered organisations, while the state board could make a binding award only if so empowered under an agreement. Industrial disputes between unregistered unions were subject only to investigation without a binding award.\(^71\) The provisions for registration of unions, the three types of boards, and most of the original machinery clauses remained. While failing to meet most of Kingston’s original objectives, the Act at least provided a formalised system of voluntary industrial arbitration, enforceable collective agreements and the compulsory investigation of disputes. Kingston particularly stressed the advances which the 1894 Act made in allowing enforceable collective industrial agreements between unions with enhanced corporate legal personality.\(^72\) He still expected that, with the tendency of both employers and employees to organise and meet amicably to settle their mutual interests, the Act would prove beneficial. In this he was quite wrong, for the procedures were almost never used: unions refused to register, while only one (unsuccessful) investigation was made by the state board. In 1900 a wages board system was adopted from Victoria.\(^73\)

Like the other Australasian colonies, New Zealand had been shaken by the Maritime strike. Ballance’s Liberal government won the election after the 1890 strike with a policy of industrial conciliation and labour reforms. William Pember Reeves, the new Minister of Education and Justice, was a close ally of the union movement. During the strike he had supported mediation and compulsory state arbitration.\(^74\) He presented a compulsory conciliation and arbitration bill in July 1891, but the government hesitated and it was temporarily withdrawn.\(^75\) Appointed Minister of Labour in 1892, Reeves pressed his reforms harder. Reeves was a true state socialist: influenced by the \textit{Fabian}

\(^{71}\) Conciliation Act 1894, No. 598, ss. 49-50, 65-68 (SA).


Essays, he believed that socialism could be achieved by progressively extending the province of the state. He believed in the state "because the State is now the people, and the people the State, and because the people are orderly and well-educated." Democracy had made the state into the "collective power of the community" which must now act to make a more just and civilised society. Industrial arbitration was part of his socialist politics: it would extend the state's legal powers to protect and assist workers in their unequal struggle against their employers for just wages and conditions.

After further revision (including borrowing from New South Wales' Trade Disputes Act), Reeves' bill was presented to parliament in 1892. By this stage it provided for a three-member court of arbitration, along with local conciliation boards. Reeves agreed to make a Supreme Court judge president of the court. The bill was designed to encourage conciliation; arbitration was played down until it seemed like an afterthought. There was provision for registered industrial agreements, which were administered by the boards. Apart from this function, the boards' jurisdiction was voluntary and their decisions unenforceable. The court would act as a venue of appeal, and would also have the power for compulsory reference of the most damaging disputes. But compulsory arbitration could only be instigated by the Minister or a petition from organisations representing a minimum number of employers or employees. Awards were enforceable only if lodged with the Supreme Court, which was responsible for their execution by ordinary civil remedies. The system was premissed upon corporate registration and representation; the use of unions, said Reeves, was to discourage trivial matters.

In its most important respects, Reeves' bill compares closely with Kingston's earlier bill. Long debate has ensued as to the extent to which Reeves drew on Kingston's work, and who therefore deserves the credit for "inventing" the industrial arbitration system. Reeves always claimed that his bill was original and strenuously denied accusations that he had drawn extensively on or been inspired by Kingston's. Both

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76 Reeves, NZPD vol. 76 (21 Jul 1892), p. 38.
77 Sinclair, William Pember Reeves, pp. 205-209.
79 Reeves, NZPD vol. 77, p. 52.
80 Reeves, NZPD vol. 77, pp. 30, 32.
James Holt, the historian of New Zealand arbitration, and Keith Sinclair, Reeves' biographer, argue that Reeves resorted to several sources, including Kingston's bill, in his drafting, but that the total result was novel.\textsuperscript{81} Mitchell's recent examination of the issue unfortunately does not embark on a detailed collocation of the language of each text, but it does compare the structure and concepts of each. He concludes that based on both the essential components of the "Australasian model" of compulsory arbitration and the conceptual framework and content, Kingston's bill deserves to be regarded as the model for Reeves, while Kingston may be accounted the originator of the Australasian form of compulsory arbitration.\textsuperscript{82} There do appear to be direct borrowings: the provisions for the registration of industrial agreements and unions, and the compulsory reference powers of the Minister, for example. Reeves' attention was drawn to Kingston's bill in March 1891 when the Wellington Trades Council sent him a copy.\textsuperscript{83} Kingston frequently referred to Reeves' scheme as derived from his own. Later, in 1903, he went so far as to accuse Reeves of plagiarism.\textsuperscript{84} A recognition of Kingston's innovations need not take us that far. The drafting of new legislation requires use of whatever precedents are available, while frequent redrafting, fresh ideas and the endeavour to create an integrated and unambiguous whole lead the drafter to depart from the original scheme. Reeves' drafting process followed this very pattern: his bill was re-worked many times and with the advice of several people.\textsuperscript{85} His most significant contributions to the compulsory model were made in the next three years.


\textsuperscript{82} Mitchell, "State Systems of Conciliation and Arbitration", pp. 93-95.


\textsuperscript{84} Sinclair, \textit{William Pember Reeves}, p. 152.

\textsuperscript{85} Reeves, \textit{NZPD} vol. 77, pp. 27, 32, 50; James Drummond, \textit{The Life and Work of Richard John Seddon} (Christchurch: Whitcombe & Tombs, 1906), p. 239. In his Memoirs Reeves admitted he was "not an original thinker". Of his labour reforms he said: "The air was thick with schemes.... What one had to do was form a view as to what was wanted and desirable in New Zealand. Then one looked round to see whether there were any schemes or suggestions that would be useful. From these you selected what seemed likely to be of service, taking one, rejecting many. What you took you pieced together, modified and endeavoured to improve upon": quoted in Sinclair, \textit{William Pember Reeves}, pp. 209-210.
The bill was blocked by the appointed Legislative Council but, unlike Kingston, Reeves was not prepared to compromise. Believing that a half-hearted measure retarded rather than advanced the cause of compulsory arbitration, he revised his bill and presented it again in 1893. A few important changes were made: unions would be required to adopt comprehensive rules before registration, and strikes were to be prohibited pending the award of the Court. The bill was again blocked by the upper house, which struck out the compulsory clauses. But in the general election in November, arbitration was taken up by the Liberals as a major plank of their platform. Their decisive victory was regarded as a mandate for the bill, which became law on 31 August 1894. New Zealand's Industrial Conciliation and Arbitration Act was thus the first legislation for compulsory arbitration of collective labour disputes. Its successful enactment can be attributed to the small number and disorganised state of industrial employers, the strong support for it among trade unions and the virtual absence of strikes at the time.

As the result of Reeves' persistence, the Act that resulted in 1894 was virtually as he had originally drafted it. Registered unions gained full corporate status, having perpetual succession, the ability to sue and be sued, and a common seal. The district conciliation boards were really mediatory bodies which could make recommendations or reports; only the Court of Arbitration could make enforceable awards following a reference by one of the parties to the board hearing. Awards bound only those parties (and their members) mentioned in them. Enforcement was left to the Supreme Court: the Court of Arbitration had only powers to obtain evidence and punish for contempt in its presence. These limited powers over contempt signified that it was a court of inferior jurisdiction, lower in status than the Supreme Court. The Act continued to evolve in the light of experience. Technical amendments were made in 1895 and 1896, while the Court's powers were enhanced in 1898. A new Act amending and consolidating the earlier ones was passed in 1900. This extended the system's coverage to shop and

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86 Reeves, *NZPD* vol. 79 (30 Jun 1893), pp. 144-145.
88 *Industrial Conciliation and Arbitration Act* 1894, No. 14, ss. 6, 15, 52, 64, 75.
89 *Industrial Conciliation and Arbitration Act Amendment Act* 1895, No. 30; *Industrial Conciliation and Arbitration Act Amendment Act* 1896, No. 57; *Industrial Conciliation and Arbitration Act Amendment Act* 1898, No. 40.
clerical workers by expanding the definition of "industry", which had suffered a restrictive interpretation by the court. It also provided that a board's recommendation, unless referred to the court within a month, had the same effect as an industrial agreement. Workers who were not members of a registered union could have the provisions of an award extended to them if their employer was bound by it. Further amendments were made the following year, notably to allow a party to by-pass the boards and refer a dispute directly to the court.

At first, circumstances seemed to justify Reeves' prediction that the arbitration machinery would be little used. Unions were fairly slow in registering and the court was not convened until May 1896. From 1897 several unions began to take cases to the conciliation boards. Some of the early disputes were resolved amicably at this stage, but cases were increasingly referred to the Arbitration Court: mainly, it seems, because unions wanted an award which bound all employers cited. Soon the board hearings became preliminary bouts to a final award of the court: in the first 86 disputes, only 29 were resolved by all parties accepting the boards' recommendations. Nearly all the cases were brought by trade unions. Resentment of the Act built up among employers, their chief objection being that it was costly and time-consuming to require a board hearing before a binding court award. Opposition to the boards resulted in a privately-sponsored amendment in 1901 which allowed a dispute to be referred directly to the court if either side so wished. Despite these problems, superficially the Act seemed to be working. New Zealand continued to enjoy a low level of industrial disputes, and this was attributed by commentators to the existence of the arbitration system. Henry Demarest Lloyd, an American reformer who visited in 1900, enthused that the arbitration experiment had made New Zealand the "country without strikes". In 1900 the 1894 Act as amended was adopted in Western Australia with slight changes.

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90 Industrial Conciliation and Arbitration Act 1900, No. 51, ss. 2, 58, 87; Reeves, State Experiments, pp. 125-127.
91 Holt, Compulsory Arbitration in New Zealand, p. 41.
93 H.D. Lloyd, A Country without Strikes: A Visit to the Compulsory Arbitration Court of New Zealand (New York: Doubleday Page, 1900).
The most salient feature of Kingston's and Reeves' schemes was their reliance on judiciality and legality. Both men believed strongly in what Weber called legal domination: the social acceptance of rules simply because they were established by a rational legal order. Kingston wrote that people "obey the law because it is the law, though if it were not for its provisions discontent might induce different action." But more than this, both men stressed that their schemes established specifically legal systems which gave workers, through their trade unions, collective legal rights to redress their individual inequality with their employers. By adopting ordinary legal processes, Reeves believed that the problems of enforcing awards would be eliminated because people obeyed the orders of those endowed with judicial authority and status; workers would embrace compulsory arbitration because it was a "great and noble experiment in the cause of law and order" which would provide "legal means to gain industrial justice by orderly and judicial arrangement".

Meanwhile, a very different picture was unfolding in Victoria. There too debate over conciliation and arbitration took off after the Maritime strike, promoted mainly by the labour movement although initially with support from the Chamber of Commerce. While the Turner government included several liberals in its ranks, it displayed singular lack of interest in such legislation, and a scheme for compulsory arbitration foundered in 1894 after opposition by the Victorian Employers' Union. It was overtaken in the early 1890s by the campaign against sweating (the gross exploitation of "helpless" workers, particularly women and children) in the clothing and furniture trades. The campaign was organised mainly by middle-class reformers and concentrated on the moral perils and degradation of outwork and factory life. After a series of public reports and inquiries, the agreed legislative solution

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generally was the setting of a minimum wage and increased government supervision of workplaces.

The result was an experimental new Factories and Shops Act in 1896, limited to three years’ operation, which established six boards to determine minimum wages, maximum hours and the number of apprentices in the trades where sweating was thought most common: clothing, furniture and baking. The wages boards consisted of members elected by employers and employees in the trade, with an independent chairman chosen by the board or, failing that, appointed by the Governor. The boards were only to determine the lowest price or rate to be paid for articles, as well as other matters to be prescribed. Determinations were enforced by the factory inspectors and were punishable by fine. Unlike the arbitration schemes championed by Kingston and Reeves, the wages board system did not aim to resolve particular industrial disputes, did not rely on unions (indeed, did not recognise them) and was not based on a judicial method of determination. The boards’ decisions were really a form of delegated legislation: they took effect only when published in the Government Gazette.

In the late 1890s, unions continued to press both for an extension of the boards and for a form of compulsory arbitration along the lines of New Zealand’s Act. When W.A. Trenwith, an MP and secretary of the bootmakers’ union, introduced a bill for conciliation and arbitration in 1900, already wages boards and arbitration were being seen as alternatives. Instead the wages boards system was expanded by permitting boards to be established in other trades on the resolution of either house of parliament, as well as allowing boards to set maximum working hours. Compared with compulsory arbitration, wages boards were considered second best by the labour movement. The moderation of the boards system and its status as the extension of an existing legislative régime allowed its establishment at a time when Labor was too weak, and the government insufficiently radical, to invoke a brave new system of compulsory arbitration.

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100 Factories and Shops Act 1896, No. 1445, s. 15 (Vic).
So by the late 1890s there were three existing models available nearby for adoption in New South Wales. There was a system of compulsory hearings without enforced awards, along the lines of Kingston’s compromise and effectively an extension of the Trades Disputes Act; there was the experimental voluntary conciliation and compulsory arbitration system introduced in New Zealand and apparently working successfully; and then there was the altogether different approach of the Victorian wages boards, designed to prevent sweating by fixing minimum wages but without power to resolve industrial disputes as such. Any one, a combination, or none of these schemes might have been introduced in New South Wales in the next few years. Numerous factors in the political economy of the colony in the 1890s can be advanced to explain why labour legislation was possible then. Economic restructuring after the depression, particularly increasing industrialisation, and the tradition of state activism in Australasia are the most important of these. But the implementation and actual form of the legislation which ultimately fostered a new industrial relations system depended not on the trajectory of the international and local economy, the general or specific requirements of capital, or the playing out of competing ideas about state functions. The passage of the Industrial Arbitration Act depended first on the efforts of a capable individual who believed in compulsory arbitration strongly enough to persist with it against strong opposition; secondly on support within parliament and outside, particularly from the labour movement; and ultimately on the conjuncture of political forces and events such as would allow its enactment.

B.R. Wise

In the case of New South Wales, the introduction and passage of a scheme of compulsory arbitration in the form devised by Kingston and Reeves may fairly be attributed to a single man, Bernhard Ringrose Wise. Because of his unusual background, career and beliefs, Wise has been accorded a negative and largely unfair historical treatment.


104 The only detailed study remains J.A. Ryan’s "B.R. Wise: An Oxford Liberal in the Freetrade Party of New South Wales" (Unpublished MA thesis, Sydney University, 1965), which covers only the period up to 1895. Wise’s memoir to his son, Reverie and Reminiscence
Wise came from a family of ancient Kentish gentry who emigrated to become scions of the colonial establishment.\textsuperscript{105} His father was educated at Rugby and practised at the bar before moving to Sydney where he was elevated to the Supreme Court bench within five years of his arrival. When he died in 1865 he left a reputation for integrity and public-mindedness, a large family and little else. Thus at the age of seven Bernhard, the second son, inherited the mantle of success and the station of impoverished gentility. Thanks to Parkes, his mother was awarded a small yearly pension and in keeping with family tradition the family returned to England so that the boys could be educated at Rugby. Young Bernhard spent seven miserable years as a town boy, victimised and humiliated for his family's relative poverty.

Wise went up to Oxford in 1876 after winning a presentation to Queen's College. There he achieved great success, becoming British amateur mile champion, founder of the Amateur Athletics Association and president of the Oxford Union. He gained a first in Jurisprudence in 1880 and was allowed to read history for a year without examination, a rare honour. His studies introduced him to political economy and the leading jurists, including Jhering, Savigny and Maine.\textsuperscript{106} From them Wise would have appreciated that law was evolutionary and intimately connected with social developments. The rights it recognised could adhere to collectivities as well as to individuals, while historically law was dependent on groups for its content and enforcement.

Wise later reminisced that he was "fortunate in being at Oxford at a time of intellectual ferment, when the mid-Victorian conventions were breaking up, and all received ideas were in the melting pot."\textsuperscript{107} It was the time when T.H. Green and Arnold Toynbee dominated liberal thinking at the university. In his senior years Wise attended Green's lectures which were later published as the classic \textit{Principles of Political Obligation}. Fascinated with politics, Wise became a leader of the young radical liberals of his day. He was treasurer and then president of the select Palmerston Club, the centre of radical liberalism at Oxford. Wise's

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\footnote{Wise, \textit{Reverie and Reminiscence}, p. 35.}
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academic attainments gave him good prospects of a fellowship, but when a sympathetic private letter to the Irish MP and prominent Land Leaguer, T.P. O’Connor, was alluded to in the Times, the dons’ reaction denied him a position at All Souls.\footnote{Ryan, "B.R. Wise", pp. 46, 62-65; Wise, Reverie and Reminiscence, pp. 30-44.}

But Wise’s association with radical liberalism went far deeper. In 1879 Toynbee had founded a select "little society" of like-minded scholars at Oxford. This group, half-jokingly dubbed "the Regeneration of Humanity", was designed to forge the theoretical basis of radical liberalism. Toynbee hoped that by expounding their views in public lectures to workers and by publishing a "Political History of the People", the group could become the vanguard of a revitalised liberalism that would unite the middle- and working-class radicals. The circle met regularly until just before Toynbee’s final illness and death in 1883.\footnote{The circle initially consisted of Toynbee’s student contemporaries, who were now mostly junior fellows: Alfred Milner, P.L. Gell, D.G. Ritchie, J.D. Rogers, F.C. Montague, J.A. Hamilton and W.N. Bruce; a little later Wise and E.T. Cook (the only undergraduates) were invited to join. See Kadish, Apostle Arnold, pp. 55, 63-65; B.R. Wise, Industrial Freedom: A Study in Politics (London: Cassell, 1892), pp. v-vi; B.R. Wise, "Reminiscences of the Oxford Union" (1896) in The Union Book of 1902 (Sydney: William Brooks, 1902), pp. 215-216; W.N. Bruce and F.C. Montague, Reminiscences of Alfred Milner (1926), Milner Papers, vol. 183, Bodleian Library, Oxford (photocopies in possession of J.A. Ryan).}

Each member chose or was assigned a topic to contribute to the theoretical program. At one of his public lectures, Toynbee had encountered resistance to free trade from his worker audience, so he suggested to Wise that the relationship between free trade and wages be explored in detail.\footnote{Kadish, Apostle Arnold, p. 74; Wise, Industrial Freedom, p. v. Montague’s Limits of Individual Liberty and Ritchie’s Darwinism and Politics (and probably Principles of State Interference) originated in this group.}

Wise’s association with Toynbee extended to participation in the latter’s public activities. In 1880 Wise delivered the final lecture (on the life of Cobden) in a series arranged by Toynbee at the Oxford Co-Operative Society.\footnote{Oxford Chronicle and Berks and Bucks Gazette, 11 Dec 1880, p. 6; Kadish, Apostle Arnold, p. 155. Wise claimed Cobden as a progenitor of radical liberalism, focussing on his refusal to allow economic principles to override the welfare of the people.} He also joined Toynbee in campaigning for Liberal candidates in the 1880 election. When Toynbee fell ill in early 1883 Wise and Cook were asked to take over his public lecturing...
commitments and spoke on the land question on several occasions. The signs are that Wise was one of Toynbee's closest disciples, chosen to carry out his plan of social regeneration. In turn, Wise regarded Toynbee as his mentor, the source of his political ideals.

After leaving Oxford he tutored while reading for the bar and, once admitted to the Middle Temple, practised briefly in London. Yet the call of duty to his native land proved too strong. In 1883, against the advice of his mother (who well remembered how small a place Australia really was), he sailed for Sydney. On his return he set up at the civil bar, gaining a solid though not very lucrative practice. Following Toynbee's dictate to propagate the faith, he began a career of public lecturing on labour and fiscal issues, becoming one of the leading exponents of free trade in 1885 and helping to found the Freetrade Association. In 1887 he became president of that organisation and led its campaign for Parkes' faction in the elections. He gained a seat in South Sydney (a protectionist stronghold) and three months later was appointed Attorney-General at the age of 29, though he was forced to retire two years later to attend to his practice. In his first term in parliament Wise looked on Parkes as his political tutor, and the tone of their letters suggests that in return he was valued as a protégé and confidant.

Wise's political beliefs show a high degree of consistency throughout the 1880s and '90s, maintaining the views originally formed under Toynbee's tutelage. But Wise, who was at least an agnostic, replaced Toynbee's concern for spiritual development with practical social reform achieved by political means. Enlightenment among the working class was to be achieved not by the assimilation of bourgeois respectability but by the attainment of improved living standards and working conditions. This would enable workers to achieve industrial freedom and realise their potential as social beings.

Wise shared Toynbee's conviction that trade unions carried great social benefits and corresponding responsibilities in raising the material and intellectual position of the working class. He outlined

112 Kadish, Apostle Arnold, p. 95; Arnold Toynbee to Wise, 3 Aug [1882]; Mrs Toynbee to Wise, 21 Jan 1883, Toynbee Papers (copies in possession of J.A. Ryan).
these views in a lecture in 1884 and published as *Freetrade and Wages*, a continuation of his work while a member of Toynbee's circle. Unions restricted competition in labour, but "there is nothing in Free Trade which says that competition ought to be the governing influence of social life"; in fact, free trade encouraged unionism by concentrating the workforce in large industries. Wise closely followed Toynbee's defence of unions as creators of true bargaining equality and self-defence against industrial tyranny. While seeing unions as a positive force for industrial peace, he supported the strike weapon as "the Wage- Receivers' last resource. It is the knowledge that the workman has that weapon lying by which constitutes his strength." To counter the power of unions, employers should themselves combine to increase prices so that workmen could be paid reasonable wages; Public Opinion would restrain both combinations to protect the interests of the whole.\[115\] Wise took up the themes of industrial conciliation and cooperation in a lecture sponsored by the TLC on the principles and purposes of trade unionism in August 1885.\[116\] He followed Toynbee almost verbatim in claiming that as the result of the growth of trade unions the old unity between employer and worker, based on servitude, had been replaced by a new unity founded on mutual independence. Unions brought about the conditions for solution of the labour problem through their participation in conciliation boards.\[117\] He expanded on his ideas in an address to the third Intercolonial Trades Union Congress in October, although it was not an agenda item. After outlining the English successes in industry-based conciliation boards and proposing their permanent establishment in Australia, he added that the acceptance of umpires' arbitration awards could best be fostered by giving workers details of the position of their trade. The means for doing this was by creating "Boards of Industry" composed of employers and employees, "each half representing a complete organisation of their own side." The participation of workers, and the knowledge which they gained of the state of the trade, would avoid

\[115\] B.R. Wise, *Freetrade and Wages* (Sydney: Stewart & Clarke, 1884), pp. 21, 11.

\[116\] Bede Nairn, *Civilising Capitalism: The Beginnings of the Australian Labor Party* (Melbourne: UP, 1989), p. 25. Nairn records that Wise later invited the TLC to send delegates to the Free Trade Association conference, but was rebuffed by the Council, which was still firmly protectionist.

\[117\] *SMH* 3 Aug 1885, p. 11. The second part of Wise's speech closely follows Toynbee's "Industry and Democracy".
many industrial conflicts. The boards could also promote technical education and generally promote the "moral and material welfare" of workers. He also proposed reforms allowing a union to become a fully legal body acting as a co-operative supplying labour:

Contracts might be entered into directly by and with a Union, upon the guarantee of its corporate funds. For instance, a building contractor might sublet the plastering direct to the Plasterers' Union, whose corporate funds would be liable, if the contract was not performed. This would give a much better guarantee to the contractor than he can generally obtain, and the members of the Union would get the sub-contractors' profits. Strikes under such circumstances would be impossible.118

Wise went even further: in November 1890, just after the defeat of the Maritime strike, he not only supported trade unions publicly, but defended the closed shop as a corollary of their self-preservation. However, they should in turn open their ranks to all qualified applicants; refusal to work with non-unionists also implied a duty to supply the employer with a sufficient number of competent workers.119

The following year, Wise pressed the state's responsibility to protect wages, working conditions, and trade unions themselves. A major weapon for alleviating poverty was the government's leadership as a model employer: "the State should set a standard of wages and insist on those who contract with it doing the same."120 He welcomed the Labor party's success at the 1891 elections as promising advances in social reform and moral progress. For the first time the industrial conditions underlying poverty — the high cost of living, inferior housing and irregular employment — could be solved with the active participation of the working class. But legislation could only establish the preconditions for reducing these problems; solutions had to come from collective social groups like trade unions.

Wise's views on the role of the state are encapsulated in his book *Industrial Freedom: A Study in Politics* which was published by the Cobden Club in 1892. An analysis supporting the economic and social benefits of free trade, it was well-received by the economics journals

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119 B.R. Wise, *The Labour Question, or Social Revolt and its Causes: Address delivered by B.R. Wise to the Working Men of New South Wales* (Sydney, 1890), pp. 7-8. This speech was probably delivered to Wise's local Liberal Association in South Sydney.
and became a minor text of the new liberalism. In it, he took pains to support state intervention and collectivism from a standpoint which gave primacy to individual freedom. Wise's philosophy of the state was derived from Green, although he did not accept the doctrine that the state was the organic expression of the society's will and was more sensitive to the social benefits of private groups. The purpose of the state was only to secure individual liberty. Law was the instrument by which the individual's will was curtailed to protect the freedom of others. The state was the servant of society, responsible for the satisfaction of the needs which society determined were necessary to human development. It became necessary for the state to interfere with individual freedom to ensure the social conditions prerequisite to the fulfilment of these needs. The limits of state action could only be determined by experience and what was necessary for the individual's self-improvement (in other words, Green's notion of self-realisation). The state should not weaken individual morality or self-reliance, or undertake that which could be equally achieved by private endeavours.

But where the object to be gained is one of national importance, which the efforts of individuals cannot accomplish, and when it can be gained without discouraging any from making efforts on their own behalf, or from entering into union for a common purpose, then all the conditions are present which are required to justify State action.

All these conditions were present in the case of employment relations. The worker's sale of his only commodity, labour-power, gave the employer far-reaching control over the worker's physical, social and intellectual existence. The labour contract and unbridled competition between workers entrenched this dominance. When this inequality could not be remedied by the workers themselves, it became "the duty of the State to watch, lest the terms of the bargain should be such as to destroy or stunt the moral or political existence of its actual or unborn citizens." Thus the state was required to restrict the individual freedom of employers in the interests of all, to institute a state of real freedom in the place of a spurious one.

121 "The work was well worth doing, and we believe that in Mr Wise it has found an able and discreet performer": L.L. Price, Review of B.R. Wise, "Industrial Freedom: A Study in Politics", Economic Journal 2 (1892) 676-681.


123 ibid, p. 150.
Wise, therefore, was a true liberal collectivist. He embraced the activities of private groups in the pursuit of their aggregated interests and was prepared to utilize the state to secure as well as restrain their efforts for the common good. Against minimalism which would confine the state to police functions, he counted himself among those adherents of the "socialistic" approach to state functions who regard the State as an organised expression of the popular will, which is capable of directing individual citizens to the achievement of many high aims. They believe that the power of combination can reach to many things which are not attainable by individual effort, and that the State is the greatest of all combinations for the realisation of a complete and harmonious development both of the individual and the nation.\(^{124}\)

Yet he rejected state socialism with its insistence on the replacement of private organisations with a single central authority. The interests of individuals, he felt, could best be expressed by their direct participation in independent collectivities supported by the state. Trade unions were a good instance of the collective pursuit of individual interests; and conciliation was simply taking the process to the next stage of industrial freedom, collective bargaining. According to his political philosophy, the state's intervention to establish the conditions for this process through legal compulsion was a logical and necessary development.

In the antagonised politics of the early 1890s these views, when practised on contemporary events, presented Wise as a traitor to his bourgeois class. Wise later described the public stance taken by him during the great strikes as the turning point in his career.\(^{125}\) Wise had been out of parliament since 1889, but in March 1891 the Free-trade Association proposed him as a candidate in the blue-ribbon electorate of East Sydney. The merchants who dominated the party and who had declared war on trade unionism were thus inviting him to represent their constituency. The latest battle over shearing contracts was already being waged in Queensland; strike camps had been set up and police were arresting union leaders daily. In a letter to the *Herald*, Wise refused the plutocrats' support because he could not honestly represent their views. While condemning violence by the striking shearers, he believed them more correct than their opponents: "In a word, I do not believe in the present tendency to make a fetish of

\(^{124}\) *ibid*, p. 160.

\(^{125}\) Wise, *Reverie and Reminiscence*, p. 78.
freedom of contract." Following Toynbee closely, he recounted how the evils of early industrialism had only been resisted by workers' combination, and went on to support the closed shop:

If, then, it is once admitted that trade-unions are a necessary measure of defensive organisation, I cannot see how the demands of unionists that labour shall be employed through the unions and not by individual bargaining can be logically resisted. Unionism cannot exist if the principle of freedom of contract is carried to its logical issue.126

In a second letter he explained that freedom of contract without real equality was not only a sham but a real evil, resulting in industrial anarchy. He could not blame the unionists for insisting on the preservation of "a vigorous and independent organisation of defence".127 He later called for an open conference between the pastoralists and the shearers at which discussion of "freedom of contract" should be banned. Wise realised that this phrase had come to denote quite different things to each side: to the pastoralists it stood for the freedom to employ whom they chose, but to the unionists it meant the right to reject union demands and implied the destruction of unionism. Despite the current escalation of tension, Wise was optimistic that it would become easier to settle industrial problems once both sides were fully organised.128

Wise did not anticipate the reaction which his sentiments provoked. Although he was really urging that the liberals address the unionists' demands to prevent the labour vote from drifting towards more extreme solutions — that capitalism must be reformed in order to save it — his comments were treated as treachery by the employers. He was blacklisted professionally, losing much of his commercial work at the bar, and both he and his mother were also shunned socially.129 His letters were the product of his mission, advocated by Toynbee, to act as an intellectual vanguard setting the agenda for social reform. They also reflected a brooding disillusionment with his party's individualist conservatism, first expressed in a campaign in 1889 to make an English-style liberal party that would prevent a class-based schism.

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126 SMH 27 Mar 1891, p. 6.
127 SMH 2 Apr 1891, p. 8.
128 SMH 9 Apr 1891, p. 9.
129 Wise, Reverie and Reminiscence, pp. 78–89. The pastoral and financial giant Dalgety's, who had retained Wise regularly, withdrew a brief which Wise had already accepted and instructed their solicitor not to brief him in future.
between progressive forces which a separate labour party threatened to create.\textsuperscript{130}

When Parkes resigned after the new Labor members withdrew their support, Wise was a contender for leadership of the Freetrade party; his chief rival proved to be Reid, who was eventually elected in November after Wise stepped aside in his favour.\textsuperscript{131} Wise continued his allegiance to the Freetrade party, but worked instead to set the course for it to become a truly liberal party uniting middle- and working-class reformists. He became the leader of the radical wing within the party against Reid's moderate centre and McMillan's conservatives.\textsuperscript{132} In 1893 he became president of a new organisation which advocated progressive social legislation as well as a land tax and which he hoped would be joined by radical workers.\textsuperscript{133} With Reid's adoption of these tax policies at the 1894 election, Wise's position seemed unnecessarily radical: he was branded as a dangerous enemy of property by the reactionary National Association, while he was increasingly marginalised within the new Freetrade alliance engineered by Reid.\textsuperscript{134} Wise refused to join Reid's ministry following the 1894 election victory. When the new parliament met Reid presented his budget but refused to introduce any new taxes. Wise, who had pledged himself to pursuing the land tax, accused his leader of abandoning his election promises, being joined by a gleeful opposition and several intemperate harangues by Parkes. Suddenly there seemed to be a conspiracy against the new government from within its own ranks, and even Wise's own supporters turned against him.\textsuperscript{135} In a few days his political chances were destroyed and

\begin{footnotes}
\item[130] Wise used the term "Liberal" for the Freetrade Party in 1888: see his published speech \textit{The Position of the Liberal Party} (1888); Wise, \textit{Reverie and Reminiscence}, p. 87; Nairn, \textit{Civilising Capitalism} (1989 edn), p. 52. Only the day before Wise wrote his first letter, the TLC had unanimously agreed to form branches of the Labour Electoral League in all metropolitan electorates.
\item[132] Ryan, "B.R. Wise", pp. 315-318. Wise had long been an advocate of direct taxation, proposing it to Parkes in 1888: ibid., p. 258.
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he was left with a reputation for untrustworthiness which he never shook off. Henceforth, he was to remain a political outsider without strong allegiances other than his own convictions.

In the second half of the '90s Wise devoted himself mainly to federation, and attended the 1897–98 convention. He spoke against Higgins' and Kingston's proposal for overriding federal power in conciliation and arbitration, concerned that a centralised federal authority could not easily take into account local trade conditions. "Will the working classes of this country," he asked, "be prepared to surrender the right of local self-government over industrial disputes?" Supervening federal power over industrial arbitration would mean that uniform wages could be set all across Australia, irrespective of regional industrial differences.\textsuperscript{136} He repeated these views in interjections at the second session of the convention in 1898, although he appeared to support arbitration in an allusion to the New Zealand Act.\textsuperscript{137}

Given his isolation from the freetrade Liberals under Reid and his strong commitment to state intervention, it is not so very surprising that Wise eventually threw his lot in with Lyne's Progressives in 1899. By then Wise probably had more in common with a state ameliorist like O'Sullivan than anyone in Reid's party, and the impending transferral of customs powers to the federal sphere no doubt made the transition easier. His belief in the beneficial social functions of unions and his faith in the achievement of social justice through law also struck a common chord with the Labor party "intellectuals". Holman, whom Wise had tutored for admission to the bar, later paid tribute to Wise's influence on his own political and intellectual development.\textsuperscript{138}

Apart from acuity in political philosophy, Wise had displayed one great skill at Oxford: he was a brilliant orator, as many who heard him attested. Though undistinguished in Macquarie Street rough-house debating or pork-barrel electioneering, he could enthral an audience with sheer eloquence. Beatrice Webb heard him in action in the Legislative Assembly and (almost alone amongst her Antipodean acquaintances) enjoyed his company. She described him as


the exact opposite to Reid — refined, scrupulous, dogmatic and academic, with the one idea of transplanting into colonial politics the English theory of two parties basing their respective policies on definite intellectual principles. He speaks remarkably well and uses high constitutional arguments and the House including Reid is amusingly proud of him as an example of what NSW can do when it chooses to be high-principled and refined.139

Deakin too found him remarkable, "a man of culture and aristocratic tendencies, he was a democrat by conviction" who failed to fulfil his enormous promise. Deakin thought that his reputation for instability had arisen because "he could not consent to move in familiar or commonplace views but leant always to the new, the startling and unexpected". Wise was accounted as "a bad judge of the actions or impressions of the masses to whom he appealed, while he was feared and dreaded by those of his own class."140


The Road to Compulsory Arbitration

By 1896 the devastated labour movement, frustrated by the failure of earlier schemes, had lost interest in state arbitration. Andrew Garran continued to press for amendments to the Trade Disputes Act, but he was told by Joseph Cook that there was no public demand for such a bill.¹ This mood was reversed in the desperation of the 1896 Newcastle coal strike. In 1893 the Vend had been disbanded, the proprietors believing that competition would force down wages during the depression. The result was severe hardship for the next four years, with complaints from miners that they were unable to earn a living wage and calls for nationalisation of the mines. The union delegates demanded an increase in hewing rates in April 1896; this was rejected out of hand. At meetings and in public statements, citizens and worthies urged conciliation, but despite the efforts of even Reid (who conferred with the proprietors and managed to get some concessions towards union recognition), the miners' requests for conciliation or arbitration were refused. The strike continued for three months until it finally collapsed and the miners accepted even lower rates.²

During the strike, Labor politicians renewed their pursuit of the government over the promised arbitration legislation. Garrard admitted the matter had not yet been decided, so in July Watkins, prompted by the Newcastle strike, proposed "the immediate necessity of the Government introducing a bill to provide for compulsory arbitration." McGowen, Dick, Sleath and Hughes strongly supported the motion, which was not framed with compulsory enforcement in mind. Garrard

argued that, in view of the delicate attempts at negotiating an end to the strike, it was not the time to act legislatively. The leader of the opposition protectionists, William Lyne, expressed himself opposed to compulsory enforcement but asserted that, as to compulsory hearings enforced by public opinion, "I think I would have had the bill through long ago."³

The miners' defeat resulted in the conversion of Newcastle workers to the cause of compulsory arbitration, though what that actually meant was not yet settled. At the end of the strike a mass meeting was held to agitate for a conciliation and arbitration act. Most of the MPs representing the northern coalfields electorates spoke in favour of some form of compulsion. The distinction between compulsory attendance and legal enforcement of awards was made at the start of the meeting, and most speakers addressed them as alternatives. David Watkins and Arthur Griffith advocated the compulsory enforcement of awards along the lines of the New Zealand Act. Griffith, displaying some familiarity with developments across the Tasman, called upon the state to "regulate and recognise the various trades unions" and allow awards to be enforced, though he seemed to regard public opinion as the ultimate power of enforcement. But Dick and Edden would only go as far as compulsory hearings, regarding enforcement as impracticable. Fegan knew only that a permanent arbitration court must be established, so that the interests of workers and their families could "be looked after by law, and not by strikes." The miners' leader, James Curley, parried constant interjections to call for an extension of the old scheme of voluntary arbitration by an act of parliament.⁴

The period from 1897 to 1899 was dominated by federation: it was the time when the Australian constitution was drawn up, debated and taken to the people for ratification. Everything else took second place, not least for the labour movement which campaigned strenuously against the conservatism of the draft federal constitution. But the SDC showed interest in Victoria's wages board system⁵ while Labor members in parliament continued to harass Garrard on the promised arbitration bill. Watkins and Edden regularly questioned him in the 1897 session, but

³ NSWPD vol. 83 (8 Jul 1896), pp. 1380-1401.
⁴ NMH 20 July 1896, p. 6.
cabinet support for a bill seemed as far away as ever. By August Fegan had come round to the New Zealand solution, and mentioned that the Miners' Federation was pushing for such a bill. Eventually in October Garrard said he hoped to present a bill, but while one had apparently been drafted in September, the cabinet deferred discussion and by the end of the year Garrard was forced to admit that other business had overtaken it.

The push for compulsory arbitration continued to be led by the miners. Representatives of all three mining districts agreed to pressure the government for a bill at a meeting in April 1898, and the next month a delegation of union officials and politicians (Freetrade, Labor and independents) met Garrard. All the lobbyists at least agreed that in order to prevent strikes compulsory arbitration, enforced as a court order, should follow an unsuccessful conciliation. Estell favoured the New Zealand Act as the only real alternative to the purely voluntary scheme which had already been tried and found wanting. In reply, Garrard revealed that he already had two bills prepared, which he would shortly be taking to cabinet: one was an improved version of the English Act of 1896 while the other, which he personally preferred, was based on Reeves' measure. Evidently he lost, for the government later announced that it would introduce a bill establishing a system of compulsory investigations.

Towards the end of the session, Reid introduced a short bill tailored for acceptance by the upper house. It allowed the Minister to encourage conciliation, and to appoint conciliators on the application of a single party or arbitrators if requested by both parties. The only real element of compulsion arose when negotiation had been attempted but was unsuccessful. Then the Minister could direct a public inquiry which was capable of enforcing the attendance of witnesses, though not the production of books. It was a poorly drafted bill which imperfectly

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6 *NSWPd* vol. 87 (26 May 1897), p. 631; *NSWPd* vol. 88 (17 Jun 1897), p. 1196; *NSWPd* vol. 88 (1 July 1897), p. 1613.
7 *NSWPd* vol. 90 (26 Aug 1897), p. 3358.
8 *NSWPd* vol. 90 (5 Oct 1897), p. 3548; *NSWPd* vol. 91 (1 Dec 1897), p. 5341.
9 Conciliation Act 1896, 59 & 60 Vict, c. 30. This Act simply allowed the Board of Trade to encourage conciliation and arbitration, and to appoint conciliation boards where requested by employers or employees.
10 *SMH* 17 May 1898, p. 3; *NMH* 17 May 1898, p. 5.
adapted the English Conciliation Act of 1896. Even Reid doubted that it would have much effect. But he equally doubted that he could get anything stronger through the upper house, and promised that if the Act proved ineffective, he would be prepared to take compulsion further. Wise entered the debate with an exposure of its shortcomings which obviously impressed the Labor members. He declared himself a supporter of compulsory arbitration and enforceable awards. The Labor party followed Wise's lead in criticising the bill, but they still supported it in the hope that it would at least perform an educative function. The bill passed through the Legislative Council, suffering only a few amendments (C.G. Heydon insisted that inquiries directed by the Minister should be heard by a judge). Most honourable members were unconcerned at its provisions: it was, after all, mainly the adoption of a scheme already enacted in the mother country.

The Conciliation and Arbitration Act finally gained assent in April 1899. Over the next two years it resulted in one conciliation, two arbitrations and a public enquiry, all in the coalmining industry. A dispute at the Bulli mines was settled by arbitration (mainly because it was conducted by an experienced arbitrator, Alexander Kethell) but two others resulted in full-blown strikes. The Lithgow coal owners agreed to a conference arranged by the Minister in July; nothing was resolved and a four-month strike ensued. The Teralba miners also obtained the Minister's request for negotiation, and an inquiry was ordered under the Act after the mine owners refused to conciliate. The president of the Land Appeals Court, who was appointed to conduct the inquiry "court", refused to decide on the justice of the miners' claims and limited himself to finding whether they were justified in striking. He found that they were not, because they had failed to establish their claims. The miners rejected the official report and stayed out until forced to accept the company's terms.

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12 *NSWPD* vol. 96 (14 Dec 1898), pp. 3282-3283.
13 *NSWPD* vol. 96 (14 Dec 1898), pp.3296-3298.
14 *NSWPD* vol. 98 (20 Apr 1899), p. 307.
16 *Australian Star* 12 Sept 1899, p. 4; *DT* 6 Sept 1899, p. 7. The arbitration took place over ten days of hearings.
17 *Australian Star* 1 Sept 1899, p. 6; *Australian Star* 18 Sept 1899, p. 4.
By 1899 all wings of the organised labour movement were united in favouring a system based on New Zealand's. In October 1898 the SDC had included compulsory conciliation and arbitration (along with amendment of the Shops and Factories Act to create boards for setting maximum hours and minimum wages) in the agenda for a conference designed to revitalise the trade union movement. The conference, held in November, endorsed the SDC's proposal for a New Zealand-style Act in which the decisions of both the conciliation boards and the arbitration court would be legally enforceable. The motion for wages boards was also approved. Arbitration and wages boards were still being treated quite separately: the first was for preventing strikes, while the other was to eliminate sweating. Reid's measure was later dismissed as "ineffective" in meeting the SDC's demands. At its annual conference in April 1899 the PLL resolved to include "compulsory arbitration on New Zealand lines" in its general and fighting platforms. The delegates considered the leading feature of this scheme was its reliance on and recognition of unions: what they wanted was "the same solid basis of Unionism". The SDC also maintained its interest: it supported the Lithgow coalminers in their request for an inquiry under Reid's Act, while in July it sent a delegation to press the resolutions of the November conference. The new Minister for Labour, J.A. Hogue, conceded the current scheme's imperfections but maintained that progress must be gradual: he could not be expected to "force the colony up to the New Zealand standard all at once."

The Fall of Reid

The Reid government never had another chance to placate the labour movement: on 7 September it was defeated on the floor of the house over an unauthorised payment to a member of parliament. When the Governor refused to accede to Reid's request to either prorogue or dissolve parliament, William Lyne, the new Protectionist leader, was asked to form a government. Conflicting accounts of the fall of Reid

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18 SDC Minutes, 6 Oct 1898, ML A3835/369; SMH 26 Nov 1898, p. 9; SMH 28 Nov 1898, p. 5. The proposed amendments to the Factories Act included notification of piece rates, the restriction of chinese and the abolition of overtime for workers under 16.

19 SDC Minutes, 12 Jan 1899, ML A3835/389.

20 Worker 8 Apr 1899, p. 4; Worker 29 Apr 1899, p. 4.

21 SDC Minutes, 29 June 1899, ML A3835/421-423; DT 7 July 1899, p. 6; Evening News 7 July 1899, p. 3.
(and varying interpretations of them) abound. It is clear, though, that several Labor MPs, as well as members of Reid's own freetrade party had become increasingly disaffected with Reid himself (especially his stance on federation) and with his government's inability or unwillingness to pursue further reforms. The traditional view, promulgated by labour leaders like Holman, Hughes and Spence and accepted by many historians, is that Labor withdrew support from Reid and transferred it to the opposition after extracting promises for reforming legislation (including compulsory arbitration) from Lyne. The new government then carried out Labor's reform program. Thus Labor's strategy of "support in return for concessions" was finally tested and found successful.

Part of the "support for concessions" theory assumes that the reforms which followed Labor's shift of support are attributable to pressure brought on the new Lyne government. This view is cradled by Labor's self-image as the party of ideals and initiative, contrasted with the non-Labor parties' venality and opportunism. Hence the common view that compulsory arbitration was introduced by the new government as part of its promises to the Labor party, or at least to gain Labor support and keep it. But with only a choice between the two major parties, Labor may not have been in a position to gain concessions or to ensure that they were carried out. That Labor held the balance of power and that its transference of support to Lyne enabled him to gain government do not mean that Labor was responsible for Lyne's government adopting and implementing the policies that Labor wanted. Since it was the protectionists (renamed the Progressives) who secured the passage of the Industrial Arbitration Act in 1901, the defeat of Reid poses three questions for our study. Was the Labor party responsible for the change of government? Did Labor secure a commitment to compulsory arbitration from the opposition? And how important was arbitration in Labor's shift of support?


Weller's argument that Reid was facing defeat even with Labor support, and that the Labor caucus severed its allegiance to preserve its status as kingmaker, has recently been refuted by Nairn.\textsuperscript{25} The parliament was inherently unstable after the 1898 election, but the Labor caucus always had the numbers to keep Reid in power or to remove him. The labour movement generally had been losing its patience with Reid, whose reformism seemed to have disappeared. A group within caucus, the "solid six" which included Holman and Hughes, had become implacably opposed to Reid. Negotiations between them and the opposition were being conducted before the censure motion.\textsuperscript{26} Lyne had gathered a following, and Barton's timely resignation from the opposition leadership just before the censure motion allowed a fresh and promising alternative to appear.\textsuperscript{27} Others within Reid's own party had become disaffected by their leader's stance on federation and lack of reforming zeal. And the six Newcastle members, who had been in the forefront of agitation for compulsory arbitration, formed a clique that condemned the government for its neglect of the second city and failure to address labour issues adequately.\textsuperscript{28} With federation looming and the impending death of the fiscal issue, the party structure forged by Reid was falling apart.

Lyne did make some assurances to introduce legislation wanted by Labor before it effectively installed him as premier, as several leading players later confirmed.\textsuperscript{29} The substance of these assurances and their influence on Labor support are, however, unclear. Some historians have argued that compulsory arbitration was the major concession obtained by Labor, and that it swung support for Lyne. Fitzhardinge claims that Lyne "was prepared to make a bargain with Labor and to make Wise his Attorney-General with a free hand to bring in his Arbitration Bill."\textsuperscript{30} Rickard has suggested that Wise, O'Sullivan and Barton em-

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\textsuperscript{26} Evening News 29 Aug 1899, p. 6.

\textsuperscript{27} Worker 15 July 1899, p. 4; NMH 29 Jul 1899, p. 4; NMH 25 Aug 1899, p. 4.

\textsuperscript{28} DT 7 Sept 1899, p. 6; NMH 9 Sept 1899, p. 4.

\textsuperscript{29} W.G. Spence, Australia's Awakening (Sydney: Worker Trustees, 1909) p. 240; Evatt, Australian Labour Leader, p. 120.

\textsuperscript{30} L.F. Fitzhardinge, William Morris Hughes: A Political Biography, vol.1: That Fiery Particle (Sydney: Angus & Robertson, 1964), p. 74. Fitzhardinge does not cite his evidence for these claims.
braced compulsory arbitration in response to increased union support for the idea. He contends that compulsory arbitration was the central issue that switched Labor's support away from Reid, and that it was at least partly to gain that support that compulsory arbitration was embraced by the Protectionists.31

At the time, Labor was insistent on several reforms: early closing of shops, amendments to the Navigation Act, expanded employers' liability, coal mines regulation, a miners' accident fund, old age pensions, and compulsory arbitration. The work-related issues were long-cherished goals of the labour movement which Reid had promised to pass in 1894-95 and had failed to deliver. It is unlikely that they were negotiable or separable. Early closing was a recent enthusiasm, but was also the most topical. The government had presented a bill limiting hours of labour, but the unions insisted that shops be required to shut at a specific hour to eliminate evasion. A public meeting at the Glebe, just before the censure motion, pressed the reform as a matter of urgency, as the sweating of women and children was involved.32 Hughes later claimed that at the height of the political crisis, Reid refused Labor's proposal on early closing while Lyne gave a written assurance to have it passed along with other Labor demands. Hughes maintained that this promise secured caucus support for Lyne.33 At the time he announced that Lyne approved of all the proposed reforms before parliament. Lyne, he said, had also supported compulsory arbitration and "has definitely promised it a prominent place in his programme."34 Arbitration and early closing were the most important reforms to Labor; they were linked by the element of compulsion involved in each. But all the issues had a combined symbolic significance: they were part of the rights of labour now demanded by the party.

The "assurances" given by Lyne to the Labor conspirators were not concessions made in exchange for support; they were, rather, reaffirmations of his views to reassure Labor that a party led by him would implement those very reforms most desired by them. In moving the censure debate, Lyne took pains to stress his reformist credentials, but refused to commit himself to policies which had not already been

31 Rickard, Class and Politics, pp. 149, 151.
32 Australian Star 30 Aug 1899, p. 3.
34 DT 7 Sept 1899, p. 5.
announced.\textsuperscript{35} Other statements by him, which are taken as extracted promises, were expositions of his stance.\textsuperscript{36} Holman later explained that Lyne had promised compulsory arbitration, but "as to there being any bargain or agreement, as to this being in any way the price of the support of the [Labor] party, that is a thing which every member of it will repudiate in the strongest possible terms."\textsuperscript{37} Compulsory arbitration was one reform to which Lyne and Wise were plainly disposed. Both men had shown approval of compulsory hearings and enforceable awards during the debate over Reid's bill in 1898.\textsuperscript{38} As we have seen, Wise's commitment to at least collective bargaining and state intervention were long-lived. In the late 1890s he seemed to be combining the two into a commitment to some form of compulsory state scheme. He had become an advocate of the Webbs' analysis of industrial democracy, which would have inclined him towards a centralised and compulsory arbitral tribunal.\textsuperscript{39} During the debate over Reid's bill the year before, O'Sullivan had revealed a detailed knowledge of Reeves' Act and argued cogently for enforcement by legal process. This was entirely congruent with his commitment to union matters.\textsuperscript{40} O'Sullivan and especially Wise conducted the negotiations with the disaffected Labor members. Any assurances of a Lyne government's commitment to compulsory arbitration would have been given readily. There was also support for the reform among protectionists. About this time a conference between the National Protection Union and the trade unions apparently resolved to urge the passage of a compulsory arbitration act before the federal tariff came into operation.\textsuperscript{41}

\textsuperscript{35} Lyne, \textit{NSWPD} vol. 100 (30 Aug 1899), p. 1057.
\textsuperscript{36} Eg the letter to Lyne from Arthur Griffith and Lyne's reply, both published in \textit{DT} 31 Aug 1899, p. 4. Here Lyne \textit{repeated} his support for pensions, amended early closing and a miners' accident fund.
\textsuperscript{37} \textit{NSWPD} vol. 105 (23 Aug 1900), p. 2237.
\textsuperscript{39} On 29 August Wise gave a lecture on the Webbs' work. While he said that collective bargaining had proved most effective for the English trade unions, Wise also discussed the alternative method of legal enactment, but left his conclusions to a later date: \textit{Australian Star} 30 Aug 1899, p. 3. The Webbs considered enactment (which would include an arbitration statute) as a superior method of solving social problems: Sidney and Beatrice Webb, \textit{Industrial Democracy} (1897; 2nd edn London: Longmans Green 1902), p. 255ff.
At the beginning of the censure debate, when the caucus was undecided, both Fegan and O'Sullivan dwelt particularly on the government's failure to provide an adequate conciliation and arbitration measure. O'Sullivan announced that he believed in a judicial system of compulsory arbitration as existed in New Zealand. If Labor wanted such reforms, "the quickest and shortest way to get them is to hurl into political obscurity the poor nondescripts opposite". The ideological nature of Reid's objection to compulsion was by then well-known: no government led by him would implement the scheme demanded by the union movement. The Worker singled out "the determined opposition of the Government to Compulsory Arbitration" and its fatuous early closing proposals as the cause of the belief that "the Ministry is not desirous of giving any real reform." The members of Labor's "solid six" were not the most avid proponents of compulsory arbitration, although Hughes, Holman and Edden had been prominent in the debate the year before. Edden was a recent convert. Of the key members who switched their votes — Watson, Ferguson, and later Sleath — the last two had good reason to support compulsory arbitration, having been gaoloed after the 1892 Broken Hill strike. Yet only Sleath was a strong advocate of the reform, though he had not been at the forefront lately; meanwhile Cann, his fellow crusader, remained loyal to Reid. The best that can be said is Nairn's recent conclusion: ultimately it was Labor's general disaffection with Reid that led it to support Lyne and thus "ensured a continuation of reforms at a time when Reid could not deliver any more". Compulsory arbitration was a leading, though not crucial, component of the package desired by Labor which the opposition had shown itself disposed to provide once it gained power.

Wise's Bill

The new government was sworn in on 14 September, with Lyne as Prime Minister and Wise as Attorney-General. Outlining his government's policy five days later, Lyne announced that he now believed the enforcement of arbitration awards was practicable. He mentioned an amalgam of the New Zealand and English statutes, but was not committed to any particular method of enforcement. The Worker insisted

42 Fegan, NSWPD vol. 100 (31 Aug 1899), p. 1083; O'Sullivan, ibid, p. 1095.
43 Worker 2 Sept 1899, p. 4.
on a close copy of Reeves' Act. Wise was forced to stand for re-election, and during a speech to his supporters at Ashfield he first expounded his initiative. The failure of boards of conciliation and arbitration he attributed to their inability to enforce awards; however, he denied that only direct force could ensure compliance. The New Zealand solution of requiring bonds before adjudication was dismissed in favour of declaring an agreement a common rule for the trade, as often happened in England. The common rule would prohibit work or business other than on the terms agreed to. Those questions that could only be determined by strikes could be reduced if the country will seriously set itself, with the assistance both of associations of employers and unions of workmen, to devise some fair means by which when the representatives of both sides have come together, and the influence of public opinion has been brought to bear, practical effect may be given to the determination of impartial bodies.

Obviously, no concrete plan had yet been developed. Yet even at this stage Wise expressed the germ of his later idea: collective agreements would be interpreted prospectively by an independent tribunal and enforced by legal regulation similar to that under the factory acts. This was articulated in terms of two central tenets of the new liberalism: the mass organisation of capital and labour, and the positive duty of the state to intervene to prevent public harm. Wise implicitly acknowledged his debt to the Webbs and Reeves, and took pains to deny the novelty of his proposal.

The government's policy, announced to the House in October, reaffirmed Lyne's commitment to bringing in a compulsory arbitration bill as soon as possible. Edden and McGowen kept up the pressure by introducing bills for the protection of unions and recovery of subscriptions. A bill did not appear that year, but O'Sullivan promised that it would be introduced in the following session. When a deputation of Labor MLAs met Lyne in April 1900 to urge, amongst

45 *Australian Star* 20 Sept 1899, p. 3; DT 20 Sept 1899, pp. 7–8; *Worker* 23 Sept 1899, p. 4.
46 New ministers were required by the electoral act to stand for re-election. Most were unopposed, but Wise was challenged by Thomas Bavister, who questioned Wise's freetrade convictions in accepting a portfolio in the protectionist ministry: *DT* 23 Sept 1899, p. 9.
47 *SMH* 23 Sept 1899, p. 10.
48 DT 23 Sept 1899, p. 10.
50 *SMH* 5 Mar 1900, p. 5; *DT* 5 Mar 1900, p. 3.
other things, a bill along the lines of the New Zealand Act which recognised trade unions, Lyne replied that he had asked Wise to draft such a bill and that it was already prepared. As Wise had taken so great an interest in the measure, the Premier referred the Labor members to the Attorney-General for details.51

The Industrial Arbitration Bill was introduced by Wise at the end of June. All agreed that his second reading speech was a masterpiece of oratory, the best heard in the Assembly for years. It was a consistent application of the principles gained from Toynbee and refined during his public career in Australia since the 1880s. Thus he began by outlining the growth of combination which created the possibility of real industrial equality. He then described the incomplete legal recognition of trade unions which, by giving them "collective power without collective responsibility", threatened the stability required in modern industrialism and hampered the state's function of ensuring peace. But while these convictions provided a justification for state intervention, they did not indicate the specific form which the state should adopt to achieve industrial collectivism. Two other sources were selectively adopted by Wise for this purpose. The final report of the British Royal Commission on Labour in 1894 had refrained from making any recommendation in relation to compulsory arbitration or binding awards, but a large minority of the commissioners appended a report which proposed extending the corporate legal personality of unions through voluntary registration to allow them to conclude collective agreements enforceable in the ordinary courts. Wise used this report to justify giving unions legal incorporation and the power to make collective bargains.52 The Webbs' Industrial Democracy, published in 1897, had considered the establishment of universal minimum wages and conditions by "the method of legal enactment" as a far superior way of ensuring industrial stability through regulation than "the method of collective bargaining" and voluntary arbitration. They cited both the New Zealand and Victorian legislation as prime examples of this method,
and their arguments could easily be used to justify state intervention in the form of a coercive judicial tribunal. But recent developments in the law of conspiracy and trade union liability led them to distrust the ordinary courts and legal processes as means of determination and enforcement.\textsuperscript{53} Wise cunningly combined these two sources to produce a new conceptual approach: the creation by the state of a special legal sphere occupied by juridical subjects with limited powers and liabilities, regulated by a unique quasi-judicial tribunal. The problems encountered by the use of law in industrial relations would be solved by creating a new legal system and a new industrial law within the framework devised by Kingston and Reeves.

Although no member of the Labor party participated in the drafting process,\textsuperscript{54} the labour movement generally may be accorded some credit for the adoption of Reeves’ Act as a model. Wise’s convictions, as expressed up to 1898, might equally have been realised by an enforced system of collective bargaining; but any scheme would have to include the legal recognition and protection of unions as well as some means of enforcing awards. Reeves’ Act achieved all these objectives within a system of state tribunals which also allowed awards to be imposed. While the New Zealand Act was taken as a model, it was extensively reshaped to reflect Wise’s philosophy. Reeves described Wise’s work as "a free and skilful adaptation" of his measure.\textsuperscript{55} The chief innovations were the reliance on existing organisations, the promotion of industrial agreements, a provision to allow the court to award unionists preference in employment, and the capacity of the court to extend an award to all employers and employees by declaring it a common rule for the trade.

\textsuperscript{53} Sidney and Beatrice Webb, \textit{Industrial Democracy} (London: Longmans Green, 1897), pp. 530-536, 814-815. The Webbs saw a living wage as best achieved by the state establishing common rules by legal enactment, which "naturally puts the State in the position of arbitrator... But the appeal is not to the Common Law. It is no longer a question of protecting each individual in the enjoyment of whatever could be proved to be his customary privileges, or to flow from identical 'natural rights,' but of prescribing, for the several sections, the conditions required in the interest of the whole community, by their diverse actual needs." (\textit{ibid}, p. 596-7).


Wise's proposals were connected by a tendentious logic. The organisation of unions must be promoted by giving them legal protection, while a framework which encouraged them to conclude effective agreements would result in greater industrial stability. Once this was recognised, it became the duty of the state to provide some tribunal to settle disputes over the interpretation of agreements. The legal system was unsuitable for dealing with complex questions of fact in industrial matters, so there must be "a special tribunal outside the present law." Yet this tribunal must inspire confidence among those subject to it, so it should be headed by a person of indisputable stature, fairness and integrity. No better person than a judge of the Supreme Court could be found for this task. Confidence would also be advanced by having representatives of employers and employees as members of the court. While the large majority of disputes would be settled by agreement, the court must have the power to determine disputes compulsorily and enforce its awards. The mere presence of this compulsory tribunal would encourage parties to make their own agreement rather than have one made for them, and the court would also settle those few cases where no agreement could be reached. Because neither labour nor capital were so well organised as in Britain, legal compulsion had to take the place of economic compulsion. It followed that measures must be taken to ensure that union membership was open to all, that unionists be protected from discrimination, and that participating employers be sheltered from undercutting by competitors who refused to participate in collective bargaining.

Wise hoped to avoid the problem of the law's antagonism towards trade unionism (and the union movement's distrust of the law) by creating an autonomous legal system not subject to ordinary legal doctrines and procedures. The arbitration court would decide "according to equity and good conscience", a legal formula signifying that a court was separated from the common law system and free to decide according to general tenets of fairness rather than strict legal rules. The phrase had been interpreted judicially to mean "such as plain men, ignorant of the rules of law ... shall think just". In England, local courts with limited jurisdiction were traditionally

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56 NSWPD vol. 103 (4 Jul 1900), p. 648 (italics added).


58 Industrial Arbitration Bill 1900 (LA), c. 19(a); IAA 1901, s. 26(a); Scott v Bye (1824) 2 Bing 344; 130 ER 338 per Best CJ.
empowered to decide according to equity and good conscience (ex aequo et bono); they were not required to apply strict law (including the rules of evidence), lawyers were often excluded, and there was usually no avenue of appeal. The same formula was used for the civil jurisdiction of courts of petty sessions in New South Wales, where small sums could be recovered with little formality and decisions were not subject to review by the Supreme Court. Wise additionally provided that the arbitration court would not be subject to either appeals or judicial review through injunctions or the prerogative writs of certiorari and mandamus, the means by which the Supreme Court ensured that inferior tribunals acted according to law, including legal requirements of fairness.

The arbitration court's freedom from legal strictures was manifested in other ways. The president could admit "such evidence as in good conscience" he thought was "the best available whether strictly legal evidence or not", while only identifiably legal matters of practice and procedure were excluded from the direction to act as a court of conscience. Adopting New Zealand amendments made in 1898, the court would have "full and exclusive jurisdiction" over industrial agreements, and would enforce awards and agreements directly through penalties, though the actual recovery of penalties would be entrusted to the ordinary courts. The application of normal contractual principles to collective agreements would have been disastrous to trade unions. Under ordinary contractual principles, unless the parties agreed to limit liability to a specified penalty, a union engaging in a strike might be held liable for all the losses (damage to the plant, lost profits and liabilities to others) suffered by affected employers. Instead, Wise

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60 IAA 1901, s. 26 (a), (p). The court was to act according to law in framing orders, awards and rules, or deciding questions of joinder, waiver, amendment, extensions of time, adjournments and dismissal of proceedings: IAA 1901, s. 26.

61 Industrial Conciliation and Arbitration Act Amendment Act 1898, No. 40, ss. 8-9 (NZ); Industrial Arbitration Bill 1900 (LA), cll. 12, 29-31, 19(m), (o). These clauses were made more explicit and their powers expanded slightly in the Act: IAA 1901, ss. 15, 37, 39-41, 26(n).

62 Although the point was not directly decided this would be the measure of damages under the second limb of the rule in Hadley v
provided that a breach of a registered industrial agreement was treated as a breach of an award, with a penalty set by the arbitration court and limited to £500 (though later, while defending the Act, he said that industrial agreements should be enforced "just like any other contract" by the court assessing damages as in breach of contract).63 As registered unions would be incorporated solely for the purposes of the Act and be subject only to the jurisdiction of the arbitration court, they would be protected from common law actions for defamation, conspiracy or other torts.

The court itself would consist of a president and one member each representing industrial unions of employers and employees. The president would be drawn from the existing bench of the Supreme Court. The appointment of a practising judge was to instil confidence in the independence, impartiality and legitimacy of the court. The president would also deal with preliminary matters in chambers, when he would exercise the same powers possessed by him in his normal capacity. Technical questions could be referred to two assessors appointed by the court to represent the parties' interests. The registrar of the court would be a senior officer of the Attorney-General's Department exercising the preliminary and administrative functions of the Act. He would also act in a judicial capacity when deciding whether to register a union, though there would be an appeal to the president.

Wise had originally intended to create a court of conciliation, but changed his mind just before presenting the bill. Experience in New Zealand had shown that cases almost invariably went from the conciliation boards to the arbitration court, making a two-tiered structure redundant. Instead he intended to integrate the conciliation and compulsory investigation machinery of the 1899 Act into his scheme by allowing the Court of Arbitration to determine any matter referred to it by conciliators appointed under the earlier statute.64 Although Wise assumed that unions would naturally conclude bargained agreements, mechanisms were included to prevent an award being sought except as

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63 IAA 1901, ss. 15, 37(8); NSWPD vol. 2 (2 Oct 1901), p. 1831.
64 Reference to a "court of conciliation" was in the original motion but was deleted in the tabled bill: NSWPD vol. 103 (27 Jun 1900), p. 449; Industrial Arbitration Bill 1900, NSWPA, LA TP 1900/259.
a last resort. The court would have the power to dismiss a dispute which it considered trivial, or "where, in the opinion of the court, an amicable settlement can and should be brought about."  

While Reeves' Act allowed any seven workers to be registered, Wise provided that only unions already registered under the Trade Union Act could become industrial unions. This was to rely on existing unions, which were stable and familiar to employers. It would also retain the legal protections given by the earlier statute. In order to obtain registration, a union's rules would have to provide for a committee of management and the manner in which they were appointed and removed, the conduct of meetings and the mode of decision-making. As they were the fundamental units of the legislation and would enjoy considerable benefits from the state, unions would also have to provide "reasonable facilities" for the admission of all those who wished to join. Only registered industrial unions could initiate proceedings before the court, although a person affected by an order of the court could also make an application. A special meeting of the union would have to authorise the initiation of proceedings before a dispute could be heard. Because employers would be able to evade awards if they could refuse to employ members of registered unions, the capacity to award preference in employment to unionists became a logical consequence of the scheme. The award of preference was also designed to encourage workers to join their respective unions, ensuring that all employees should share the burdens as well as the benefits of union membership. And universal unionism would eliminate the casual and itinerant workers who, because they were not up to the union standard of skill and proficiency, were employed for less than the union rate. As a further protection of unionism, no employer could dismiss an employee simply for membership of a registered union or entitlement to the benefits of an award or agreement. In determining the reason for dismissal the onus of proof was reversed, so that the employer had to satisfy the court that the employee was dismissed for other reasons.

Wise also adopted the device of the "common rule" which was used in voluntary arbitrations in England to apply an award to the whole industry; it was advocated by the Webbs to prevent avoidance of

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65 Industrial Arbitration Bill 1900 (LA), cl. 19; IAA 1901, s. 26 (d), (e).
68 Industrial Arbitration Bill 1900 (LA), cl. 26; IAA 1901, s. 35.
awards and eliminate any advantage accruing to employers who refused to arbitrate. Wise utilised it for the same reason; thus he originally provided that only an industrial agreement could become the basis of a common rule. An agreement, which "crystallise[d] the current industrial morality", would be extended throughout a trade by making its terms a court-awarded regulation. The common rule was "a simple and automatic method of enforcing the law" which could be policed by the factory inspectors.

Reaction

As might be expected, the initial reaction from organised employers was completely hostile. The Pastoralists’ Union immediately condemned Wise’s bill as a sop to the trade unions and a repudiation of freedom of contract; the provision for minimum wages would wreck industry and throw aged and infirm workers out of employment. The builders’ and master bakers’ associations similarly rejected the bill as dictatorial class legislation which eroded managerial control and good will between employers and their men. William McMillan and the Chamber of Commerce undertook the task of co-ordinating the employers’ response and arranged a deputation to the premier on 25 July to urge the postponement of the bill until after federation, since the Commonwealth parliament would have power to legislate for conciliation and arbitration. Lyne, however, remained resolute in wanting the reform enacted during the current session.

Undeterred, the employers widened their attack through diatribes in the press and petitions to parliament. Their real objection to the bill was made plain at a public meeting of employers on 31 July organised by the Chamber of Commerce. McMillan and his colleagues denounced the compulsion that would be exerted by the arbitration court, and

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69 Wise, _NSWPD_ vol. 103 (1900), p. 654; Industrial Arbitration Bill 1900 (LA), cl. 28, 31; cf IAA 1901, s. 37(1).

70 _SMH_ 5 Jul 1900, p. 4.

71 _SMH_ 18 Jul 1900, p. 10; _SMH_ 20 Jul 1900, p. 10; _SMH_ 23 Jul 1900, p. 3.

72 _SMH_ 24 Jul 1900, p. 3; _DT_ 26 Jul 1900, p. 3; _SMH_ 26 Jul 1900, p. 4.

73 Trevor Matthews, "Business Associations and Politics: Chambers of Manufactures and Employers’ Federations in New South Wales to 1939" (PhD thesis, Sydney University, 1971), p. 150. Petitions from seven employers’ associations and 731 employers were sent to the Legislative Council in September: _LC Journal_ (1900) vol. 1, pp. 917, 919.
declared that they would only tolerate legalised collective bargaining. Some saw Wise's initiative as designed to extend the minimum wage paid for government works in a prelude to the nationalisation of industry.\textsuperscript{74} One key tactic was to discredit the New Zealand system, whose example was used by Wise to show that compulsory arbitration did not adversely affect the economy. A critical article written by John MacGregor, a former New Zealand MP, was published and circularised to members of parliament; the master builders did likewise with a report by one of their number.\textsuperscript{75} Two prominent capitalists, Edward Knox (general manager of CSR) and W.E. Abbott (president of the Pastoralists' Union), together with McMillan, emerged as the leaders of the struggle against the bill. Apart from interference with employers' discipline and control over their businesses and the harmful effects on mutual employment relations, their major objection was the potential for arbitrary, ill-informed and ruinous decisions by the court. These claims, which persisted throughout the debate, confronted Wise's reassurances that a Supreme Court judge could be trusted to decide fairly and according to sound knowledge of business requirements. Abbott and Knox also emphasised that unions would not be fully liable for the damage caused by their actions; the proper place for trying the liability of unions for interference in employment relations was the ordinary courts, which were not subject to political interference.\textsuperscript{76} The contents of the bill were repeatedly misconstrued; many, for example, thought that it specifically required all employees to join trade unions forthwith, and that an employer could not close his business even if he became insolvent.

But not all employers were resolutely opposed to the bill. Early in the piece, a few had expressed no objections if it followed the New Zealand law exactly, while one anonymous manufacturer welcomed the standardisation of wages that it would produce: "If we all pay the same rate of wages, then we don't care very much about this question of arbitration, for we shall all be on the same footing; otherwise we shall not know exactly where we are."\textsuperscript{77} The bill was initially discussed by the Chamber of Manufactures at its meeting on 10 July, but while

\textsuperscript{74} SMH 1 Aug 1900, p. 11; SMH 3 Aug 1900, p. 8.
\textsuperscript{75} SMH 13 Aug 1900, p. 8; SMH 25 Aug 1900, p. 12; Federated Builders' and Contractors' Association of Australasia, \textit{Report of Sixth Convention} (Melbourne, 1900), p. 10.
\textsuperscript{76} SMH 24 Jul 1900, p. 7; SMH 17 Aug 1900, p. 8.
\textsuperscript{77} SMH 12 Jul 1900, p. 3.
several members lambasted Wise's measure, others spoke in favour of arbitration in some form and a few even approved the fixing of a uniform minimum wage. A sub-committee formed by the meeting later rejected the bill as unacceptable on any terms, but its report was not adopted by the full Chamber. The manufacturers were still divided, though most agreed that any legislation should be introduced by the federal parliament to prevent undue competition from other colonies and overseas. The link between tariff protection and wage regulation through arbitration was already being forged. Most manufacturers were protectionists, happy to pay uniformly higher wages so long as they could, like their New Zealand counterparts, hide behind high tariff walls. William Sandford, the Lithgow ironmaster and leading protectionist, saw a need for a system of enforceable conciliation and arbitration along with high tariffs. The Chamber itself had strong links with the Protection Union, which only the year before had tentatively endorsed a system of wages boards. This proposal was privately supported by the secretary of the Chamber of Manufactures, provided that it was nation-wide and accompanied by a protective tariff. The subject was debated again during the protectionist conference at Sydney in April 1900.

After Lyne's refusal to delay the bill, the Chamber formed another committee to devise acceptable amendments; in August it met Wise to urge instead a system of trade conciliation and wages boards for the settlement of disputes over wages and conditions in each industry, supervised by a Supreme Court judge. Wise deftly extracted from them a commitment to compulsory arbitration with judicial enforcement of awards, and turned their demands into support for a scheme already proposed by Cook, Sleath and several union leaders: the court would be supplemented by a board of delegates elected from within each industry. After the meeting Wise announced his willingness to amend the bill to enable specialist temporary members to be appointed to the arbitration court for each dispute. Although it still opposed the bill, the Chamber of Manufactures later sent Wise a list of recommended

78 SMH 11 Jul 1900, p. 8; SMH 17 Jul 1900, p. 6. Sandford was an active member and sometime chairman of the National Protection Union: John A. Perkins, "William Sandford", ADB vol. 11, p. 521.

amendments. Sandford defended their position against accusations of inconsistency from other employers.80

The Labor party was well pleased with Wise's bill, and adopted his rhetoric in its support. Recognition of unions, they argued, was the only possible means of enforcing awards. The encouragement to organise, and the limited penalties that could be imposed, explained why the enforcement of awards was acceptable to the labour movement when compulsory arbitration had been rejected by English trade unionists.81 They would settle for nothing less than legally enforceable arbitration, for without a compulsory arbitration court there would be no conciliation and no agreements. There was no need for a formal conciliation stage because unions would continue to negotiate with the court in the background.82 The Labor party took up the SLC's demand that all government employees be covered by the Act.83 Labor remained divided over whether the court should include arbitrators drawn from the trade in each dispute, or should be permanently constituted. Several members hesitated at the appointment of a Supreme Court judge as president, but there seemed to be no alternative source for an impartial umpire. Holman's argument was that Australia had no "leisured class", independent of business or labour, from which to draw men of sufficient public prominence to act as arbitrators, as existed in England. The only choice was to "take from official life a man who is peculiarly sheltered and guarded by the nature of his position from every kind of undesirable influence which might be supposed to make the decisions of such a court untrustworthy and unrespected."84 Cook sided with his former Labor colleagues in wholeheartedly supporting the bill. Like Wise, he thought the mere existence of the court would prevent disputes arising. The award-making compulsion of the court would be seldom used because "it will not be long before it establishes certain well-defined precedents for its

80 DT 9 Aug 1900, p. 7; SMH 9 Aug 1900, p. 4; SMH 14 Aug 1900, p. 8; SMH 20 Aug 1900, p. 5. The Chamber petitioned the Legislative Council to defer the bill on 14 November 1900: LC Journal (1900) vol. 1, p. 923.


82 Spence, NSWPD vol. 104 (9 Aug 1900), p. 1790; Young, NSWPD vol. 105 (23 Aug 1900), p. 2251; Edden, ibid, p. 2221; Wilks, ibid, p. 2225.

83 SMH 13 Jul 1900, p. 5.

84 Holman, NSWPD vol. 105 (23 Aug 1900), pp. 2232-2233; also Spence, NSWPD vol. 104 (9 Aug 1900), p. 1791; Griffith, ibid, p. 1800.
future guidance, and the moment these precedents become well known in a trade there will be very little reference to it."^{85}

Apart from Cook, the freetrade opposition uniformly rejected the court's power to extend its decisions throughout an industry by declaring a common rule. They also hesitated at the power to set a minimum wage and condemned the introduction of compulsory unionism by means of the preference clause. A few supported the bill in principle and endorsed compulsory unilateral awards.\textsuperscript{86} Among them was Reid, who pointed out the dangers of subjecting unions to "the meshes of the law" by putting them under the power of the Supreme Court (which he refused to distinguish from the proposed Court of Arbitration). Because he thought that state intervention should only be invoked after the disputants had exhausted every avenue of voluntary conciliation and agreement, he proposed instead a representative conciliation board with power to enforce its awards if necessary.\textsuperscript{87} Most would support only those provisions which created increased opportunities for collective agreements and their enforcement; they opposed the power of the court "not only to interpret agreements, but to make agreements, and to enforce the agreements it so makes".\textsuperscript{88} The opposition's preferred measure would have been somewhere between Kingston's final scheme and Reeves' measure, with the court enforcing agreements and delivering awards after a hearing initiated by one side; the further step allowing legal compulsion of unilateral arbitrations would not have been acceptable to many. Their position was, however, still drastic enough to be described as compulsory arbitration.

Reid's influence or the hope of amendment must have prevailed, for the second reading was carried on the voices. In the committee stages the opposition objected to powers allowing preference, minimum wage rates and the common rule. They also sought amendments to the provisions for the compulsory production of books and documents, obtaining safeguards for trade sensitive information, and the penalties clause (which they regarded as favouring unions). Against his better

\begin{footnotes}
\footnote{Cook, \textit{NSWPD} vol. 104 (2 Aug 1900), p. 1542.}
\footnote{Storey, \textit{NSWPD} vol. 105 (23 Aug 1900), p. 2239; Anderson, \textit{NSWPD} vol. 105 (30 Aug 1900), p. 2540. Anderson was then a freetrader, but joined the progressives in 1901.}
\footnote{Reid, \textit{NSWPD} vol. 104 (9 Aug 1900), p. 1780, 1785-1786.}
\end{footnotes}
judgement, Wise also adopted the suggestion, made by a number of unionists and the Chamber of Manufactures, that when making awards the court should largely comprise members with specialist knowledge of the particular industry under review. Wise preferred a permanent membership, believing that it was the best way to ensure confidence, stability and consistency. But as the scheme could only succeed with the co-operation of organised employers and employees, he was ready to adopt their demands. The arbitration court would consist of the president sitting with between two and six members appointed by the Governor from lists recommended by each side to a dispute. After an all-night sitting, the bill finally passed through the Assembly with a few other amendments, most of them proposed by Wise. The Labor party succeeded in having employees in government instrumentalities, including the railways, brought under the jurisdiction of the court. Wise also allowed unions to recover membership subscriptions by an action before the president.

The real battle, as everyone knew, was in the upper house. Wise immediately resigned his seat in the Assembly, transferring to the Council — at the request, he later said, of the cabinet — to steer the bill through the hostile chamber. Addressing the Council for the first time, he pointed to the high state of industrial unrest that was now endemic and could only be remedied by compulsion; but was it to be the compulsion of force or of law? Surely the court could be trusted to make reasonable decisions? The Council's answers were provided by Dr Cullen. A keen scholar and compelling lawyer with a special flair for legislative drafting, his opinions on legal matters were regarded with some awe by his fellow councillors. He had supported Wise's attempt to recast the law of strikes in 1893, but took little part in the debate on Reid's bill in 1899. Cullen attacked the very principle of compulsion embodied in bill and awakened his colleagues to its dangers, which no employer would be able to escape. Compulsion to Cullen meant any form of interference with an individual employer's rights; he would not even countenance voluntary binding agreements. Why, under the bill "the

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90 Wise to Sir John See, 10 June 1904, See Papers vol. 27, ML A3675/183.
employer is not even at liberty ... to dismiss a person because he objects to having a trade-unionist in his employ."\(^92\) Where, asked Cullen, was the public clamour or the pressing need for such a drastic measure? There was only one course of action, he instructed the chamber:

Unless you are prepared to adopt the principle of compulsion, unless you are prepared to see a court interfere between workmen and their employers, and tell them on what terms they are to continue to conduct their business, if they continue at all, you must reject the bill; you cannot amend it. No suggestion of amendment that does not deal with that detail will alter the character of the bill at all.\(^93\)

Other than Cullen, the bill was met with a "phalanx of silence" by its opponents. Only one other short speech was delivered; the majority confined themselves to mutterings and interjections.\(^94\) The bill was defeated on the second reading by 33 votes to 18. The public debate had eventually turned on the effects of Reeves' Act on business and the economy in New Zealand. So, to reassure the bill's opponents, Lyne undertook to appoint a royal commission to examine compulsory arbitration across the Tasman.\(^95\) Judge Backhouse, who was appointed sole royal commissioner in February 1901, visited New Zealand and afterwards travelled to Victoria to examine the wages board system.

**Passage**

In April 1901 Lyne left to take up a seat in the federal parliament. He was succeeded by John See, a north coast shipowner with a less liberal reputation than Lyne. But See immediately announced his intention to continue the government's progressive policies, including the Industrial Arbitration Bill.\(^96\) He also announced that the next election would be held in June, so the government's policy became the electoral manifesto of the new Progressive party (renamed from the

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92 *NSWPD* vol. 107 (7 Nov 1900), p. 4814.
93 Cullen, *ibid*, p. 4810.
94 Wise, *NSWPD* vol. 108 (22 Nov 1900), p. 5587; also John Hughes, *ibid*, p. 5570; Blanksby earlier referred to a "conspiracy of silence": *NSWPD* vol. 107 (14 Nov 1900), p. 5118. Macintosh spoke for five minutes declaiming the bill's coercion, while MacLaurin took issue with Wise's picture of New Zealand: *NSWPD* vol. 108 (21 Nov 1900), pp. 5427-5428; *ibid*, pp. 5573-5580.
95 *NSWPD* vol. 108 (22 Nov 1900), p. 5639.
96 *SMH* 13 Apr 1901, p. 9; *SMH* 27 Apr 1901, p. 10.
Protectionists in May to distinguish it from the freetraders who now called themselves the Liberal party). The imminent preparation of a commonwealth arbitration bill by Kingston was also announced in April; given his record, employers feared that it "would probably contain advanced provisions". The new opposition leader, Charles Lee, outlined his party's platform in May: it included support for industrial arbitration. Thus arbitration was not a major election issue during the campaign; as the Herald noted, the government was "appealing for support on so many issues that neither Arbitration nor any other can be singled out as having been specially voted upon." Still Wise, who refrained from contesting a seat in order to ensure the passage of his bill through the upper house (sacrificing his prospects of political advancement in the process), attempted to keep it before the public gaze by claiming that the Liberals were not committed to an effective law, and "would set their backs to the wall" to fight his bill. In return the government was accused of stalling the reintroduction of the bill; the pro-Liberal press indicated that the opposition's support was for the principle and not Wise's bill. McGowen announced that the Labor party supported the government on three major reforms, of which compulsory arbitration was one. In his final rally the night before the poll, See linked the Reid government's aversion to compulsory arbitration with the attitudes of present opposition members, while Lee, speaking at Balmain, committed his future government to a compulsory arbitration and conciliation bill as a priority. The result was a convincing win for the Progressives, though they still governed with Labor's support. Neither See nor Wise attributed their success to particular policies.

Despite an absence of apparent controversy between the parties, industrial arbitration became a public issue during the election by force of circumstance. Towards the end of May the ironworkers' assistants' union, which had been formed only a year earlier, struck to

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97 SMH 22 Apr 1901, p. 8.
98 DT 17 May 1901, p. 7.
99 SMH 27 Jun 1901, p. 4.
100 SMH 22 Jun 1901, p. 12; DT 27 Jun 1901, p. 6; DT 2 Jul 1901, p. 6; Wise to Sir John See, 10 June 1904, See Papers vol. 27, ML A3675/182-183. Wise had unsuccessfully contested the federal seat of Canobolas in March.
102 SMH 3 Jul 1901, pp. 7, 8.
recover past reductions and enforce a minimum daily wage of 7s. As the strike spread from the giant Mort’s Dock to other docks, foundries and workshops, the union’s membership doubled virtually overnight. The union and the united masters conferred, and for a while there were good prospects of a settlement, but negotiations became deadlocked when the employers refused to move from their original offer. The shipwrights went out in sympathy, other unions in the iron trade pledged their firm support, and the SLC opened a strike fund to which many unions contributed. A second conference resolved nothing. The Minister for Labour, John Perry, then offered to invoke the 1899 Act by appointing a mutually agreeable conciliator or arbitrator. The strikers undertook to abide by any award, but the employers resented interference and considered they had already made all possible concessions. By the fourth week of the dispute shipping was being disrupted by the lack of repair and maintenance facilities. The employers also rebuffed the entreaties of a citizens’ committee appointed by a public meeting in Balmain, arguing that the issues were too complex to take to arbitration. Just days before the election O’Sullivan offered to make the government docks available for the striking men to repair idle ships, while a large demonstration at the Domain organised by the SLC and PLL demanded a compulsory arbitration act to prevent such disputes. After the election the employers finally agreed to submit to private arbitration. An umpire was appointed and both sides signed a bond to abide by his determination, which was handed down in August. So probably the greatest argument for compulsion during the election ended as a model of private voluntary arbitration. In the meantime, though, the recalcitrance of employers even in the face of the state and public opinion was underlined.

Backhouse delivered his report a few weeks after the election. While complimentary towards the New Zealand system, he criticised the two-tiered structure, especially the failure of conciliation boards to settle disputes with finality. Backhouse found that the Act had resulted in an increase in the cost of manufacture and in the cost of living, but concluded that its overall effect on industry and investment was quite limited. Employers generally favoured the Act because it increased

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103 SMH 21 May 1901, p. 3; 23 May, p. 11; 28 May, p. 3; 4 Jun, p. 7; 11 Jun, p. 5.
105 SMH 20 Jun 1901, p. 9; 22 Jun, p. 10; 26 Jun, p. 5.
106 DT 1 Jul 1901, p. 9.
stability and certainty. Industrial relations were excellent and strikes of any magnitude had been prevented. Backhouse realised that because unions sought awards as a first resort, the function of the system had moved beyond preventing or settling disputes and towards the general regulation of wages and conditions. He was far less favourable towards the Victorian system, finding the number and informality of the boards cumbersome. It was difficult to separate occupations into strict industrial classifications, resulting in more anomalies than a centralised system. He mentioned criticisms of the political control with its potential for influence, which was not possible under a judicial system of arbitration. Overall, Backhouse's report was written to allay fears that the conditions of industry would be dictated by a compulsory arbitration system; there were reasonable controls on the abuse of power, mainly because of the good sense and judicial nature of the arbitration court.

Reintroducing the Industrial Arbitration Bill in the Assembly at the end of August, See claimed that a strong mandate for the measure had been given by the electorate. As the opposition supported it in principle, he was determined to conclude debate quickly. The bill was rushed through the committee stages during a sitting that continued all night and into the following evening. Although Crick was responsible for the measure, Wise sat behind the ministry throughout the entire 26 hours, guiding the numerous amendments. Objections were stifled by frequent applications of the gag. Wise dropped his proposal allowing members of the court to be nominated ad hoc by parties to a dispute, and reverted to his original plan for permanent membership. There would also be a board of reference chaired by a District Court judge and charged with conciliating matters referred to it by the court. Each union would appoint a member to the board, which would constitute a special committee for each dispute, nominated by the parties both directly and from members of the board. Despite some doubts as to its effectiveness, the Labor party endorsed the change, recognising it as a concession to placate the opposition and upper


108 See SMH 9 Aug 1901, p. 3; DT 9 Aug 1901, p. 7 for summaries of the bill. See's second reading speech, which he read, was written by Wise: See, NSWPD vol. 1 (28 Aug 1901), pp. 868, 891.
A motion to remove all references to conciliation under the 1899 Act was also approved; instead an industrial union or the Attorney-General would refer matters to the court, including disputes involving an unregistered union. The rules governing the deregistration of unions were remoulded extensively. Wise adopted a New Zealand amendment of 1900 which was designed to prevent a multiplicity of industrial unions in the same industry. The registrar could also seek the deregistration of a union for failing to comply with the Act or an order of the court as well as "for any reasons which appear to him to be good". By withdrawing the right to participate in the arbitration system, cancellation of registration would become "one of the heaviest of all penalties" that the court could impose against a union which refused to abide by an award or disobeyed a court order.

Another addition was a prohibition of strikes and lockouts by members of registered unions while a dispute was pending before the court. This provision had appeared in Reeves' Act; fearing strong objections, Wise had refrained from including it in his 1900 bill. Late in the debate he introduced an amendment which further made it an offence for anyone aiding, instigating or engaging in a strike or lockout while proceedings in the court were pending, or before a reasonable time to refer the dispute to the court had elapsed. Offenders would be subject to a £1,000 fine or imprisonment for two months. A few Labor members and independents considered the change "too harsh". Ferguson argued that since it applied to anyone, it would particularly hit members of unregistered unions, forcing them to register under the Act. Since strikes were sometimes inevitable, it would also punish workers where a dispute could not be satisfactorily resolved through an award. The government replied that the clause merely took the bill to its logical conclusion by replacing strikes with compulsory arbitration, while McGowen supported the clause because it would prevent employers and employers staying outside the Act and

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110 Industrial Conciliation and Arbitration Act 1900, s. 11 (NZ); Industrial Arbitration Bill 1901 (LC), cl. 5; IAA 1901, s. 5. Wise assumed that the court would allow separate registration of employers and groups of workers for reasons of "the nature of their trade, or there being bitter antagonism in trade matters", but not if "the interests are the same": *NSWPD* vol. 2 (2 Oct 1901), p. 1829.
112 *NSWPD* vol. 2 (2 Oct 1901), p. 1841.
engaging in industrial disruption. The clause, apart from some cosmetic changes, sailed through the upper house to become law.113

By the time it reached the upper house, opposition to the bill had considerably diminished within the business community. Though Knox, Abbott and other employers continued their vendetta against the "pernicious and retrograde legislation" through the press, one reporter detected an air of "passive antagonism" and some resignation.114 The Chamber of Commerce suggested amendments to Wise in September and, confident that the Legislative Council would adopt its proposals, quietly dropped its opposition to the bill.115 Though some in the Chamber of Manufactures continued their open hostility, the executive continued lobbying for amendments. The first budget of the Commonwealth parliament on 8 October contained a series of tariff measures; the rates, though not high, were denounced by Reid as protectionist.116 The condition for the manufacturers' acceptance of wage fixation was being met. By the time Wise again brought the bill before the Council in October, even the _Herald_ conceded that "the practically unanimous hostility of the employers last year has been largely modified" and recognised that the upper house could scarcely reject the measure.117

The attitude of the Legislative Council had changed dramatically from the year before. Cullen continued his denunciations, but found himself among a small minority. Instead, most of the chamber took its cue from L.F. Heydon, who welcomed the stability provided by the court as a boon to capital. Heydon believed that the court's powers could safely be reposed in the sound business sense of the judge; in any case, the court would ultimately be ruled by _economic_ laws. He even supported the common rule's coverage of the whole community, and saw the production of books as a means of showing to the court the reasonable returns required by capital. The regulation of wages would promote

113 Ferguson, _NSWPD_ vol. 2 (18 Sept 1901), p. 1505; Nielsen, _ibid_, p. 1507; MacDonnell, _ibid_, p. 1508 (opposed); cf Crick, _ibid_, p. 1504; McGowen, _ibid_, p. 1510; IAA 1901, s. 34.


115 _SMH_ 11 Sept 1901, p. 5. The suggested amendments may have included strengthening the prohibition of strikes, extending the common rule to awards, and restricting the disclosure of business secrets, since these changes were made after Wise met the Chamber of Commerce: _SMH_ 19 Sept 1901, p. 7.


industrial development by limiting demands to the employers' capacity to pay.\textsuperscript{118}

On 10 October, the night that a vote was expected in the Council, a coalition of leading employers' groups and two large companies (the pastoralists, manufacturers, colliery owners, stevedores, steamship owners, master builders, brickmakers, stockowners, Mort's Dock and Engineering Co and CSR) joined forces to send a circular to members of the upper house setting out the amendments that they required.\textsuperscript{119} Nearly all their proposals were raised by one member of the Council or another during its detailed discussion of the bill. Most were lost on division, but a few concessions were gained. The prohibition of dismissal for trade union membership was limited by requiring prosecutions to be commenced by leave of the court. The board of reference was deleted. To avoid partisanship, the Council adopted a suggestion by Frederick Flowers' and adopted by Wise which made the ordinary members of the court ineligible to sit for more than one three-year term. Concerned at the potential for political interference, it also replaced the Attorney-General with the Industrial Registrar as the person able to refer disputes to the court.\textsuperscript{120} The Council insisted on the deletion of the preference clause, but the common rule was scarcely mentioned. As a final gesture of conciliation, Wise introduced a "sunset clause" under which the Act would expire at the end of June 1908. The Council's handiwork gained little admiration from the Labor members when the bill returned to the Assembly, but Wise was convinced that the amendments would have to be conceded. The Labor party insisted especially on the preference clause: unless it remained,

\textsuperscript{118} L.F. Heydon, \textit{NSWPD} vol. 2 (9 Oct 1901), pp. 2105-2109.

\textsuperscript{119} \textit{DT} 11 Oct 1901, p. 4; \textit{NSWPD} vol. 2 (10 Oct 1901), p. 2110. The amendments included: including all government employees; allowing only a Supreme Court judge as president; requiring a union to bring an application only after approval by a majority of all members; making the court's decisions reviewable by the higher courts; abolishing employees' protection against dismissal for being a trade unionist; restricting wage fixation to an "average" minimum; excising the preference clause; preventing the court from determining the output of machines; and making the ordinary court members nominees of the parties. A petition from shipping firms along those lines was also presented: \textit{LC Journal} (1901) vol. 1, p. 393; NSWPA LC TP 1901/492.

\textsuperscript{120} Legislative Council, Report of the Committee of the Whole (Committee Bills), NSWPA PRS 203 LC, vol. 41 (1901), p. 675; IAA 1901, s. 26(a)(ii).
said Dacey, the bill should be abandoned. Returning to the Council, Wise pleaded that preference was the quid pro quo for unions exposing their funds and resigning their right to strike. Despite a further circular from the combined employers asking for preference to be rejected, the chamber yielded to the Assembly by six votes. After eighteen months the Industrial Arbitration Act passed into law, much in the form Wise had originally envisaged it.

The Legislative Council's acquiescence was the result of several factors. The government's claim that it had obtained a mandate for the bill at the election was not easily disputed; certainly the principle of compulsory arbitration was not contested. In any case, the Council would be obstructing a government that had just received a new term with a clear defeat of the opposition, and the opposition itself did not oppose the bill. The position of an unelected "house of review" in a representative democracy must also be considered. One of the main issues of the election had been constitutional reform. Wise had raised the question of making the upper house elective, and of limiting its powers of blocking legislation. The Liberal opposition had also announced its commitment to an upper house elected by unqualified and equal franchise. The Council had already obstructed several major reforms of the government, as it was to do again (it was generally hostile to the See government, rejecting nearly a fifth of all bills and amending another quarter). With few achievements during the session, See was close to losing his patience. Ultimately the government could "swamp" the chamber with new appointments. Rumours that this was See's intention flew around the Council just before the second reading vote. The decision of the leading employers' bodies to concede the principle of the bill while pressing for significant amendments meant that doctrinaires like Cullen could no

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122 *NSWPD* vol. 4 (4 Dec 1901), p. 3938.
124 *SMH* 30 Apr 1901, p. 6; *DT* 2 Jul 1901, p. 6.
126 Cullen, *NSWPD* vol. 2 (9 Oct 1901), p. 2019. "The Upper Chamber is already in the bad books of the Ministry, owing to their rejection of the Adult Suffrage Bill, and all sorts of penalties are vaguely threatened against the Council if they also reject this compulsory arbitration measure": *Pastoralists' Review* vol. 10 (15 Oct 1901), p. 565.
longer claim the united opposition of capital. It also gave the Council some alterations to seize on, and even though most were lost, the changes that were made afforded some satisfaction at reducing the bill's potential for harm. But more than anything, it was Wise's dogged pursuit of his aims that secured the passage of the Act. The disarming persuasiveness of his rhetoric, combined with his mollifying attitude towards the employers and Council, reduced the initial hostility towards his measure until its passage in some form seemed inevitable.

Intended Consequences

Recent discussions have considered whether the compulsory arbitration system is corporatist in nature. If this is so, the seeds of corporatism should be manifested in the introduction of the system, particularly in the beliefs and values of its proponents. Palmer has claimed that the arguments supporting the introduction of the Australian arbitration system were founded in corporatist ideology, and that the system that resulted was corporatist in nature. According to Palmer, corporatist ideology holds that "the national interest requires government regulation of the economy, and the active involvement of union and business groups in the administration of the necessary controls." Based on Crouch's typology of state industrial strategies (market liberalism, liberal collectivism and corporatism), Palmer argues that Kingston, Reeves and Wise adopted a corporatist ideology because they proposed state intervention in industrial relations to regulate the economy in the public interest.

This view conflates both the original compulsory arbitration system and the motivations of its designers with its present-day form and practices. Placed in its specific context of Australia in the late nineteenth century, the establishment of compulsory arbitration represents a significant development of liberalism, rather than a departure from it. Crouch's typology is oversimplified, particularly when applied to specific historical junctures. It turns the usual distinction between pluralism and corporatism into one between state abstention and corporatism. Thus any departure from classical liberalism towards state intervention can be presented as evidence of corporatism. But it is the

reason for intervention, and the form that it takes, which distinguish the collectivist from the corporatist. Most liberals after Mill were agreed that some form of state action was necessary to secure individual freedom. The break came at the end of the century when socialists like the Webbs saw state action as the means not of securing individual freedoms but of promoting collective wealth. The ascription of corporatist ideology to the proponents of arbitration stems from misconceptions of their views about the objective of arbitration, the function of the state and the nature of the consensus which they identified in justifying their schemes.

While advocating greater social co-operation, Wise did not accept that the interests of different individuals and groups were essentially harmonious. His conception of society was based on conflict, not consensus, and unlike the true corporatists of the time, it looked forward rather than back. Toynbee’s teaching had been founded in progress; it looked to new forms of association based on individual freedom, not on some cosy former Gemeinschaft embraced by corporatists at the time. Wise denied a fundamental harmony and consensus in industrial relations: for him the interests of capitalists and workers necessarily conflicted because of their inherent inequality.128 Nor did Wise justify the introduction of the scheme to achieve economic rationality, assuming "a broad social consensus supporting state intervention in the regulation of economic affairs".129 Greater stability and efficiency were fundamental objectives, but so were freedom and justice. Wise did not see it as the function of the state to participate directly in the regulation of industry; this would be left to negotiation between labour and capital. The state’s function was simply to provide the means by which greater co-operation could be achieved. When agreement could not be achieved the state, in the form of the court, would arbitrate according to abstract standards of justice, not for the implementation of economic policy objectives. The registered organisations, and not the arbitration court, would be responsible for formulating policy; the state’s function was to ensure that it was carried out.

Wise’s beliefs are thrown into sharp relief when compared with the doctrines put forward by the Webbs. Keenoy has shown that they displayed definite corporatist attitudes, particularly a faith in


technocratic experts pursuing national social and economic goals.\textsuperscript{130} In their ideal world, trade unions would become democratic states in miniature, bureaucratic hierarchies contributing the expertise of their officials and the regimentation of their members towards the co-ordination of state policy.\textsuperscript{131} Unions were the embodiment of their members' communal interests. They went so far as to claim that trade unions had misconstrued their "real" function, which was not political but purely industrial. The Webbs envisaged compulsory arbitration going beyond the settlement of socially disruptive disputes, becoming instead a method of regulating employment conditions to implement national goals. They endorsed both Reeves’ Act and the Victorian wages board legislation for this purpose.\textsuperscript{132} Wise's approach was never so technocratic or authoritarian. For him the democratic state had no interests other than the material achievement of individual self-fulfilment, whether expressed individually or collectively. The collectivity, including the state, remained merely an aggregate of individuals; it had no interests of its own.

Wise's idea of industrial arbitration sits uneasily with the generally accepted definition of corporatism as a system of interest representation and policy formation. The court was not intended to formulate industrial policy; in fact, there were few clear ideas about what the court would do. In the majority of cases, Wise thought, wages and conditions would be regulated by industrial agreements bargained by the corporate parties, without input by the court. When the court did intervene, settling a dispute by an award, it would be guided not by economic imperatives but by abstract notions of justice. Its objective was industrial peace, not growth or efficiency. The court was designed to be highly autonomous, with few linkages to coordinate it with state objectives or government initiatives. This resulted in one of the greatest problems facing the court in its early years: the absence of specific objectives or guidelines. While the three-member court is highly suggestive of tripartite structures which often appear in corporatist systems, there were no avenues for mediation of corporate group interests by the court members. All three members were supp-


\textsuperscript{131} Sidney and Beatrice Webb, \textit{Industrial Democracy} 2nd edn (London: Longmans Green, 1902, repr 1911), pp. 598-599.

\textsuperscript{132} \textit{ibid}, pp. 799, 814-816, xxxvi-xl.ii.
osed to act independently, not as representatives (though the employee members especially regarded themselves as guardians of the interests of labour). While the two lay members were elected by labour and capital, the function of this process was to confer legitimacy on the court as an overall neutral arbiter. The prospect of consensual or bargained outcomes would be negated by the adoption of an adjudicative form of dispute settlement.

Nevertheless, there are aspects of Wise's system which suggest at least the potential for corporatist intermediation. The control exercised over unions was the strongest corporatist element of the system. Unions registering under the Act became corporate entities representing the industrial interests of their members. Registered unions resigned some autonomy in return for representation before the court and a more privileged and juridified status. There was great potential for indirect regulation through awards and the withdrawal of privileges under the system (eg preference and registration), but the court had few direct controls over union activities. These controls were designed to secure the operation of the system, particularly the enforcement of awards and agreements. However, the presence of such controls allowed, perhaps even predisposed, the development of corporatist policy formation and interest representation. Much depended on the judges' perception of their role: the potential for corporatisation of the system was far more likely to be fulfilled if they saw their function as the maintenance of the social order and the facilitation of capitalist accumulation rather than the adjudication of isolated interests disputes.

Palmer also asks whether the establishment of compulsory arbitration was the result of a social accord, involving bargained exchanges. One of the distinguishing traits of liberal corporatism is co-operation between groups in the creation of the policy framework.¹³³ There are superficial signs of bargained exchanges between labour, capital and the state during the passage of the Industrial Arbitration Act. Unions were willing to trade loss of the right to strike in return for obtaining justice from the arbitration court. Some employers accepted curtailment of their power in order to obtain stability, and stressed the economic benefits of uniform regulation; but most simply acceded in the face of a determined and legitimised initiative. The state (if Wise and the government can be counted as such) made concessions to both employ-

ers and unions. But most of the bargaining took place within the parliamentary system in a typically pluralist manner: by and large, neither unions nor employers participated directly in the design of the system, but relied on political representation rather than corporate involvement. The SDC was content to leave details of the scheme to the Labor members, while employers were insufficiently organised to be represented on a corporate basis. The fundamentals of Wise's system remained unchanged, and only relatively minor concessions were made. The total result was less the result of tripartite bargaining than of unilateral pursuit of reform by the state, with the support of the labour movement and acquiescence by employers.
Arrest of the Broken Hill strike leaders, 15 September 1892. The Broken Hill strike was widely taken as proof of the failure of both private and state voluntary arbitration. A large contingent of police eventually occupied the town to protect strikebreakers and the mines. Towards the end of the strike, the eight members of the strike committee quietly surrendered to a deployment of the forces of "law and order." Six were convicted of conspiracy and sentenced to hard labour.

- "Dinna Forget the Kids": Album presented to B. James, MUA
2 Bernhard Ringrose Wise. An Oxford-educated "new liberal" and brilliant orator, Wise steered the first compulsory arbitration Act through the New South Wales parliament in 1900-01. This portrait shows him in his prime, as the handsome Anglicified gentleman barrister-politician, before he was physically wrecked by malaria.

- Small Picture File, ML
The first sitting of the NSW Court of Arbitration, at the Newcastle Court House, 19 May 1902. This photograph epitomises Wise's scheme for the judicial settlement of industrial disputes. Presiding on the bench is Mr Justice Cohen of the Supreme Court; he is flanked by representatives of capital and labour. The Court's staff sit below them. At the bar table are the lawyers for the claimant (the Newcastle Wharf Labourers' Union - at right) and respondent (the Newcastle and Hunter River Steamship Company). The union is represented by King's Counsel and a junior. On the table are sheafs of paper and a solitary law report: there are as yet no precedents.

Coopers at work, Sydney, c.1900. Craft workers like these attempted to use the Arbitration Court to entrench union regulation of the trade, through the regulation of members and apprenticeships. Even though this cooperage is quite large, its primitive state reflects the low degree of capitalisation of manufacturing industry, which mainly catered for the domestic market. Scrutinising the workers at far left is the foreman, sporting his symbol of authority — the bowler hat.

- Historic photographs collection, Macleay Museum, 80/058.
"Dear Me. There's actually a flaw in it." The Worker comments on the Liberal government's proposal to replace the arbitration system with wages boards. The Arbitration Act is seen as a public institution, its flaws miniscule: a stance taken by the labour movement in response to criticism of "their" court.

- Worker 22 Aug 1907
"Labor's got me again!" The Labor party was spectacularly successful in obtaining amendments to Wade's wages board's bill, resulting in a scheme similar to the one it had been advocating for more than two years.

- Daily Telegraph 28 March 1908
"Wade's fat fifty" arrive in Broken Hill, 1909. Wade followed the custom of sending troopers into mining districts during industrial disputes. This photograph indicates the symbolism of state power involved in such actions: a small contingent of armed, mounted policemen could not keep order, but it could at least inflict damage. In fact these police were not used, but the display of force was not lost on the miners, who are observing or shadowing the intruders with deliberation.

- "Dinna Forget the Kids": Album presented to B. James, MUA.
The first Labor government in NSW, 1910. Beeby, the Minister for Labour and Industry, was the pre-eminent industrial advocate of his day. His Industrial Arbitration Act of 1912 consolidated the judicial arbitration system.

- Small Picture File, ML
George Beeby practising his craft in the Arbitration Court, c.1913. This caricature by David Low was probably drawn after Beeby resigned from the cabinet. Low published another caricature of Beeby which shows him in street clothes, sharp of gaze and bold of stance. This drawing, by contrast, has him meekly imploring the bench.

- David Low, ink drawing, ML PX*D482, no.32.
Justice Heydon on the bench, c.1912. In contrast to most of his other caricatures of the period, Low's portrayal of Heydon is unexaggerated. Dwarfed by the lamp, bench and backdrop, the judge seems as much a fixture as his surrounds. His gaze suggests not wisdom but weariness. Heydon would have been about 70 at the time.

- David Low, Caricatures (1915).
Chapter 6

The Course of Industrial Arbitration, 1902–1907

Industrial Environment

By 1902 New South Wales had recovered from the depression of the nineties and was embarking on a period of prosperity that would last until the verge of the First World War. Recovery was marred by a severe drought which had begun in 1895. It devastated wool and meat production, particularly in the western plains and Riverina, and was now affecting the secondary industries which depended upon rural produce. By the time it broke in 1903, the drought had halved the state's sheep population. But elsewhere in the primary sector, cultivation increased significantly and New South Wales emerged as the major wheat exporting state. The restructuring of the economy in the wake of the depression had produced great changes in the pattern of industry and employment. Many of these were precipitated by shifts in the international economy and foreign investment. World commodity prices recovered during the late 1890s and appreciated steadily from 1902. But the most notable changes were in labour-intensive secondary industry. Higher international shipping rates meant that local industry, especially the processing of primary commodities for export, was at last competitive. Domestic manufacturing was expanding not only in its traditional niche, supplying the domestic consumer market, but in capital goods as well. The production of clothing and footwear experienced rapid growth in the previous decade, and would be assisted further by the new national tariff. The local capital market had emerged as a significant source of finance, and investment was at last being channelled into productive private undertakings. The economy of Australia in general and New South Wales in particular was becoming more diversified.1

1 N.G. Butlin, A. Barnard and J.J. Pincus, Government and Capitalism (Sydney: Allen & Unwin, 1982), p. 53; Peter Cochrane, Industrializ-
The 1901 census discovered that the state's population of 1,359,000 included nearly 54,000 employers, 106,000 self-employed or relatives assisting them, 362,000 wage earners, and about 25,000 unemployed. The largest area of employment was in manufacturing and construction which, along with the commercial sector, showed a high rate of increase in the next decade.\(^2\) Manufacturing employment tended to be concentrated in medium-sized workplaces. Small workplaces employing less than ten workers accounted for only 17 percent of the manufacturing workforce. The number of workers employed in factories and workshops divided evenly between small to medium workplaces (less than 20 workers), medium-sized factories (21 to 100) and large establishments with over 100 employees. Most of the latter had less than 200 workers; only a handful employed more than 300. Two-thirds of all manufacturing employees worked in the metropolitan area of Sydney.\(^3\) The merchant emporia employed the only large concentration of workers in the service sector, as well as hundreds of clothing and furniture workers in their own factories. Large establishments were also developing in the primary sector. While pastoral and agricultural workers were scattered, mining was being conducted on a larger scale with an increasingly concentrated workforce, particularly in metalliferous mining. About 6,000 silver miners worked at Broken Hill, while over 1,700 copper miners were employed on the new Cobar fields. There were 12,800 workers engaged in coalmining, three-quarters of them on the northern coalfields. From 1900 coal production shifted to the Greta seam and larger mines were opened around Maitland and Cessnock.

The most salient aspect of employment at the beginning of the century was its impermanence. Only public servants and railway workers enjoyed any security of employment. Most employees were subject to short hours or layoffs, while a high proportion were employed on a casual basis at task or piece rates. Fitzgerald has pointed to four factors which affected the intermittency of work in Sydney during the late nineteenth century: the fragmented and diverse nature of manu-

\(^2\) See Appendix, table A.2 and graph 1.

facturing, the oscillations of the building industry, the large variations in labour demand in a port city, and dependence on the pastoral industry. These conditions continued well into the twentieth century. To a city still largely founded on the processing and export of primary produce, the seasonalities of the wool clip and harvest deeply affected the pattern of work in the secondary and service sectors. Where work was inherently casual (especially on the wharves and building sites) a fairly stable workforce dedicated to working in the industry was reinforced by a "reserve army" of the underemployed hopeful of picking up a few days' work. This pattern was repeated to a lesser extent in other areas. The regular manufacturing workforce in 1902 was supplemented by up to 15 percent at times. Many trades also experienced local seasonal variations. Winter, from May to September, was the slack time, when shorter hours were worked and employers shed labour temporarily; some factories shut altogether for short periods.

The restructuring of the economy was accompanied by an increase in technological innovation. The introduction of machinery had became more widespread from the mid 1890s; during the next decade its impact was felt in almost every sphere of production. Together with the related intensification of the labour-process, it forced huge changes in the occupational structure as traditional craft demarcations were thrown into disarray and many jobs were reduced in skill and status. Industrial conflict increased as employers introduced new labour processes based on isolated tasks which they classified as unskilled, while workers insisted on recognition of particular acquired skills in terms of speed, quality and minimisation of waste. Women workers and juveniles, engaged at much lower rates, threatened the traditional structure of adult male employment. Apprentices were replaced by juvenile learners and adult improvers who were restricted to lower graded specific tasks and machine-minding. This fragmentation of work processes and the division of labour marked a significant loss of workers' control over their working lives. Unions tried to resist the transformation by limiting the number of women employed or restricting

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5 *NSW Statistical Register* 1902, pp. 650-651.

them to the poorly-paid, unskilled and repetitive grades where they would not compete with men. They also attempted to minimise the impact of semi-permanents and casuals through autonomous regulation, adopting a combination of the closed shop and exclusive membership. Some unions attempted restriction through bargaining, offering to act as suppliers of labour for employers. The newly-organised unions tended to adopt a more open policy, but also reinforced occupational demarcations through their identification of group interests and solidarity with particular tasks.\(^7\)

The establishment of the arbitration court in a period of industrial restructuring meant that great expectations and demands were placed on it. Many of the early cases concerned the introduction of machinery, casual or piece work and juvenile or female labour; most involved conflict over the recognition and demarcation of skill.\(^8\) The court became the venue for struggles over the structure of work, involving complex technical disputes which could not be handled efficiently by a single adjudicative tribunal operating under legalistic judicial procedures. In addition, the system's "client base" of unions increased both before and after its establishment, resulting in a high initial demand for hearings. The union movement started to recover from the effects of the depression during the two years of the arbitration bill's passage. In 1900 craft union activists began a drive to revitalise defunct unions and build new ones, extending coverage into many new areas.\(^9\) The resurgence was not directly related to the imminence of compulsory arbitration: the new and revived unions were directed towards immediate wage goals. The most dramatic growth occurred among the semi-skilled and unskilled, where formerly unions had been organised only sporadically and had suffered the greatest collapse.


\(^8\) See G.S. Beeby, *Three Years of Industrial Arbitration in New South Wales* (Sydney: Worker Printery, 1905), pp. 5-11.

during the depression. Unionism also began to extend beyond the city into the suburbs and country centres, particularly Newcastle where Sydney unions were eager to establish branches or similar organisations. The withdrawal of the peak union body from the Australian Labor Federation and its reconstitution as the Sydney Labor Council in February 1900 was a portent of this growth and redirection. In two years it grew from seven affiliates to 43, representing about 35,000 unionists. However, union density remained relatively low by 1901, comprising only about 9.7 percent of the employed workforce.

The advent of the Industrial Arbitration Act had an undoubted effect on the growth of unionism. Although membership figures before 1902 are not very accurate, table 6.1 shows a large jump in registrations and membership under the Trade Union Act (which was a necessary preliminary to registration under the Industrial Arbitration Act) in 1902-03, though membership growth under both Acts thereafter remained fairly constant. A large part of the initial rush to register was artificial and short-lived. Between 1901 and 1907, 144 new unions were registered under the Trade Union Act, but only 88 (61%) of these were still in existence (ie regularly furnishing returns) by the end of 1907. However, the "death rate" of unions registered during this period was not unusual when compared with the previous decade. During the life of the Industrial Arbitration Act, 50 unions were deregistered either on their own request or because they had ceased to exist. The stabilisation in union growth and organisation by 1905, corresponding with the problems of delays and limitation of powers experienced by the court, suggests that the operation of the Act itself did not stimulate unionism beyond the initial period of enthusiasm. Further growth had to wait until the Industrial Disputes Act in 1908 which continued the status of registered unions under the former Act for limited purposes.

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10 DT 7 Feb 1902, p. 3.

11 Based on membership of unions registered under the Trade Union Act. Chan has calculated the state's union density among primary and secondary workers in 1901 as 12%, jumping to 20% in 1902 and 24% in 1903, where it remained fairly stable until 1908 when it reached 31.5%. Kenneth Chan, "The Politics of Compulsory Arbitration in Australia, 1890-1910" (PhD thesis, University of Sydney, 1971), p. 249. Markey estimates that total union density for New South Wales in 1891 was 21.5%: Making of the Labor Party, p. 318.

12 NSW Official Year Book 1907-08, p. 487. There were 11 new unions registered in 1906 and 13 in 1907: NSW Official Year Book 1911.
Table 6.1
Union Registrations and Membership:
NSW, 1901-1910

<table>
<thead>
<tr>
<th>Year</th>
<th>TU Act Unions</th>
<th>TU Act Members</th>
<th>IAA 1901 Employers Unions1</th>
<th>IAA 1901 Members</th>
<th>Employees Employers Unions</th>
<th>Employees Members</th>
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<td>1901</td>
<td>49</td>
<td>35,144</td>
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<td></td>
<td>109</td>
<td>2,302</td>
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<td>1902</td>
<td>101</td>
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<td>119</td>
<td>2,916</td>
<td>85</td>
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<td>1903</td>
<td>131</td>
<td>73,301</td>
<td>123</td>
<td>3,204</td>
<td>123</td>
<td>63,510</td>
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<tr>
<td>1904</td>
<td>131</td>
<td>79,815</td>
<td>122</td>
<td>3,343</td>
<td>123</td>
<td>71,031</td>
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<tr>
<td>1905</td>
<td>137</td>
<td>84,893</td>
<td>122</td>
<td>3,343</td>
<td>123</td>
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<tr>
<td>1906</td>
<td>136</td>
<td>88,478</td>
<td>125</td>
<td>3,172</td>
<td>123</td>
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<tr>
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<td>127,402</td>
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<td>174</td>
<td>130,346</td>
<td></td>
<td></td>
<td>112</td>
<td>123</td>
</tr>
</tbody>
</table>

Source: NSW Official Year Books; NSW Statistical Registers.
Notes: Registrations under Trade Union Act are for those unions furnishing returns, at end of each year. Where discrepancies exist between sources for TU Act registrations, the Year Book figures have been preferred.
1 Includes employers registered as unions.
2 The Industrial Arbitration Act 1901 expired on 30 June 1908.
See also Appendix, graph 2.

The Creation of the Arbitration Court

Wise wasted little time in setting the wheels in motion for the creation of the new arbitration system. Administrative responsibility for the Act was vested in his department on the day it became law. George Addison, an assistant parliamentary draftsman in the Attorney-General's Department, was appointed temporary registrar of the court while a barrister, John Barton Holme, became the interim chief clerk. Addison immediately embarked on a campaign of lectures to employers and unions on the benefits of registration; both were urged to register quickly to participate in the elections for members of the court scheduled for the end of March. Companies wishing to register separately would have to apply to the Governor for alteration of their articles. Trade union rules could remain as they were, but in most cases there would have to be a separate constitution for the corresponding indus-

13 Executive Council Minute by B.R. Wise, 5 Dec 1901, 01/19793, AGJ Letters Received, AO 7/5445; GG (13 Dec 1901) vol. 6, p. 9516.
14 NMH 8 Jan 1902, p. 5; SMH 5 Feb 1902, p. 8.
trial union, excluding "working rules" by which unions declared their members' conditions of employment. Addison drafted a set of model rules which were followed by most unions, and during the week before nominations closed nearly 70 unions held meetings at the Trades Hall to revise their rules preparatory to registration. By the time Addison closed the roll for the elections, 72 trade unions, 56 employers' associations and 33 separate companies had registered.\textsuperscript{15} In the employers' ballot W.D. Cruickshank, an engineer with experience as a labour arbitrator (he had been the employers' nominee in the recent ironworkers' strike), narrowly defeated the Chamber of Manufactures' candidate, J.P. Wright. Sam Smith, a Labor MLA and secretary of the seamen's union, won the employees' election overwhelmingly, although the miners complained that their large membership had not been accorded sufficient weight. As an organiser of the wharf labourers, former secretary of the SDC and long-time member of its executive, Smith had gained a reputation for moderation in industrial disputes.

The judge chosen by Wise to head the new court was Henry Emanuel Cohen. His choice had been an open secret during the final stages of the debate over the bill, but was officially made public in December. Of the seven Supreme Court judges Cohen was the closest to having the "sound commercial knowledge" identified by Wise as a necessary attribute of the president. He had worked for a merchant in his youth and for three years ran a store in Bathurst with his brother until its demise, whereupon he travelled to London to read for the bar. He practised exclusively in common law, mainly in commercial cases, and was an acknowledged pleader. Cohen sat in parliament in the 1870s and briefly held portfolios, but retired from politics in 1885. Elevated to the bench in 1895, he specialised in trying company and other commercial cases, where he gained a reputation as a fair though scrupulously technical lawyer. Attention to detail, rather than brilliance or originality, was his strong point.\textsuperscript{16} His arbitration work was expected to leave time for normal judicial duties.

Cohen, along with Cruickshank and Smith, was appointed to the industrial jurisdiction from the beginning of April. To celebrate the success of the election procedure, Wise entertained the members and

\textsuperscript{15} SMH 7 Feb 1902, p. 3; DT 24 Feb 1902, p. 3. For list of registered unions see SMH 19 Mar 1902, p. 7; 20 Mar 1902, p. 5.

delegates on a harbour cruise. Cohen noted that the court was "essentially a court of justice", standing "on the same high plane as the ordinary courts of which all British people are proud." No claim would be granted by the court unless its members were satisfied that it was based on equity and justice. Cruickshank spoke of "that spirit of compromise and conciliation which we all hope will form one of the principal factors in the administration of this Act." Smith was absent, having left to inspect the New Zealand system in action, but on his return a month later he expressed his function somewhat differently. So long as it remained consistent with his duty as an arbitrator, his task would be to strengthen the labour movement. Any failure of the Act would be the responsibility of the unions, though it could always be repealed. Claims should be brought with toleration and "a desire to show that what we are claiming is reasonable and just." He would try to see that the court established its own precedents. Before a full bench of the Supreme Court at the end of April, all three members swore not to disclose business secrets, and the two lay members subscribed to the judicial oath.

The initial flurry of administrative activism ensured not only the registration of a large number of unions, but that from the first the court would face a large calendar of work. T.H. Thrower, president of the SLC, expected that most unions would have claims to make, and that the court would be busy in its first few months. A number of unions had already postponed making demands on employers until the court began its work, and it was expected that "an era of industrial litigation" would ensue from the activities of this "Supreme Court of Labour". Even before the election of members, employers were accused of reducing wages and altering conditions in the expectation of unfavourable awards.

The court's first hearing was procedural, an ex parte application by the tailoresses' union to begin proceedings against an employer for dismissing union members. Three days later, on 19 May, the court sat in Newcastle to hear its first substantive case, a dispute brought by the wharf labourers as a matter of urgency after negotiations broke down; both sides looked forward to the court's intervention. The

17 DT 26 Mar 1902, p. 8.
18 SMH 30 Apr 1902, p. 8; DT 30 Apr 1902, p. 9.
19 SMH 6 Jan 1902, p. 4; SMH 7 Jan 1902, p. 4.
20 DT 24 Feb 1902, p. 6; SMH 24 Feb 1902, p. 3.
award, made after six days of hearings, granted the wharf labourers' wage claim but adopted the working hours proposed by the employers. The union would supply all wharf labour.\textsuperscript{21} By the end of the year the court had made four more awards, heard another 17 matters and made 44 adjudications in all, but 26 disputes were already listed for hearing.\textsuperscript{22} Unionists complained that the presence of lawyers in the court resulted in expensive and lengthy proceedings. The SLC, inundated with requests for assistance, rejected a proposal to employ a "labor lawyer" to conduct cases, preferring that a special court officer be appointed to advise unions on the preparation of claims.\textsuperscript{23} Delays and the raising of technicalities in the court prompted a large delegation from the unions to meet See and Wise in July to urge the exclusion of counsel, while in September the northern coalminers pressed for a separate court for Newcastle. Wise attributed the technical issues to the court being asked to exercise powers which it did not possess. The protracted hearings he blamed on the long lists of witnesses being called; this indicated, he said, the value of lawyers, who could obtain essential evidence more speedily.\textsuperscript{24} Wise considered temporarily establishing an auxiliary three-member court at Newcastle to deal with the backlog; while the miners and ferry employees were enthusiastic, the SLC executive did not believe that this was the answer. A bill to constitute a temporary court was rumoured to be in preparation but did not appear.\textsuperscript{25} The ferry employees' union raised the possibility of the SLC engaging a solicitor again in February 1903; the council responded by recommending that unions "consider the advisability of refusing to employ lawyers in the Arbitration Court".\textsuperscript{26} These concerns were, however, overshadowed by other developments.

\textsuperscript{21} \textit{Re Tailoresses' Union} [1902] AR 44; \textit{SMH} 14 Apr 1902, p. 7; Telegram W.M. Hughes to Wise, 23 Apr 1902, AGJ Letters 7/5392; \textit{Newcastle Wharf Labourers' Union v Newcastle and Hunter River Steamship Co Ltd} [1902] AR 1.

\textsuperscript{22} [1902] AR Records 152-163; J.B. Holme, \textit{RCIA}, p. 398.

\textsuperscript{23} \textit{NMH} 27 May 1902, p. 5; SLC Minutes 5 Jun 1902, 17 Jul 1902, ML A3836/326-329, 382-383.

\textsuperscript{24} \textit{DT} 23 Jul 1902, p. 9; \textit{SMH} 25 Sept 1902, p. 4; \textit{SMH} 26 Sept 1902, p. 3.

\textsuperscript{25} \textit{NMH} 20 Nov 1902, p. 5; \textit{NMH} 21 Nov 1902, p. 4; SLC Minutes 12 Feb 1903, 19 Feb 1903, ML MSS A3837/130-131.

\textsuperscript{26} SLC Minutes 12 Feb 1903, 17 Feb 1903, ML A3837/124-131.
Civil Liability: the Spectre of Taff Vale

In August 1900 railway workers employed by the Taff Vale Railway Company in south Wales began a strike over union recognition and the replacement of unionists by "free labour". After attempts at conciliation failed, the executive of the Amalgamated Society of Railway Servants reluctantly endorsed the action and authorised strike pay. In response, the company not only began prosecuting strikers and union officials but commenced civil action against the union for loss of profits which it refused to discontinue even after the defeated unionists returned to work. The union's secretary had persuaded a group of strike-breakers to return to London, so he and the union were sued for inducing the labourers to break their employment contracts with the railway company. The company's action was part of an organised counter-attack against the new unionism in Britain in the 1890s, involving the mobilisation of "free labour" as strike-breakers and refusal to employ known unionists. Legal action against unions was also used as judges expanded the scope for injunctions as well as damages actions under the so-called industrial torts of conspiracy and inducing breach of contract.

The Mogul Steamship case in 1891 had confirmed the view that actions not in themselves unlawful could not found an action in tort, but a series of cases commencing with Temperton v Russell in 1893 began to establish a new tort of conspiracy which was actionable if combined action, though lawful, was undertaken for a malicious purpose. Any language which showed hostility towards the target of the action was sufficient to establish malice. This new form of liability embodied the view of many judges that industrial action by trade unions was unlawful even though protected by statute from the crime

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29 Mogul Steamship Co. Ltd v McGregor, Gow & Co Ltd [1892] AC 25; followed in Jenkinson v Nield (1892) 8 TLR 540.
of conspiracy since 1875.\textsuperscript{31} It was used almost exclusively against unions, and was soon extended to cases where industrial action, though not malicious, was taken for the purpose of furthering union objectives.\textsuperscript{32} While the House of Lords reaffirmed its former principle that tortious conspiracy did not exist when pursuing legitimate trade interests, judges and juries were very reluctant to concede that unions possessed any legitimate interests.\textsuperscript{33} In addition, union officials and members were both civilly and criminally liable for picketing.\textsuperscript{34} But the keystone in the anti-union edifice was the \textit{Taff Vale} decision by the House of Lords in 1901 that a union registered under the Trade Union Act had sufficient legal identity to enable it to be sued in its own name.\textsuperscript{35} Among labour circles \textit{Taff Vale} stood for the class bias of a judiciary complicit in the destruction of unionism and the precarious legal basis on which it stood.

While some injunctions had been issued against unions, the general opinion had remained that unions were immune from legal action, even when registered under the Trade Union Act, because they possessed no separate legal personality.\textsuperscript{36} Hence few were surprised when the Court of Appeal unanimously overturned the trial judge's injunction against the railway servants pending an action for inducing breach of contract. The judge had held that in passing the Trade Union Act, parliament must have intended unions to carry duties correlative with their new-found legal rights,\textsuperscript{37} but the appeals court accepted the union's contention that the statute revealed no intention to confer corporate status on trade unions, which therefore possessed no standing to be sued. In July 1901 the House of Lords reversed this decision and upheld the injunction. Underlying their lordships' judgments was

\begin{itemize}
\item \textsuperscript{31} Conspiracy and Protection of Property Act 1875, 38 & 39 Vict, c. 86. In \textit{Lyons v Wilkins} [1896] 1 Ch 811 Lord Lindley (at 820) said "You cannot make a strike effective without doing more than is lawful".
\item \textsuperscript{32} \textit{Glamorgan Coal Co v South Wales Miners' Federation} [1903] 2 KB 545; [1905] AC 239.
\item \textsuperscript{33} \textit{Allen v Flood} [1898] AC 1.
\item \textsuperscript{34} \textit{Lyons v Wilkins} [1896] 1 Ch 811; [1899] 1 Ch 255; \textit{Charnock v Court} [1899] 2 Ch 35.
\item \textsuperscript{35} \textit{Taff Vale Railway Co v Amalgamated Society of Railway Servants} (1900) 44 SJ 714; [1901] 1 QB 170; [1901] AC 426.
\item \textsuperscript{36} \textit{Pink v Federation of Trade Unions} (1893) 8 TLR 216, (1893) 8 TLR 711; \textit{Trollope v London Building Trades Federation} (1896) 12 TLR 272; Alan Fox, \textit{History and Heritage} (London: George Allen & Unwin, 1985), p. 180.
\item \textsuperscript{37} [1901] AC 426 at 430; (1900) 44 SJ 714 at 715.
\end{itemize}
the view that unions should not be "above the law". As if to highlight the new threat facing unions, a fortnight later the law lords delivered their decision in Quinn v Leathem, which upheld a finding of civil conspiracy against five union officials for organising a secondary boycott against an employer who refused to dismiss non-unionists.

In Britain these decisions aroused among trade unionists a lingering suspicion of the judiciary and played no small part in the establishment of a separate labour party to campaign for legislation to protect unions. It has even been argued that this struggle, resulting in the Trade Disputes Act of 1906, was the reason why Britain turned away from compulsory arbitration and adopted instead a system of voluntary collective bargaining. In New South Wales compulsory arbitration, with its requirement that participating unions register under both the Trade Union Act and the Arbitration Act, was already being embraced by the union movement by the time that the implications of Taff Vale were appreciated. So potentially every registered union could be held directly liable for industrial action endorsed by it or even that taken independently by its members.

When first introducing his bill in June 1900, Wise had assured his labour audience that a registered industrial union would obtain corporate legal personality only for the purposes of the Act. Wise intended the Act to create a domain of labour law divorced from the ordinary courts, enabling the enforcement of agreements and awards by a special court while protecting union funds from vexatious litigation. Doubts over this approach had been expressed by Sidney Webb who, alluding to the anti-union court cases, urged Wise that the trade union "ought to be and remain a shadowy entity, unknown to the law". If unions were to be induced to register as incorporated bodies, urged Webb, "you had better make it quite clear to the judges that it is not to be injunctioned, or in any way laid hold of". This intention had been expressed in Wise's original bill by stating that nothing in the Act enabled the property of either industrial unions or their members

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38 [1901] AC 426 per Lord Macnaghten at 438; Lord Lindley at 443.
39 Quinn v Leathem [1901] AC 495.
41 NSWPD vol. 103 (4 Jul 1900), pp. 646-647.
42 Sidney Webb to B.R. Wise, 10 October 1900, Wise Papers, ML MSS 1327/2/559-562.
being "taken in execution by any process in law" other than pursuant to the Act. By the time it reached the statute book, this proviso in s.7 added that the Act did not render an industrial union liable to be sued. When the bill was being debated in October 1901, Wise had not read the official report of the House of Lords' judgment in Taff Vale (which had just arrived in the colony) and did not grasp its full implications. He was more concerned with redressing unions' legal disabilities under the Trade Union Act by allowing the creation of new legal entities under the Arbitration Act; the common law position of trade unions per se, was left unaltered until the effects of the recent court decisions were clear.

The full significance of Taff Vale was not immediately realised by unionists in either Britain or Australia. This came when the company continued its legal action against the railway union, claiming heavy damages for inducement of breach of contract. The trial took place in December 1902 and a special jury found for the plaintiff on all counts. Both sides opted to settle, and in March 1903 the union paid out a total of £23,000 including costs. In the meantime, New South Wales seemed about to get its own version of the case. By 1902 the perennial war between the AWU and the pastoralists was reaching desperate levels as the drought reduced both flocks and the demand for shearers. Faced with ruin, some graziers decided to go out fighting. One of these was W.M. Keogh, proprietor of Warrana station at Coonamble where a shearers' camp had been established to stop blacklegs from coming in to salvage the clip. On 29 August he lodged a statement of claim seeking damages against the officials and trustees of the union for inducing his shearers to break their contracts; at the same time he obtained an ex parte injunction against the executive of the AWU and officials of its local branch to restrain them from continuing their picketing. When the AWU continued to stop shearers entering the station, Keogh moved to enforce the breach of the injunction by sequestrating the property of the union until it purged its contempt, the only way an injunction could be enforced against a corporate body.

43 Industrial Arbitration Bill 1900 (LA), cl. 7; IAA 1901, s.7 (2) (a).
45 Bealey and Pelling, Labour and Politics, pp. 70-71; Clegg, Fox and Thompson, History of British Trade Unions, vol. 1, pp. 326-327. A series of similar cases was also decided around this time.
There were rumours that other pastoralists were about to take similar action.46

The shearers' strike collapsed after the commencement of the legal actions and Keogh's injunction lapsed. He also discontinued the damages suit, but there remained the question of costs for the injunction. Thus the case eventually heard in the Supreme Court's equity jurisdiction was not a repetition of Taff Vale, though it involved a similar question: could the union's property be attached for payment of the costs of an injunction breached by some of its members? Walker J decided that the officials of the local branch had conspired to induce Keogh's employees to break their contracts, an illegal act under the decision in Quinn v Leathem. And, applying Taff Vale, the union was responsible for the officials' actions: they were its agents and rendered it vicariously liable for any of the class of activities for which they had been authorised, even if the particular action they took had not been approved. Furthermore, as the union had established a strike camp to enforce union shearing rates, anyone from the camp, member or not, who "committed illegal acts for the benefit of the union" rendered it liable by the principle of agency at common law.47 Walker rejected the AWU's contention that the words of s.7 of the Arbitration Act prevented a registered industrial union from being sued: the section, he held, referred only to actions under the Act and within the arbitration court's jurisdiction. Here there was neither an industrial dispute within the meaning of the Act nor an action under its terms, so the section did not apply. If industrial unions were amenable only to the arbitration court's jurisdiction, a union could not be bound by an ordinary commercial contract because the arbitration court had no power to decide common law matters: this was surely an absurd result that proved the continuing liability of unions under the general law. The costs of the injunction must be borne by the officials personally and by the trustees out of the union funds.48 In holding that the union was not protected by s.7, Walker implicitly denied that its legal personality flowed from the Act: it may have gained a new

47 Keogh v Australian Workers' Union (1902) 2 SR 265 at 274, 280.
48 (1902) 2 SR 265 at 277-279. The sequestration order was also upheld, but the judge limited its application because the union officials honestly though erroneously believed that the union was protected by the Act.
persona for some purposes but the old body still existed and could be attached under the principle in *Taff Vale*.

The labour movement began to react even before the judgment in Keogh's case was delivered. The dangers of civil action were raised when the northern coalminers met Wise on 24 September to complain about delays in the arbitration court. Wise criticised the unions for failing to take full advantage of the Act by vesting their property in "industrial trusts", which would extend the protection of s.7 to their funds.\(^49\) Despite Wise's continued assurances that trustees were the answer, the unions remained concerned. On 14 October a private members' bill was introduced into the Legislative Assembly by Labor MP and veteran union leader Andrew Kelly. Its single substantive clause stated that "no trade union registered under the Trade Union Act 1881 shall be competent to sue or be liable to be sued in any court of law or equity".\(^50\) Although Kelly seemed to be acting alone, the bill was taken seriously by conservatives. A meeting convened by the Chamber of Commerce to condemn it highlighted the need for employers to organise in order to propagate their views.\(^51\) The bill was never taken up by the government and lapsed at the end of the session. A motion for similar legislation, proposed by Matthew Charlton of the northern coalminers, was carried at the first Commonwealth Trade Union Congress held in Sydney at the end of November.\(^52\) Amendment of the Trade Union Act to reverse *Taff Vale* was made the first plank of the Labor party's fighting platform at its annual conference in January 1903. Donald MacDonell, general secretary of the AWU, proposed the motion, warning that the House of Lords had placed trades unionism "in danger of utter annihilation." Reflecting his union's concern at the outcome of Keogh's case, he demanded that no union be held liable for the unsanctioned action of its members. So important did the executive deem the matter that no debate was permitted.\(^53\)

\(^49\) *DT* 25 Sept 1902, p. 3. Wise seemed to be contemplating the use of IAA s. 6 which enabled a trade union registering as an industrial union to apply to the Governor to adopt rules dealing with, *inter alia*, control of property and investment of the funds of the union. If a union vested all its property in trustees appointed under rules sanctioned by statute supposedly it would be protected by the proviso in s. 7.

\(^50\) Trade Union Amending Bill 1902, cl. 2; *SMH* 31 Oct 1902, p. 4. The rights and duties of union trustees would, however, be preserved.

\(^51\) *SMH* 1 Nov 1902, p. 11.

\(^52\) *NMH* 29 Nov 1902, p. 6.

\(^53\) *SMH* 28 Jan 1903, p. 7.
leaders feared employers' united use of civil actions against strikes in retribution for their reduced power under the arbitration system. There was talk that the common law would be used in the Outtrim coalminers' strike in Victoria, and the AWU was exposed to further legal actions over its picketing. Other unions expressed trepidation that civil action would be taken against them.\(^{54}\) Then, in April, a felt hatter named Slattery obtained an injunction and £10 damages from the officials of his former union for conspiring to induce his employer to dismiss him after he was expelled for arranging men to work for less than the going rate.\(^{55}\)

During all this, Wise had been absent in England, but on his return in April he reaffirmed his view that the Industrial Arbitration Act effectively nullified *Taff Vale* for unions registered under it, an opinion which was publicly contradicted by Dr Cullen who pointed out that Keogh's case had specifically decided against this argument.\(^{56}\) A labour deputation to Premier See urged that the Arbitration Act be amended to remove the possibility of civil action against unions, pointing out that at present they were doubly encumbered with strike penalties under the Act as well as common law liability.\(^{57}\) Although Wise held his ground, See was compromised by the need to maintain the support of the Labor party and the prospect of an election in a year's time. In the next session the government announced its intention of legislating to protect the funds of industrial unions.\(^{58}\)

While the labour movement's solution was to remove unions altogether from the reach of the courts, Wise sought a more surgical approach. His bill had three objects: to redefine conspiracy by excluding strike threats and boycotts, to reduce the application of agency principles to unions, and to amend the Industrial Arbitration Act by stating emphatically that no industrial union could be sued in the ordinary courts.\(^{59}\) Wise promoted the bill with all his usual eloquence, though he resigned himself to strong ideological opposition and the likely need to concede some changes. He denounced the new principles enunciated in the conspiracy cases as having been made in ignorance of modern

\(^{54}\) SLC Minutes, 29 Jan 1903, 19 Feb 1903, ML MSS A3837/111, 131.

\(^{55}\) *Slattery v Keirs* (1903) 20 WN 45.

\(^{56}\) *SMH* 27 Apr 1903, p. 4; *SMH* 28 Apr 1903, pp. 6, 8.

\(^{57}\) *SMH* 23 May 1903, p. 11.

\(^{58}\) *NSWPD* vol. 10 (1903), p. 138.

\(^{59}\) Law of Conspiracy Amendment Bill 1903, cl. 1-3.
industrial relations. The result was confusing, unequal and unrealistic. The *Mogul Steamship* case had condoned combinations by traders in pursuit of self-interest, but the trade union cases punished similar action designed to promote the principles of trade unionism and the interests of others. Under his bill unionists would not be caught by the common law so long as they confined themselves to the pursuit of industrial matters as defined in the Arbitration Act. Wise, however, could not see inducing a breach of contract as a legitimate end, so tactics such as those used recently by the AWU's pickets at Coonamble would remain illegal. The amendment to s.7 was simply to clarify the intention of Parliament when passing the Act: it showed what he had said all along, that registered industrial unions "only owe their existence to the statute". If unions availed themselves of the current statutory protections, they would be answerable only to the arbitration court and the anti-strike powers of s.34.60

It was on this last point that he was attacked most stridently by Dr Cullen, who saw the amendment as rendering unions unaccountable to the general civil and criminal law and placing their members above ordinary citizens. The Coonamble affair had produced little violence or property damage, but Cullen presented it as an outrage that could only be prevented through the protections secured by the recent case law. Cullen blatantly misrepresented the effects of the bill. Despite Wise's protestations that individual criminal liability would remain and the arbitration court could always issue injunctions, the activities of the shearers enabled Cullen to portray the bill as a licence to commit crime. Was not the question, he asked,

whether industrial unions are to be subjected only to the jurisdiction of the Arbitration Court, or whether they shall be left liable to the law of the land in regard to personal injuries, violence, and intimidation?61

The newly-formed Employers' Federation had circularised the upper house to prevent the passage of "this most serious attempt to undermine the foundation upon which the rights of the individual depend".62

Faced with certain defeat, Wise withdrew his bill from the onslaught, suggesting that a select committee might be appointed. Wise had attempted to institute a semblance of equality between trade unions and

60 *NSWPD* vol. 13 (11 Nov 1903), pp. 4092, 4097, 4099.
61 *NSWPD* vol. 13 (11 Nov 1903), p. 4106.
other combinations, while reserving control of registered unions to the
system of industrial law administered chiefly by the arbitration court.
His opponents decried this as a displacement of the "natural" law, the
repository of reason and order, by an illogical and disordered extra-
legal system centred on "a special tribunal of an altogether artificial
kind".63 Their rhetoric rested on the self-evident unity, neutrality and
immutability of the law. Debate over the actual content of the new
industrial torts was closed by the fiction that the common law was not
invented but declared, combined with the belief that every element in
the corpus of law formed the fabric of social order. Once the "Imperial
Courts" had spoken on a matter identified as private rights (which was
equated with individual freedoms), they could not be contradicted. The
amendments demanded by the unions were not presented again.

The Need for Amendment

Apart from the Taff Vale question, the labour movement continued to
criticise delays, the presence of lawyers and inadequate enforcement of
awards.64 Union leaders blamed lawyers for the intrusion of legalism
and protracted hearings. Donald Macdonnell, secretary of the AWU and
MLA for Cobar, voiced the disappointment of unionists who had
believed in a court where there would be a complete absence of
the formality which now characterises it, where men would come
together and state their case, and where the court, without going
into legal technicalities, would simply deal with the merits of a
case and give its decision. As it exists, however, there is an
attitude of stiff formality about it. There is a judge in his wig,
and all the imposing ceremony of the Supreme Court. The result is
that when witnesses are called they are thrown off their centre, so
that they cannot tell the plain, straightforward tale they would tell
under other circumstances.

In New Zealand, he said, there was "none of this wig business or other
formality" and proceedings were both swifter and cheaper.65 Unions
also identified the time occupied in hearing preliminary and con-
sequential matters as a major cause of delay. It was pointed out that

63 "Proposed Legislation on the Subject of Trade Unions", WN Covers
64 SLC Minutes 5 Feb 1903, ML MSS A3837/117; DT 23 May 1903, p. 13.
The unions also reacted to specific decisions involving the AWU by
demanding a right of appeal from the registrar's decision not to
refer the deregistration of a union to the court, and an amendment
to prevent the registration of "bogus" unions: see ch. 8.
65 NSWPD vol. 10 (1 Jul 1903), p. 394.
while the conciliation boards in New Zealand had failed to settle disputes, at least they defined the issues more clearly for submission to the court.\textsuperscript{66} Regulations framed by Cohen were introduced to require a preliminary hearing to settle the issues in dispute, but this procedure was thwarted by changing circumstances and demands, and unions frequently applied afterwards to amend their claims.

In July 1903 Wise introduced his amending bill, which proposed changes similar to those demanded by the unions. Much of the consequential work — breaches of awards and recovery of union subscriptions — would be heard by the registrar (who would gain similar functions and powers to the Master in Equity), while the court could refer other matters to him. The factory inspectors would be charged with supervising awards, but if they proved insufficient the court could appoint unpaid inspectors for particular purposes, giving them the same powers as factory inspectors.\textsuperscript{67} After seeking the views of the Labor Council, Fred Flowers opposed most of the reforms since they gave the registrar excessive judicial functions, including the power to interpret awards, and opened up wasteful avenues of appeal to the court from his decisions.\textsuperscript{68} Cullen agreed: the amendments removed the safeguard of leaving the vast powers under the Act to the wisdom of a Supreme Court judge. The provision for inspectors would simply be subjecting employers to greater union control at public expense. The rest of the chamber expressed their opposition to the arbitration system and the powers of unions by blocking any amendment.\textsuperscript{69}

One of the chief causes of delay was the time occupied in hearing the coalminers' awards. As the hewing of coal was always subject to variations in the condition of the seam within each mine, awards were also subject to constant applications for interpretation. The miners saw themselves as a caste apart, and insisted that a separate tribunal consisting of mining experts was required to determine the complex technical questions that invariably arose. In November 1903 a dispute

\textsuperscript{66} \textit{NMH} 7 Oct 1902, p. 4.

\textsuperscript{67} Industrial Arbitration Act Amendment Bill 1903, cl. 2-8; \textit{SMH} 17 Jul 1903, p. 4; Wise, \textit{NSWPD} vol. 10 (15 Jul 1903), pp. 680, 682. Wise also proposed allowing breaches and recovery of subscriptions to be heard before a District Court judge.

\textsuperscript{68} SLC Minutes 16 Jul 1903, ML MSS A3837/297; \textit{NSWPD} vol. 11 (12 Aug 1903), p. 1394.

\textsuperscript{69} \textit{NSWPD} vol. 11 (12 Aug 1903), p. 1404; \textit{SMH} 13 Aug 1903, p. 6. For the Employers' Federation's objections, see \textit{SMH} 3 Aug 1903, p. 8.
was expected following the announcement of a reduction in hewing rates, and Fegan, now a minister without portfolio, introduced a bill to constitute a temporary arbitration court with exclusive jurisdiction over the coalmining industry in Newcastle and other gazetted districts. The court, constituted by a District Court judge together with representatives elected by the companies and coalmining unions, would also be able to determine other claims referred to it by the principal court. While the Newcastle members firmly supported the bill, it faced a mixed reception from the opposition and Labor members. Macdonnell saw the special court for miners as "the assassination of arbitration", undermining the principles of equality between workers and consistency in awards. J.B. Nicholson, member for Illawarra and a former coalminer himself, opposed special treatment for the northern miners which allowed them to jump the queue. The bill failed to reach a second reading and, after lapsing, was not taken up in the next session: Wise later explained that the lack of unanimous support by the Labor party had caused it to be abandoned.

The SLC continued to press for reform at a meeting with Wise in February 1904. The most detailed suggestions came from George Beeby, a solicitor representing the clothing unions. Echoing Wise's earlier scheme, he proposed a second court for the miners, extension of the registrar's powers, and the appointment of a special magistrate with "some knowledge of industrial matters" to hear breaches of awards, which occupied a fifth of the court's time. Wise replied that he had already arranged for a factory inspector to act as investigating and prosecuting officer for award breaches, while a magistrate had recently been appointed to the Water Police Court to handle penalty matters. He would look into a suggestion that a investigations officer be assigned to the Registrar's Office, but the registry must act impartially and could not give legal advice to unions. Wise vowed to reintroduce his amending bill to allow delegation of the court's consequential powers and the creation of a second court for Newcastle.

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70 Industrial Arbitration (Additional Court) Bill 1903; NSWPD vol. 11 (19 Nov 1903), p. 4379.
71 Macdonnell, NSWPD vol. 11 (19 Nov 1903), p. 4384; Nicholson, ibid, p. 4505. Carruthers and C.G. Wade (who had close links with coal proprietors) supported the bill: ibid, p. 4387.
72 DT 4 Feb 1904, p. 7.
73 SMH 4 Feb 1904, p. 5; SMH 12 Feb 1904, p. 5; SMH 25 Feb 1904, p. 5.
The Consolidation of Reaction

The prospect of achieving amendments was, however, receding even further as opposition to compulsory arbitration gathered momentum. The employers' objection that the Act was one-sided was reinforced by a dispute at the Northern Extended and Rhondda collieries at Teralba. The arbitration court had issued an award in August 1903 which, when finalised by an accountant appointed by both sides, resulted in reduced rates.\(^74\) When the new scale was posted in January 1904 the Teralba miners, defying their union officials, refused to work under its terms. The coal owners reacted by taking the union and a large number of men before the arbitration court for breaches of the award. After an urgent hearing in Newcastle the court held that the award had not been violated because the miners' termination of their employment contracts was a matter left to custom and common law, not the award.\(^75\) Despite Wise's comments that the Act had never been intended to force employees to work under an unfavourable award, the decision was greeted by employers as proof that compulsory arbitration was a failure since it did not prevent strikes, and that workers could defy the court's awards with impunity. Unionists, too, felt uneasy with the result. The mine proprietors next lobbied Wise to prosecute the strike ringleaders under s.34 of the Act, which made it an offence to cease work to enforce compliance with demands. Although the court granted the Attorney-General's application for leave to prosecute, the miners had already decided to return to work by the time proceedings were commenced, and the 13 summonses were dropped. Wise later pointed out that a prosecution under the Masters and Servants Act would have succeeded, but the damage had been done when the court held that the award was not infringed by the strike.\(^76\)

Teralba became a battle-cry of the growing conservative movement in industry and politics. The Employers' Federation had been formed in May 1903 by delegates from the employers' trade associations to combat "undue aggression and excessive interference" by government. Interest


\(^{75}\) Re Colliery Employees' Federation [1904] AR 160; NMH 14 Jan 1904, p. 5; SMH 18 Jan 1904, p. 8; SMH 20 Jan 1904, p. 9; SMH 21 Jan 1904, p. 5.

\(^{76}\) SMH 22 Jan 1904, p. 7; DT 15 Feb 1904, p. 6; NMH 27 Feb 1904, p. 4; NNH 2 Mar 1904, p. 6; B.R. Wise, The Industrial Arbitration Act of New South Wales: A Reply to Critics (Sydney: 1904), p. 5.
dropped off until the Teralba strike, when a private meeting was called by the Chamber of Commerce to organise a protest by employers at the Act's failure to prevent interruptions to business. A huge gathering resulted from a circular issued by the Employers Federation condemning the "unjust working of the Arbitration Act" and the threat posed by Wise's foreshadowed amendments. While the Chamber of Manufactures remained aloof, the Chamber of Commerce entered a close alliance with the Federation to fight a perceived onslaught of socialism in the form of restrictive industrial legislation and domination of government by the Labor party caucus.77

With a state election approaching, the Progressives were in disarray. Wise had been acting premier since February, but when passed over as See's replacement he quit politics and left for England. Always more a coalition of individuals than a party, and without an electoral support group, the Progressives faced an opposition united under Joseph Carruthers with the backing of the Liberal and Reform Association. Pressure groups leading the popular mood for conservative "reform" also supported the Liberals. The Peoples' Reform League (slogan: "security and freedom are all that industry requires") was formed in 1902; the following year it absorbed the Taxpayers' Union, an anti-government group run by businessmen. The PRL, the state's equivalent of the Victorian Kyabram movement, led the anti-socialist reaction against high government spending and state interference with private enterprise. In their support of Carruthers' Liberals they were joined by protestant and temperance pressure groups as well as the Employers' Federation.78 One of the public leaders of the "reform" campaign was Charles Wade, a barrister and former crown prosecutor who had won the conservative seat of Willoughby in 1903 with the support of the PRL as well as protestant and temperance groups. Wade was a state minimalist who believed that social and commercial life should be unfettered as much as possible.79 Having some experience as


an employers' advocate in the arbitration court, he railed against the
government's "encouragement of socialistic ideals", a prime example
being the way in which the Arbitration Act violated the sacred rights
of employers. The preference clause especially turned the court into "a
recruiting agency for the unions" and thus a bulwark for the Labor
party, since most unions supported the party through levies.80
Carruthers himself did not entirely welcome the conservative reaction,
and warned that the cause of true liberalism and reform should be
preserved from "any taint of conservative reactionary politics" pursued
for "ulterior motives".81

Carruthers announced the Liberals' policy on arbitration in July.
While supporting the principle, the party wanted changes to prevent
the court being used except for serious and genuine disputes, and
then only if all attempts at conciliation had been exhausted. Preference
should only be awarded if the claimant union represented a majority of
workers in the trade, and penalties should no longer be paid to the
union bringing the summons. To allow the court access to technical
expertise, lay members of the court would be appointed to represent
employers and employees of the industry in dispute. The Liberals
pointed to the Victorian wages board system as a model.82 Carruthers
was personally committed to arbitration: he took pride in his far-
sighted proposal for a conciliation bill in 1888, and claimed credit for
the inclusion of the anti-strike clause in the present Act. In February
he had published an article which approved the valuable experiment
being conducted in industrial relations, while deprecating the Act's
failure to suppress strikers and the labour movement's use of the
system to promote its political ends. The Liberals' proposals were not
sufficient to placate the PRL, which wanted preference abolished and
the court restricted to deciding wages and hours. The Chamber of
Commerce and Employers' Federation weighed in, condemning the Act
outright for its injustice and interference with individual rights.83

80 SMH 29 Apr 1904, pp. 3, 7; DT 29 Apr 1904, p. 3.
81 Speech by Carruthers at Newtown, 30 Apr 1903, in Liberal and
Reform Association, Manifesto [Aug 1903].
82 SMH 15 Jul 1904, p. 8.
of New South Wales", Review of Reviews (Australasian edition) 24
(1904) 153-156; SMH 19 Jul 1904, p. 6; SMH 29 Jul 1904, p. 4; SMH 30
Jul 1904, p. 12.
The Liberals' election campaign, conducted around the theme of anti-socialist "reform" and the need to revitalise industrial development, did not concentrate on the arbitration system, but few were left in any doubt that it was a major target of their criticism. Compulsory arbitration, with its encouragement of unionism, was indelibly associated with Labor and the "socialistic" government interference that conservatives argued was producing a flight of capital from the state. The Progressives suffered a crushing defeat at the polls, securing only 16 seats. The Liberals, with 45 seats, were just able to govern independently, while Labor became the direct opposition party with 25 members. When Carruthers announced his ministry the inclusion of the inexperienced Wade as Attorney-General came as a surprise. As minister responsible for the Act, Wade received the coalminers when they renewed their complaints in September. He promised to take their grievances to cabinet, but showed misgivings at the creation of a special court. Expressing interest in J.B. Nicholson's suggestion for compulsory conciliation committees, he replied that conciliation, rather than the multiplication of tribunals, was the best way to reduce the court's waiting list. The arbitration court had already taken steps in this direction. With 57 disputes still listed for hearing in July 1904, Cohen announced that henceforth minor issues should be settled between the parties concerned and the court would only entertain matters of wages, overtime, working hours, preference and the common rule. The court hoped that if these five essentials were left to the court, the disputants would be forced to come to an agreement on less important matters. Still the backlog persisted, and by October Hughes, describing the system as "totally inoperative", called upon the Carruthers government to either amend the Act or repeal it. The Newcastle MLAs kept up the call for an extra court for coalmining.

Crisis: 1905

In January 1905, 200 wheelers employed at Newcastle coal mines refused to work after a notice reducing their wages was issued by the

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84 SMH 30 Aug 1904, p. 7.
85 DT 23 Sept 1904, p. 10. This proposal was supported by the secretary of the ferry employees' union: SMH 27 Sept 1904, p. 7.
87 DT 4 Oct 1904, p. 5; NSWPD vol. 17 (19 Dec 1904), p. 2841.
proprietors. Most wheelers were outside the union and were not bound by the arbitration court's award, but the court ordered them to resume work and granted leave to prosecute when wheelers and sympathetic miners remained on strike. The charges, under s.34 of the Act, alleged that the accused had unlawfully discontinued work in an industrial dispute before a reasonable time had elapsed for reference of the dispute to the court. By 25 January, 21 strikers representing all the affected pits had been committed for trial and the Crown had issued a further 300 summonses. The strikers began returning to work the next day. Speculation that wholesale convictions might lead to even greater industrial unrest became superfluous when the first cases came up for trial before the Quarter Sessions at Newcastle in February. In the first case Judge Fitzhardinge held that, since the prosecutor had not shown that the dispute occurred between the employer and a union, there was no evidence of an industrial dispute within the meaning of the Act. He directed the jury to acquit. A second case was put to a jury, which failed to agree on a verdict. Another defendant was acquitted by direction when the prosecution failed to prove that the accused had discontinued work unlawfully: there was no clear evidence that notice was required before termination of the employment contract. The remaining cases were withdrawn.

The wheelers' strike signalled a further period of confrontation over reform of the arbitration system. Employers' organisations cited it as proof that arbitration could not be imposed on workers, and that the anti-strike provisions were worthless. The labour movement equally regarded the episode as an indication that capital's intention was the suppression of unionism: the Worker, drawing an analogy between Carruthers' government and the repression then occurring in Russia, claimed that employers wanted either to quell strikes with bullets or "to grind industrial organisation with Russian Coercion Acts" making strikes illegal, as happened with the Victorian railways strike two years earlier. Peter Bowling, the socialist activist and northern miners' organiser, called for workers to return to direct action: "The only hope of a return of unionism to its full, vigorous manhood will be when the fetters that bind us to the wheels of the legal machinery are

88 SMH 4 Jan 1905, p. 6; SMH 7 Jan 1905, p. 11; SMH 21 Jan 1905, p. 11; SMH 26 Jan 1905, p. 7; SMH 27 Jan 1905, p. 5.
89 SMH 11 Feb 1905, p. 9; SMH 14 Feb 1905, p. 6; SMH 15 Feb 1905, p. 5.
90 Worker 23 Jan 1905, p. 4.
burst asunder." In response to the employer organisations' repeated call for repeal of the Arbitration Act, Hughes claimed that the unions were stronger than ever and could quickly win better conditions than had been obtained before the court. An increasing number of unionists thought that labour was so strong, both politically and industrially, that the defeats of the 1890s could not recur, while resort to justice through law had proved elusive. Many unions had been waiting for two years to obtain an award, and the long waiting list meant that any new dispute that arose was unlikely to be heard before the Act's expiry.

The delay problem was compounded by the success of employers in restricting the powers of the arbitration court by a series of cases decided in the Supreme and High Courts. As the result of organised employer resistance, superior court decisions in 1904 had limited the effect of many awards and nullified a range of common rules. In March 1905 the Supreme Court delivered a judgment which effectively neutralised preference clauses. The decision was confirmed on appeal to the High Court in July, and a few weeks later the Supreme Court gave another decision which struck at the power of unions to obtain awards. The Newcastle miners, frustrated by the judicial nullification of even those awards which they could obtain from the arbitration court, began to revert to the old system of voluntary arbitration. A dispute at the Hebburn colliery was settled following a conference between the miners' union and proprietors: after the two arbitrators appointed by each side failed to agree, an award was delivered by the umpire, Dr Cullen. The southern miners also withdrew from the compulsory system; in 1906 they signed a voluntary agreement based on their award, which lasted for three years. The effect of the superior court decisions would have an even greater effect in 1906, almost bringing the court's award-making to a standstill.

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91 NMH 1 Mar 1905, p. 4; NMH 4 Mar 1905, p. 5.
92 DT 25 Apr 1905, p. 4; SMH 26 Apr 1905, p. 6.
94 Ex p Master Carriers' Association (1905) 5 SR 77; DT 1 Apr 1905, p. 11; Trolley, Draymen and Carters' Union v Master Carriers' Association (1905) 2 CLR 509; Ex p Brown; the Colliery Employees' Federation, Respondents (1905) 5 SR 412. The substance, context and effects of the judicial review decisions are examined fully in ch. 7.
95 SMH 16 Oct 1905, p. 10; SMH 3 Oct 1906, p. 8; Robin Gollan, The Coalminers of New South Wales (Melbourne: UP, 1963), p. 120.
Table 6.2
Court of Arbitration:
Matters Disposed of, 1902-1908

<table>
<thead>
<tr>
<th>Year</th>
<th>Awards</th>
<th>All Matters</th>
</tr>
</thead>
<tbody>
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<td>1902</td>
<td>5</td>
<td>32</td>
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<td>195</td>
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<td>1904</td>
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<tr>
<td>1907</td>
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<td>97</td>
</tr>
<tr>
<td>1908</td>
<td>13</td>
<td>54</td>
</tr>
</tbody>
</table>

Source: Arbitration Reports Records.

Notes: All matters includes awards, orders, penalties. It does not include matters determined by the president sitting alone or the registrar. Figures for 1902 and 1908 are for six months only.

The death of Cruickshank and the illness of Cohen and Sam Smith in early 1905 compounded the problem. J.P. Wright, a boot manufacturer and Cruickshank's rival for the post three years earlier, was elected by the employers. On top of this Cohen, prompted by exasperation at the Newcastle miners' strike, intimated to the government that he did not wish his three-year appointment (which expired on 31 March) to be renewed. Wade had already admitted that it might be necessary to amend the Act to allow a District Court judge to be appointed. He saw the chief justice about possible replacements, but with only three puisne judges available apart from Cohen (G.B. Simpson had just taken extended leave), the choice was not great. Both Owen and Pring were approached and declined. Although Cohen was persuaded to remain in office until a successor was found, the court was adjourned until its status was clarified.96 As a result of the interruptions, the court only delivered 4 awards in the first half of 1905. The northern coalminers renewed their demand for an auxiliary court in April. The slowness in obtaining an award, claimed several delegates, made the Act virtually inoperative. Resolution of the Teralba dispute seemed as far away as

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96 Wade, *NSWPD* vol. 18 (14 Jun 1905), pp. 85-86; AGJ Index to Letters Received 1905, AO X2068/21; *SMH* 16 May 1905, p. 6; *SMH* 31 Mar 1905, p. 6. Simpson was granted leave from February 1905 and did not return to duties until February 1906: under-secretary's minute, 16 Jan 1906, AGJ Letters, AO 7/5402. Neither Darley, the Chief Justice, nor A.H. Simpson, the Chief Judge in Equity, could have been appointed, while Walker became divorce judge to replace G.B. Simpson.
ever, and the delay was affecting the solidarity of the union. The judges were accused of "going on strike" against the Act, while a meeting arranged by the SLC condemned the denial of justice produced by the suspension of the court. Carruthers, it was claimed, intended to kill the Act by refusing to appoint a judge; such a situation would never be tolerated with any other court of justice. In June Cohen renewed his intention to resign and requested that a deputy president be appointed in his place. A bill to allow the temporary appointment of a District Court judge as president or deputy president of the court was hurriedly produced and rushed through parliament.

The judge chosen to succeed Cohen was Charles Gilbert Heydon. Born in 1845, Heydon was the second son of Jabez King Heydon, an English immigrant of liberal opinion who converted to catholicism and became one of the church's leading laymen. After a strong catholic education, Charles had worked as a bank clerk until beginning studies for the bar. He signed the rolls in 1875 and built up a steady practice in commercial and common law. A strong protectionist, he twice failed to secure a seat in the Legislative Assembly but was appointed to the Council in December 1893 where he became Attorney-General in the Dibbs government until its fall in August 1894. He remained in the Council until 1900. Heydon was driven by a mania for punishing work and a commitment to public duty. Shortly before taking silk in 1896 he volunteered for the position of commissioner for the consolidation of the statute law, after the rest of the bar turned it down. This unpaid task of unrivalled drudgery occupied his spare time until the post expired in 1902, although he continued work on consolidation at least until 1909. During the late 1890s he also acted as a Supreme Court judge on several occasions. His elevation to the District Court bench in March 1900 was strongly supported by Wise in the face of opposition.

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97 NMH 17 Apr 1905, p. 5; SMH 17 Apr 1905, p. 7.
98 SMH 12 May 1905, p. 8; SMH 1 Jun 1905, p. 6; Worker 1 Jun 1905, p. 5; SLC Minutes 15 Jun 1905, ML A3838/373; NSWPD vol. 18 (13 Jun 1905), p. 31ff; Industrial Arbitration (Temporary Court) Act 1905, No. 1 (assented to 30 June 1905).
from Crick. When approached to preside over the arbitration court, Heydon was enthusiastic. Wilfred Blackett, his former secretary, later recalled that Heydon's appointment to the arbitration court "filled him with delight, for it opened up a formidable list of new problems, and necessitated an unlimited field of research."102

Heydon's name had been mentioned during the debate on the Temporary Court Bill, and labor members were not impressed.103 During the 1894 shearers' strike Heydon's speeches had revealed antipathy towards unionism and a strong belief in freedom of contract, a view which he later repeated in opposing limitations on working hours for women and youths. In 1899 he had regarded Reid's conciliation bill as useless, and ventured hopefully that industrial arbitration was bound to fail.104 The following year he had opposed federation for conservative reasons. The Bulletin denounced Heydon as "the most bitter and uncompromising Tory on the State bench" who regarded the Arbitration Act as "a huge and unmitigated evil." It speculated that Carruthers had appointed Heydon in order to wreck the Act.105 Both Wright and Smith were re-elected as members, and the three were sworn in on 3 July. However, Smith's illness continued and he eventually refused to sit, citing the insanitary conditions of the court room. He was granted leave in August, and was later declared insane. Edward Riley, an SLC stalwart, was chosen by the unions to replace him. Judge Gibson was appointed deputy president, although little work was found for him.

Wages Boards

Debate over the problems with the arbitration system increasingly concentrated on the bottleneck caused by the existence of a single tribunal for making awards. The failure of the arbitration court was frequently compared with the apparent success of the Victorian wages boards. As early as February 1905 the foremost labour lawyer, George

101 Wise to Lyne, 23 Jan 1900, Wise Correspondence ML A2646/238.
102 SMH 8 Mar 1932, p. 8.
103 NSWPD vol. 18 (27 Jun 1905), pp. 409, 412.
Beeby, had proposed a series of boards with a supervening arbitration court "ready to intervene when necessary," similar to the system existing in Victoria. Expanding on these views in July, Beeby stressed that while compulsory arbitration had not failed, the sole court was inadequate for demands. Beeby's vision retained the judicial tribunal, but delegated technical issues to a board for each industry, consisting of representatives of unions and employers. The boards would perform the functions of both conciliators and arbitrators, conducting preliminary conferences and resolving matters referred to them by the judge. Within the boards,

The arbitrators would all be practical men, no advocates would have any standing, the parties would realize that they are not litigants, the spirit of conciliation and voluntary agreement would increase, and infinitely better and quicker results would be achieved. Under some such scheme any number of cases can be in progress at the same time, and there would be no serious congestion of work. The Boards appointed would soon realize the advantages of settling all minor differences themselves, and all agreements arrived at could be made awards without litigation. The main essentials of this scheme would be the vesting of all final decisions in the President and the exclusion of advocates from the deliberations of the Boards. I am perfectly satisfied that within a few years the duties of a Court of this nature would be gradually reduced. Parties would become acquainted with the principles underlying the awards, and voluntary agreements would become more frequent. The assistance of the Court would only be invoked in matters involving broad principles, in converting agreements into awards, and in seeing that such awards are properly carried out.

Some conservative critics of the Act favoured a similar solution, though for different reasons: a Victorian-style wages boards system was not based on unions, and did not allow the granting of preference. While the Employers' Federation argued for wholesale repeal and a return to voluntary collective bargaining, employers privately lobbied for more "equitable" reforms. The Chamber of Commerce wanted prelim-

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106 SMH 9 Feb 1905, p. 3. In 1903 the Victorian wages board system had been supplemented by a Court of Industrial Appeals constituted by any one of the Supreme Court judges, with powers to review board decisions. The court was designed to limit determinations according to wage-fixing principles laid down in the amending Act.


inary conferences before the court could be invoked, and would restrict the court to wages, hours and industrial agreements while abolishing the court's powers over preference and the common rule. Carruthers reiterated his faith in arbitration, and announced that amendments would soon be introduced to remedy the Act's chief defects.

The nature of the government's plan was kept secret, but rumours began to emerge that it involved a system of wages boards. Wade, who had already expressed his preference for conciliation boards rather than further arbitration courts, instructed his department to inquire about the operation of the Victorian wages boards in February 1905. His plan, devised in March or April, involved creating 41 separate boards grouped into six industries. Although the division was closely compared with the Victorian boards, it was based on workers who had already obtained awards or agreements so it largely reproduced demarcations between existing unions. In May Carruthers revealed that the government's reform would meet the miners' demand for expert lay members on the court for each dispute. The bill would be a "very radical amendment" and might contain some things disagreeable to the unions, but they would have no cause to complain about the constitution of the court. Labor members displayed little faith in the government's intention: Edden claimed that Wade had been instructed by the PRL to abolish preference, while MacDonnell argued that the government would try to do away with compulsory arbitration "and give us some sham system in the shape of sham wages boards rather than an Industrial Arbitration Act." In July Carruthers announced to a SLC deputation that he still believed in arbitration, but that its chief object should be the abolition of sweating; hence the amending bill would confine the arbitration court to questions of wages and

111 Wade, Minute 05/1880, 1 Feb 1905; Chief Inspector of Factories (Victoria) to Under-secretary, 20 Feb 1905, AGJ Letters, AO 7/5424.
112 See untitled plan and memo Victorian special boards and NSW industrial unions compared (both undated), AGJ Letters AO 7/5424. Internal evidence suggests a date in March or April.
113 Worker 20 May 1905, p. 5; see also his remarks to the secretary of the Chamber of Commerce: Rickard, Class and Politics, p. 188.
114 NSWPD vol. 18 (13 Jun 1905), p. 3; ibid (27 Jun 1905), p. 434.
conditions. While convinced that men should join unions, he did not think that "as a matter of British justice" they should be legally compelled to do so.\textsuperscript{115}

Wade's amending bill was not revealed until the end of September. Though presented as a supplementary measure, it involved the complete erosion of the arbitration court's supervisory position and powers of compulsion, largely replacing it with appointed industry boards. The bill was a much simplified version of the Victorian wages board legislation, although it contained no provisions for inspection and enforcement, or the court established in 1903 to hear appeals from wage board determinations.\textsuperscript{116} The arbitration court would no longer have general jurisdiction over industrial disputes and matters. Instead, 41 boards would be established, together with others requested by employers or employees. Each board would consist of at least six members elected by those engaged in the industry; the members would then nominate the board's chairman. Ultimate power to constitute boards and appoint members would reside in the minister. Once a matter had been referred to it by the minister, or an application had been made by employers or employees, a board could make determinations on minimum wage rates and piecework rates, maximum working hours and times, overtime, holidays and apprentices. Lawyers would be excluded from board hearings, and only agents engaged \textit{bona fide} in the trade could attend. Determinations would be decided by majority vote, though the chairman could exercise a casting vote if satisfied that a majority could not be reached. Boards would have power to compel the attendance of witnesses and the giving of evidence, though not the production of documents. Breaches of determinations would not be subject to a penalty; after the board decided a breach had occurred, the amount owing would be recovered as a debt in the ordinary courts.

The arbitration court would have the same scope of jurisdiction as the boards, being limited to wages, hours and apprentices, but reference could be made to it only if all parties consented or if no board had been constituted for the industry. Previous industrial agreements and consent awards made by the court would remain in force until their expiry, but other awards would be superseded by a board determination. The court would exercise no power of appeal or supervision.

\textsuperscript{115} \textit{SMH} 18 Jul 1905, p. 8.

\textsuperscript{116} Factories and Shops Act 1896, s. 15 (Vic); Factories and Shops Act 1900, ss. 15-27 (Vic); Factories and Shops Act 1903, ss. 4-19 (Vic).
over the boards.\textsuperscript{117} There would be no jurisdiction over industrial disputes as such. While unions would retain their registration under the Arbitration Act, and presumably the prohibition of strikes would continue under s.34, unions would have standing only as agents of employees in the industry: either trade unions or industrial unions could bring an application before a board if they contained at least 25 members employed in the industry. Wade declined to give an explanation of the bill; when asked, he replied curtly that there would be "a contest of merits" between the wages board and arbitration systems.\textsuperscript{118}

Wade's bill had been drafted without consulting either labour or capital; it earned the approval of neither. A sub-committee of the Employers' Federation examined the bill and criticised a number of provisions as inadequate or "too indefinite to be clearly understood"; the voting procedure in particular could operate to the prejudice of one side.\textsuperscript{119} Both unions and employers challenged the classification of workers contained in the proposed boards. The brewery employees and tobacco workers wanted boards to cover all workers in their industries, the carcass butchers (masters and slaughtermen) objected to being included with retail butchers, while the painters' union and the master painters' association wrote jointly to protest at their inclusion among woodworkers.\textsuperscript{120} A stinging article in the \textit{Worker} condemned the measure as being designed to destroy trade unionism and drive down wages.\textsuperscript{121} The abolition of preference was the main objection voiced at the annual Eight-Hours banquet, but the labour movement's broader concerns were expressed at a PLL-sponsored mass "indignation meeting" on 13 October which condemned the bill as "subversive of the principle of arbitration, and destructive of the recognized legal rights of organised labor." The bill, claimed Holman, would abolish preference and the enforcement of awards, and return workers to the old era of voluntary conciliation while denying them the right to strike. Although

\textsuperscript{117} Industrial Arbitration (Amendment) Bill 1905.

\textsuperscript{118} \textit{NSWPD} vol. 20 (21 Sept 1905), p. 2373.

\textsuperscript{119} Report of Sub-committee appointed by the Employers Federation, 10 Oct 1905, AGJ Letters AO 7/5424.

\textsuperscript{120} Secretary Brewery Employees' Union to Wade, 25 Sept 1905; secretary Carcass Butchers Association to Wade, 26 Oct 1905; secretary Amalgamated Slaughtermen and Journeymen Butchers' Union to Wade, 25 Sept 1905; president and secretary Master Painters and Decorators Association and Sydney Trade Union of Painters to Wade, 3 Oct 1905: AGJ Letters AO 7/5424.

\textsuperscript{121} \textit{Worker} 28 Sept 1905, p. 4.
the SLC president, E.J. Kavanagh, declared that the council was opposed to the bill, the SLC took little part in the agitation. Some members objected to the council's involvement in an ostensibly political matter, but a more likely reason was the affiliated unions' lack of enthusiasm for the existing system.122

By far the strongest opposition came from Broken Hill, where the metal miners' award was due to expire at the end of October. Both Joseph Norton, the secretary of the AMA, and John Cann, the local Labor member, spoke out against the bill during the Labor day celebrations. Cann was particularly concerned that it offered no protection for workers who tendered evidence as witnesses, while Norton warned that the amendments eschewed any means of enforcement. At a mass meeting sponsored by the AMA, Norton described Wade as an "industrial anarchist" for his attempt to kill the Arbitration Act and revoke the rights of organised labour. After heated debate, and contrary to Norton's wishes, the meeting determined not only to call on members of parliament to reject the measure, but to urge that the SLC declare a general strike if the Arbitration Act were interfered with. A petition from the Barrier praying that the Act be given a fair trial collected 9,000 signatures before being presented to parliament by Cann.123

Wade's bill, along with several other government initiatives, was not proceeded with during the session. Carruthers, who clung to the hope of moderate reforms that favoured neither labour nor capital, may have been genuinely surprised by labour's hostile reception of the bill. The government was also preoccupied with liquor law and local government reform, while Carruthers became implicated in a scandal revealed by the royal commission on lands administration.124 Yet Wade's scheme at least united the labour movement, forcing even sceptical unionists to rally in defence of the judicial system of collective industrial arbitration. The labour movement was finally galvanised into considering the substance of their ideals.


124 Rydon and Spann, New South Wales Politics, p. 63.
The threat of Wade's bill was compounded by the superior courts' assault on the arbitration court's powers. In December the High Court delivered its judgment in Brown's case, the most damaging restriction by far: an industrial dispute must originate between an employer and his employees; the union could only pursue the issues at the request and on behalf of particular workers remaining in an employment relationship. Edward Riley, the employees' representative on the court, issued a missive (based on an opinion from Holman) which warned that while the penal sanctions for strikes remained, the powers enabling the settlement of industrial conditions "have been practically destroyed, and nothing is left but the bare shell of the original Act." At the PLL's annual conference a few days later a committee, chaired by George Beeby, was appointed to consider the effect of the judicial review decisions. Apart from amendments to reverse the judgments, the committee proposed that the court be empowered to appoint boards of conciliation to assist it to make awards, and that further amendments should extend the court's jurisdiction to contract work, exclude lawyers from cases, require that the profits of an industry be taken into account when fixing the minimum wage, make preference compulsory, provide for enforcement by the Department of Labour, and create an additional court for two years. In Beeby's view, the Labor party should press for repeal of the Act and, when the party was strong enough, seek a better and stronger statute. He personally believed that the government's proposal for boards of conciliation was workable, provided that the conciliation courts (as he described them) were subservient to the arbitration court.

The labour forces strengthened their resolve the following month, with a large meeting at which McGowen accused the judiciary of an over-strict interpretation. The situation was so serious as to rouse the SLC to "political" action. Selina Anderson of the shop assistants proposed that unless the premier agreed to amend the Act immediately to remove the "deadlock" caused by Brown's case, all unions should be urged to withdraw their registration and boycott the court. The following week the council decided to work with the PLL for reform of the Act and adopted the party's list of amendments. Most galling was the

125 Colliery Employees Federation of the Northern District v Brown (1906) 3 CLR 255.
126 SMH 26 Jan 1906, p. 6.
127 Worker 1 Feb 1906, p. 7; SMH 30 Jan 1906, p. 5.
one-sided situation produced by the superior court decisions: some union leaders announced that they would rather go back to the old days of strikes, while according to the vice-president, Frank Bryant, class-dominant rule meant that they had "surrendered their vital rights and privileges" for nothing but "the very name and shadow of arbitration." When the seamen's representative declared that if they could not obtain amendments, "they should drop their tools", he was greeted with applause and laughter: most were agreed that political rather than industrial action was the proper solution. The large and united deputation which pursued the labour movement's demands caught Carruthers off guard; in reply to their concrete proposals he could only offer his support for the principle of arbitration when contrasted with strikes. While admitting that the "enemies of arbitration" had contrived to wreck the system, he blamed the unions for overloading the court and repeated his objection to preference or compulsory unionism.128

In May 1906 the SLC agreed to meet the Employers' Federation in a series of conferences over amendments to the arbitration system. The president of the SLC, Edward Kavanagh, was the guiding force behind the council's stance. As secretary of the exclusive clothing pressers' union, he had obtained a common rule based on an industrial agreement that recognised the union log. The pressers were satisfied with the court, and the experience made Kavanagh a convinced arbitrationist; but the High Court's decisions had destroyed the common rule almost as soon as it was made, and blocked the union's chance of obtaining preference.129 While the employers were interested only in a general discussion and talked exclusively about eliminating sweating, Kavanagh demanded that they declare their position on compulsory judicial arbitration, the common rule and the exclusion of lawyers. At the second meeting, the Federation's executive outlined their preferred scheme: industry-based conciliation boards capable of fixing wages and conditions by agreement, which would then become a common rule. If no agreement could be reached by the representatives, the dispute would be referred to a court consisting of a single judge, who would

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128 SLC Minutes 22 Feb 1906, ML A3838/546; SLC Minutes 1 Mar 1906, ML A3838/553; SMH 2 Mar 1906, p. 5; Worker 8 Mar 1906, p. 5; SMH 3 Apr 1906, p. 6; NMH 3 Apr 1906, p. 5.

then deliver a common rule insusceptible of appeal. Lawyers would be excluded from the boards, though not the court. The two groups seemed in accord until the SLC delegates insisted that unions should be responsible for employee representation on the boards. When the employers demurred, Kavanagh ended the meeting by announcing that the employers clearly wanted a new system rather than amendment of the Arbitration Act.

Kavanagh's position was confirmed when the Labor Council discussed the employers' proposals: delegates insisted on the retention of the Arbitration Court as the primary body, with power to override the boards, enforce awards and grant common rules. Also, a true arbitration system must be based on the corporate representation of labour by unions.130 These conditions were rejected by the Federation at the third and final conference in June: the employers could not accept the boards having a merely advisory capacity; above all, they wanted finality. With negotiations having broken down, the Federation pursued their plan with Carruthers. By now it resembled Wade's bill, with a few minor changes and the crucial addition of an industrial appeals court consisting of a Supreme Court judge. The government rejected the SLC's demands; their objections would be met by wages boards, asserted Carruthers. Most of the suggestions made by the Employers' Federation were accepted, but Carruthers drew the line at an appeals court: the decisions of the boards must remain final.131 By the time Wade began reintroducing his bill in September, the Labor members were implacable. Wages boards without an arbitration court were denounced as a fraud, while Fegan warned that unions would desert the state system and seek awards from the federal arbitration court. Although Wade later repeated his determination to have it enacted quickly, by December the government had relegated the bill to a lesser place in its program.132

Although the SLC continued its criticism of the Act's failure and interference by the superior courts, industrial arbitration remained a dead issue for much of the following year.133 It did, however, gain some attention during the three-month campaign leading up to the

130 SMH 3 May 1906, p. 8; SMH 16 May 1906, p. 10; Worker 17 May 1906, p. 4; SMH 25 May 1906, p. 5; Worker 31 May 1905, p. 4.
133 SMH 22 Feb 1907, p. 5.
state elections in September. Carruthers' policy speech promised the repeal of the Arbitration Act and its replacement by "wage boards on the Victorian model" without the influence of lawyers. Even the pretence of amending the present Act had been abandoned. Wade's campaign stressed the replacement of the court by bodies of "practical trade experts" to eliminate sweating and strikes.\(^{134}\) The Labor party had dropped amendment of the Arbitration Act from its fighting platform in January; while support for an effective arbitration court had not waned, the executive was satisfied that the party had affirmed its commitment to the principle of arbitration. James McGowen, the parliamentary Labor leader, gave the issue prominence in his policy speech: Carruthers, he said, only wanted to abolish the court because of the evils exposed by it. The history of the movement for industrial arbitration legislation showed that "as conciliation failed, we were forced to advocate the Court."\(^{135}\) Several Labor candidates campaigned against the introduction of wages boards, arguing that in Victoria wages were lower and sweating more prevalent.\(^{136}\) Within weeks of the election, which returned the Liberals to power while increasing Labor representation, Carruthers resigned and Wade became premier. His commitment to the government's policies was taken by McGowen to mean that wages board legislation would be at the forefront of the legislative program. The opposition, said McGowen, would "fight for the Arbitration Act right on to the finish", but would also go some way towards meeting the wishes of their opponents.\(^{137}\)

\(^{134}\) SMH 10 May 1907, pp. 8-9; SMH 17 May 1907, p. 6; DT 18 Jul 1907, p. 4; SMH 25 Jul 1907, p. 11; SMH 29 Jul 1907, p. 8.

\(^{135}\) SMH 30 Jan 1907, p. 10; SMH 22 May 1907, p. 10; SMH 30 May 1907, p. 8; SMH 4 Sept 1907, p. 10.

\(^{136}\) DT 7 Aug 1907, p. 6.

\(^{137}\) SMH 2 Oct 1907, p. 9.
Chapter 7

Jurisdiction and Judicial Review

A necessary part of Wise's scheme of industrial arbitration was its independence from the established legal system. The arbitration court had to be protected from appeals and the other forms of judicial restraint: equity injunctions and the common law prerogative writs of prohibition, certiorari and mandamus. These writs were the ancient means by which superior courts, as delegates of the King's supreme authority to dispense justice, restrained lesser courts and other bodies from moving beyond their powers (ultra vires) or acting unjustly. In 1900 Wise assured his audience that the new court would have "full and exclusive jurisdiction" over matters before it.\(^1\) The Arbitration Act provided no avenue of appeal to other courts, while judicial review by the superior courts was ousted by s.32 which stipulated that

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 vitiates 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.

This section was largely copied from s.72 of Reeves' Act, which had been found adequate to discourage the New Zealand Supreme Court from reviewing arbitration court decisions. An application for mandamus against a decision granting preference to unionists had been refused both at first instance and unanimously on appeal, though the judges had made plain their distaste for preference which they viewed as displacing natural rights.\(^2\) They decided that parliament had expressed a sufficiently strong intention to oust review and allow preference even though the power was not expressly included in the Act. It was

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1 *NSWPD* vol. 103 (28 Jun 1900), p. 539.

confidently expected, therefore, that the New South Wales Arbitration Court would transact its business without imposition.

The Australian superior courts held otherwise. Within two years the court's decisions were being reviewed regularly by the Supreme Court, even though compulsory arbitration's strongest critics admitted that "it was not the intention of the Arbitration Act to apply appellate review to the proceedings of the Arbitration Court." Between 1902 and 1907, the full bench of the Supreme Court heard 14 cases seeking to overturn an arbitration court decision, six of which proceeded on appeal to the High Court. Only three cases upheld the arbitration court's jurisdiction. The effect of these decisions was to limit significantly the operation of the arbitration system and the power that the court of arbitration could legitimately exercise. The superior courts imposed a series of strictures on the extent of the arbitration court's jurisdiction which in turn were translated into directions on the manner in which its legitimate powers would be exercised. In this way the first arbitration court became integrated into the existing legal structure, its activities subordinated to established juridical doctrines.

The superior courts' actions gained widespread notoriety among the labour movement, paradoxically confirming many workers' distrust of the ordinary legal system and their faith in arbitration. Judicial restriction of the Act at the behest of employers was proof of the proposition "that justice should really become the law is a matter which the classes cannot understand." To W.G. Spence, the reactionary antipathy of the legal profession was to blame:

The judges in the other courts seemed eager to get opportunities to declare the Act ultra vires on any pretext, and some of them did not hesitate to extend their functions by making speeches from the bench condemning such legislation. Their purely technical and biased legal minds have no sympathy with the spirit which should underlie the administration of such an Act as Arbitration. It was never intended that there should be any appeal, but the lawyers soon found a way to get to the other courts, and then we had the spectacle of the clear intentions of the Parliament being upset and reversed by judge-made law.

This view has become part of labour folklore, verified by repetition and accepted by historians. Thus Brian Fitzpatrick found "nothing

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3 SMH 22 Mar 1904, p. 6.
4 Worker 1 Apr 1905, p. 4.
5 W.G. Spence, Australia's Awakening (Sydney: Worker Trustees, 1909), pp. 480-481.
intrinsically surprising" in the Supreme and High Courts' restriction of legislation. Both the courts and parliaments made and interpreted labour laws "according to their lights from time to time — according, in fact, to the political, and hence to the social and economic, bias of their majorities on a given occasion." The courts' behaviour he put down to a conservative "judicial habit" of restrictive interpretation of pro-labour legislation. Yet judges did not always seek to restrict the powers of the arbitration courts: they sometimes extended them beyond previous delimitations and eventually accepted a reduction in their powers of review.

To lawyers, the restrictive interpretation was not extraordinary: it was simply a matter of the legal system doing its job of interpreting statutes according to established principles. Even Wise later said that "no lawyer could quarrel with these decisions" and blamed the conservative Carruthers government for failing to remedy the defects by amendment. Beeby put the cause down to faulty original draftsmanship. Others simply saw the superior courts exercising their duty to protect society, for it was "far better to let the Court become useless, and let the Legislature remedy the defect, than to turn loose on the public a tribunal that no man can define." The judges regarded themselves as only applying well-settled canons of interpretation. To understand their motivations we must examine the presumptions of the prerogative writs and statutory interpretation which reflected the conception of law as a system and not just a collection of rules. For the judges concerned did not only decide the interpretation of Acts according to their own political ideologies, although several statements from the bench show that they were willing to make these beliefs explicit as part of the reasons for their decisions. Even when the judges spoke out in this way, they were able to muster strong support for their actions from centuries of judicial precedents and apply these authorities in the same conventional way as they approached the interpretation of other types of legislation.

Prohibition

Unlike an appeal, judicial review does not strictly examine the merits of a case. Rather, a decision is examined only on whether it was within the tribunal's jurisdiction or was properly arrived at according to the procedural standards of fairness embodied in the rules of natural justice. Lawyers justified judicial review as the protection of individual rights and freedoms against incursions by tribunals exercising powers that did not belong to them. Curlewis and Edwards stated forcefully in the opening sentence of their textbook on prohibition that "unlawful aggression is never so dangerous as when it takes place under colour of judicial process".\(^8\) The writ of prohibition could only issue against ostensibly judicial decisions, and by the late nineteenth century in Australia its issue was limited to "a manifest defect of jurisdiction", fraud by one of the litigants, or proceedings that were conducted so as to deny a party's legal rights to natural justice, such as the right to a fair trial.\(^9\) Judicial review could not be granted merely because the inferior court had made an error of law: only errors of fact or law leading to a mistaken finding in favour of jurisdiction could be nullified.

Despite these general principles, judges often exercised their power of supervision to ensure that the decisions of inferior tribunals conformed to the doctrines and assumptions of the general common law. The small debts courts which, like the arbitration court, were directed to act according to "equity and good conscience", were particularly susceptible to such constraints. In several cases from 1894 the New South Wales Supreme Court displayed a readiness to grant prohibitions against magistrates' small debts decisions that were adjudged contrary to natural justice, broadly defined.\(^10\) The judges imposed their own standards of justice, which stressed strictly legal obligations, on the broader moral ambit of the small debts courts. These cases and others following them, claimed George Campbell Addison in 1901, established a new principle: prohibition could be granted ostensibly for contravening

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9 *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442.
10 *Ex p Moate and Wife* (1894) 15 NSWR 83; *Purcell v Perpetual Trustee Co* (1894) 15 NSWR 385; *Ex p Shakespeare* (1894) 15 NSWR 477; *Bowtell v Lindsay* (1899) 16 WN 107.
natural justice though really because the decision was erroneous.\textsuperscript{1}\textsuperscript{11} He put this down to the fact that there was no appeal from the small debts courts. The Supreme Court judges rationalised this extension by arguing that where the inferior judicial officer decided manifestly against the evidence or without evidence to ground the claim, he was acting outside his jurisdiction or departing from his judicial function, and Justice G.B. Simpson stated baldly that "[i]f this Court is of opinion that any decision of an inferior Court is against natural justice a prohibition will lie just in the same way as if the Court had acted without jurisdiction."\textsuperscript{1}\textsuperscript{12}

The availability of the prerogative writs was the means of enforcing the superior courts' position in the judicial hierarchy as the successors to the king's inherent power to dispense justice. The Supreme Court had been invested with all the powers of the royal courts by successive charters of justice, and so (apart from some admiralty areas) had unlimited jurisdiction. All other courts established within the state therefore had lesser powers, and were defined as courts of special or limited jurisdiction.\textsuperscript{1}\textsuperscript{3} These lesser courts had their powers strictly limited to the statutes creating them through an assumption that was accorded constitutional significance. All legislation establishing new courts or limiting the issue of the prerogative writs was interpreted according to the doctrine that nothing was presumed to be outside the jurisdiction of the superior court except that which "specially appears to be so", while inferior courts were limited to exercising only those powers which were "expressly alleged" by statute.\textsuperscript{1}\textsuperscript{4} By the nineteenth century it was judicially settled that statutory attempts to oust the jurisdiction of the courts had only a limited effect. In an English case in 1878 it was assumed as beyond question that a section of an Act taking away certiorari to review an inferior court did not apply where the court had exceeded the limits of

\textsuperscript{11} G.C. Addison, "Common Law Prohibition and 'Natural Justice'", \textit{WN Covers} 10 (1901) 53-54, 165; C.E. Weigall, "Some Modern Applications of the Writ of Prohibition", \textit{Commonwealth Law Review} 6 (1908), p. 19. At the time Addison was assistant parliamentary draftsman; soon afterwards he became registrar of the arbitration court: \textit{GG} (1901) vol. 6, p. 9516.
\textsuperscript{12} \textit{Ex p Mansfield} (1899) 20 NSWR 75 at 80.
\textsuperscript{14} \textit{Mayor of London v Cox} (1867) LR 2 HL 239 at 259; \textit{Re O'C
Callaghan} (1899) 24 VLR 957 (Full Court, Victorian Supreme Court).
its jurisdiction. But, as Stanley de Smith said, the courts were defending not so much the sacrosanctity of the prerogative writs as the judges' "own identification of the public interest with their retention of inherent powers of review." The limits of an inferior court's jurisdiction were discovered through the process of statutory interpretation.

Divination of Statutes

The interpretation of statutory rights and powers in an application for judicial review was the means by which a hierarchical and unified common law system was maintained. The early common lawyers had believed that the law was the complete and immutable embodiment of reason, so that statutes like the decisions of judges merely declared the pre-existing law. This approach continued in muted form the conviction of its strongest and most revered exponent, Sir Edward Coke, that the common law was natural reason perfected over centuries and therefore superior to parliament's whim. According to this view, the courts should restrain the excesses of parliament and strike down its pronouncements if they conflicted with the common law. Coke's enduring gift to the art of interpreting statutes, known as the rule in *Heydon's Case*, instructed judges first to look to the pre-existing common law, then find the "mischief and defect" which that law did not provide for and which the legislature was presumed to address in its enactment; the interpreter should then examine the remedy which parliament had created to resolve this defect, and finally arrive at the "true reason" for the statutory innovation. This approach was modified by the constitutional supremacy of parliament after the revolution of 1688 and the acceptance that legislation could alter the law. Dicey's principle of parliamentary sovereignty demanded that "any Act of Parliament ... which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts." Henceforth judges adopted a more

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15 *Ex p Bradlaugh* (1878) 3 QBD 509.
18 *Heydon's Case* (1584) 2 Co Rep 18; 76 ER 637 at 638. The modern exposition of this approach was stated in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 *per* Lord Blackburn at 763-764.
passive and formalist approach, seeing their task as simply the application of the law. Statutory words were to be given their natural or literal meaning to avoid stepping out of the place of the judge and into that of the legislator by making, rather than declaring, the law.19

The modern treatise writers on statutory construction, beginning with Sir Peter Maxwell in 1875, sought to systematise these approaches and the case-law built upon them into a coherent set of rules and presumptions. The first and most fundamental of these was the rule of literal construction: legislative words and sentences were to be given their "ordinary and natural meaning" regardless of whether the consequences were absurd or mischievous. But this rule admitted many qualifications which accommodated the earlier activist judicial approach. Maxwell conceded that "language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many."20 The rule of literalness could be departed from where the cause, context and consequences of the enactment showed that the literal meaning did not convey the "real intention" of parliament. As the task of the interpreter was to discover "not what the legislature meant, but what its language means", this intention could only be found in the text of the statute.21 Few points were more settled than the rule that a court could not take into account the "parliamentary history" of a law's enactment, the intentions of its framers, or the motives which influenced the legislature.22 So the augury of judicial intent was conducted almost exclusively by consideration of legal context and consequences, and general ideological preconceptions. Maxwell thought it "obvious that the intention which appears to be most agreeable to convenience, reason, justice, and legal principles, should, in all cases open to doubt, be presumed to be the true one."23

Within this process of judicial exegesis, a legislative innovation like the Industrial Arbitration Act was given an almost apocryphal status. In the long tradition of Coke, it was accepted judicially that general, non-technical words should be construed against the alteration of the existing law. Among the objects and consequences presumed not to have been intended by parliament was an alteration of the law unless by express words or necessary implication the legislature signified otherwise "with irresistible clearness".\(^{24}\) Thus statutes altering or encroaching on vested rights to person or property, or imposing penalties or taxes, were to be construed, if possible, to respect such rights and given a strict (ie limited) interpretation. Similarly, Acts creating new jurisdictions or delegating authority were given their "natural" meaning by judges only where the language used made it unavoidable. Judicial review was regarded as a "valuable right" of the subject to have an inferior court's jurisdiction tested in the superior courts which could not be taken away unless parliament expressed this intention in clear terms, either expressly or by necessary implication.\(^{25}\) Maxwell thought that

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\text{[i]t is, perhaps, on the general presumption against an intention to disturb the established state of the law, or to interfere with the vested rights of the subject, that the strong leaning now rests against construing a statute as ousting or restricting the jurisdiction of the Superior Courts.}^{26}
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These rules and presumptions of statutory interpretation privileged judges with insight as to the presumed intention of parliament and enabled them to decide how far a statute should be carried. The political nature of the choice available could in all cases be masked by the apparently neutral application of binding rules, but it should be remembered that a choice did exist. As Julius Stone argues, all legal interpretation carries with it "leeways of choice" stemming from the inherent imprecision of language; the choice may be veiled by embracing binding rules and precedents, but the choice of rules and their meaning also involves decisions whose limits are prescribed by


\(^{25}\) Jacobs v Brett (1875) LR 20 Eq 1 per Jessel MR at 6-7.

\(^{26}\) Maxwell, Interpretation of Statutes, p. 193.
non-legal compulsions. The judges of the New Zealand Court of Appeal decided to adhere strictly to the Arbitration Act and refuse to entertain judicial review: the power of the legislature was deemed sufficient to displace the common law interpretive principles restricting innovation, even though the statute represented for the judges a retrogression from contract to status and a violation of fundamental common law rights. The Australian superior court judges took a contrary view, adopting a restrictive interpretation which gave pre-eminence to the continuity and coherence of traditional legal rights. The semantic leeway created by the rules of interpretation gave doctrinal justification to their extreme limitation of the arbitration court's jurisdiction.

The Arbitration Act was fertile ground for leeways in interpretation. The central terms which it used were linked by a chain of signification which had originated in Kingston's bill of 1890. An "industrial dispute" was defined by reference to an "industrial matter", and both referred to the definition of "industry", while all three used the terms "employment" or "employed" which were nowhere defined. These definitions, adopted from Reeves' 1894 Act, had been drafted in very broad terms: "industrial matters" referred generally to "matters or things affecting or relating to work done or to be done, or the privileges, rights, or duties of employers or employees in any industry" and went on to include several specific matters. The result opened up a gulf of indeterminacy and ambiguity, which gave free reign to the judges' preconceptions of the objects of the Act.

Assumptions of Power

One of the first applications for an award of the arbitration court came from the union covering cooks and other kitchen workers. Before the substantive issues could be heard, the employers raised a preliminary objection: the Act explicitly excluded "employment in domestic service" from its definition of "industry" and as members of the applicant union were employed in duties that were usual in the maintenance of a house the court could not hear the case. When Cohen

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28 *Taylor & Oakley v Mr Justice Edwards* (1900) 18 NZLR 876.
rejected this argument as contrary to the intention of parliament, the employers' association sought to have his decision overturned by the Supreme Court. Immediately the application for prohibition was heard, A.B. Piddington, who appeared for the restaurant employees, objected that "[i]t is evident from the whole Act that the Legislature intended to create a Court of the highest prestige and independent of any supervision by the Supreme Court" and that s.32 specifically precluded judicial review. Acting Chief Justice Stephen expressed amazement that a barrister could have been found to argue the point. Supported by the other judges, he said "there must be, and ought to be" power for the Supreme Court to interfere when a statutory court dealt with matters beyond its jurisdiction. Section 32, it was held, referred only to attempts to appeal against the orders of the arbitration court. However the judges held that the ordinary meaning of "domestic service" excluded businesses run for profit, and so prohibition was refused. The secretary of the union urged that the decision be considered by the Labor Council as "a matter of great importance to Registered Unions" but the matter was merely noted.

The full significance of judicial review only emerged after the courts delivered an authoritative statement on the general scope and purpose of the Act. This occurred in Clancy's Case, which arose from the attempted regulation of the retail meat trade. Two types of retail butcher served the carnivorous needs of the metropolis. A plenitude of small suburban "family" butchers relied on the delivery of small orders placed on credit. The "shop" or "cutting" businesses concentrated on cash sales to passing trade; the most significant were large establishments strategically sited at either end of George Street in Sydney to accommodate the train and ferry commuters. While these large butchers, such as Ralph Walker and Richard Clancy, were able to take advantage of economies of scale in purchasing carcasses wholesale or slaughtering their own stock, and owned refrigerated cooling rooms which reduced spoilage, the family butchers particularly suffered from increased competition since they incurred the high overheads of home delivery. The drought had depleted the number of stock brought to the sale-yards, while those slaughtered were in very poor condition. The

29 Hotel, Club, Restaurant, and Caterers' Employees' Union v Caterers and Restaurant Keepers' Association [1902] AR 77.
30 Ex p Caterers and Restaurant Keepers' Association (1903) 3 SR 19 at 22-23.
31 SLC Minutes 26 Feb 1903, ML A3837/142-143.
smaller butchers, who were forced to buy inferior quality meat from the carcass butchers at the abattoirs, began to lose custom to their larger competitors whose prices were about 20% cheaper.\textsuperscript{32}

The differences between the shop and family butchers made the formation of a representative association difficult, but after several short-lived attempts the Master Butchers and Livestock Buyers' Association was formed in 1902, ostensibly to set standard prices for meat.\textsuperscript{33} On 16 July ten "representative employers" met with delegates of the Butcher Shop Employees' Union and managed to frame an industrial agreement. However divisions emerged between the employers at a subsequent meeting called to ratify the agreement: while the small butchers sided with the union in wanting the shops to shut at 5pm, the larger businesses preferred to stay open until the 6pm limit imposed by the Early Closing Act 1899 in order to sell to customers travelling home from work. After failing to reach a compromise with the divided masters, the union decided to seek an award.\textsuperscript{34} The employers' association finally approved the agreement at a meeting at which the dissenting large butchers led by Richard Clancy were shouted down. Included in the agreement was a clause requiring the union to apply for its terms to be made a common rule. The large cash butchers had no doubt that the agreement was "really a family agreement ... suited for the small outside butchers only" and designed to benefit the suburban traders at their expense.\textsuperscript{35} Clancy attempted to resign from the association as soon as he learnt of the agreement's terms, but found that he was prevented by s.9 of the Act as a dispute was pending. The union's application for a common rule was granted subject to the right of employers to apply for exemption. The large butchers all applied, but the court refused to exempt Clancy and other members of the association from the agreement, or butchers like Walker, who were not members, from the common rule.\textsuperscript{36}

\textsuperscript{32} Butcher Shop Employees' Union v Master Butchers and Livestock Buyers' Association (1903) AO 2/5708/157.
\textsuperscript{33} AO 2/5708/51 (Richard Clancy); DT 19 Sept 1902, p. 7.
\textsuperscript{34} DT 11 Sept 1902, p. 3; DT 12 Sept 1902, p. 9.
\textsuperscript{35} AO 2/5708/88 (F.W. Seaton). One dissenter, J.P. Ryan, said that the secretary of the Association had admitted to him that the new opening time arrangement "was done to localise trade. The people in the suburbs come down to the city and buy their meat from the Sydney butchers and the suburbs lose that trade, he said": AO 2/5708/115.
\textsuperscript{36} Ex p Walker [1903] AR 207; AO 2/5708/212.
The union then began enforcing the common rule against its known opponents but, finding it difficult to prove that employees had worked longer than the award hours, it summoned Clancy for keeping his shop open late. Clancy did not dispute the claims, but argued that the court had no jurisdiction to say when an employer should close his shop: such a direction was outside the definition of "industrial matters" as it did not relate to working hours.\textsuperscript{37} Cohen thought that while the language of the Act was "apparently ample enough to cover every condition of employment which mutually and directly affects the relation of employer and employed", the regulation of shop closing hours went beyond such mutual relations and appeared to conflict with the Early Closing Act. But in joining the employers' association, Clancy had voluntarily agreed to close his shop earlier than he was legally required, and was therefore bound by the earlier hours. Cohen doubted that the clause specifying closing hours was strictly an industrial matter, but he thought himself powerless to alter the terms of an agreement and so he advised the union and association to alter it themselves so as to regulate only the hours of employment.\textsuperscript{38} After being fined £12 for breach of the agreement, Clancy applied to the Supreme Court to overturn the decision.

Two of the judges, Stephen and Owen, were generous in their interpretation of the arbitration court's powers and the rights of parties under the Act. They largely accepted the union's argument that one purpose of the agreement was to prevent employers reducing the total amount of work available by intensifying output while trading after employment had ceased. Stephen was reluctant to interfere with the terms of a mutual agreement or to limit the scope of industrial matters to work performed during the hours of employment and thus allow "a contingency which they might have desired to guard against". Owen rejected the contention that an industrial matter only related directly to work, and insisted that the agreement be considered within the context of the settlement of the industrial dispute. The early

\textsuperscript{37} Re Clancy [1903] AR 385 at 386; AO 2/5708/273-274. He also relied on the case of Bonarius v Davis (1903) 20 WN 78, involving the prosecution of a butcher for remaining open contrary to the Early Closing Act but in compliance with the agreement; the Supreme Court held that the agreement was illegal so far as it was repugnant to the Act. Cohen distinguished this case from Clancy's situation, where he had agreed (as a member of the employers' association) to close earlier than he was entitled to do under the Early Closing Act.

\textsuperscript{38} [1903] AR at 389; AO 2/5708/306.
closing clause was justifiably part of the agreement as the intention of
the parties was essential to its interpretation. Pring, who dissented
from this stance, regarded the matter as if there had never been an
agreement and the court had simply made an award. He refused to
allow that by framing an agreement employers and employees could
decide what were to constitute industrial matters. The Act had "to a
great extent destroyed that freedom of action which, under the common
law, was the privilege of both", and because of the possible con­
sequences of the arbitration court's power to control natural rights
and freedoms he found that the disputed clause was outside the
meaning of industrial matters under the Act.

Clancy then took the matter to the High Court. Appearing for the
union, Piddington again argued that the arbitration court's decisions
could not be reviewed, that the legislature had deliberately taken the
risk of the court stepping beyond its jurisdiction. He failed to impress
the judges on this point, or on his assertion that a matter included in
an agreement thereby became an industrial matter. In contrast to the
majority in the Supreme Court, Chief Justice Griffith regarded an
industrial agreement with little reverence: as a contract it was less
compelling than an award. Griffith (with whom Barton concurred)
gave two reasons for finding that judicial review had not been ousted:
firstly, because similar sections had always been construed as not
extending to an excess of jurisdiction (although, as Piddington pointed
out, the words in s.32 were far more extensive than in any statute
hitherto decided upon); and secondly, because other parts of the Act
indicated that the court had a limited jurisdiction. O'Connor thought it
most important that the Supreme Court's supervision of a court operat­
ing under a statute giving extensive new rights and creating "relations
altogether new to the law" should be maintained. Both judges based
their decisions on the need to limit the term to prevent the arbitration
court from extending its power to control the conduct of business.

39 Re Clancy (1903) 3 SR 592 at 596-597.
40 (1903) 3 SR 592 at 601.
41 Clancy v Butcher Shop Employees' Union (1903) 1 CLR 181 at 200.
42 (1903) 1 CLR 181 at 187; see also Waterside Workers Federation of
Australia v Gilchrist, Watt and Sanderson Ltd (1924) 34 CLR 482
per Isaacs and Rich JJ at 524; Ross Anderson, "Parliament v.
Court: The Effect of Legislative Attempts to Restrict the Control of
Supreme Courts over Administrative Triunals through the Prerog­
43 (1903) 1 CLR 181 at 204, 205.
Griffith professed to discover that the words of the Act clearly implied "matters of mutual obligation" between employer and employee.\textsuperscript{44} O'Connor considered the consequences of allowing the court unlimited jurisdiction by not limiting the meaning of industrial matters to direct employment relations: could the arbitration court prohibit the introduction of new machinery on the ground that it affected work to be done by the employees? Obviously it could not, and therefore it is impossible to construe the words of the section in such a way as to include within the "industrial matters" there defined everything that is in any way "relating to an industry." The construction of the section must be controlled by the subject-matter, and the general intention of the Act. The subject-matter is to regulate the relations between employers and employés. Every section of the Act deals with this. If we confine the effect of the sections to matters directly affecting industries, its scope and intention can be carried out. But once we begin to introduce and include in its scope matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part.\textsuperscript{45}

Clancy's campaign to keep his shops open after the award's stated hours had several consequences for the early arbitration system. The previously accepted view that arbitration decisions were incapable of being challenged was authoritatively and conclusively repudiated. Even more important was the High Court's assumption that the Arbitration Act was limited to direct relations between employers and employees, defined according to the common law conception of the employment relation as founded in the contract of service. This limitation meant that the arbitration court had to accept the formal equality and substantive inequality inherent in the employment relation. The daily newspapers, continuing their crusade against compulsory arbitration, hoped that its subrogation to the ordinary courts and common law rights would restrict the number of applications for awards and reduce the expectations of unions. Instead of being a law unto itself, the arbitration court was relegated to being "a part only of the legal machine, not an irresponsible excrescence upon it."\textsuperscript{46} The Employers' Federation was discussing the High Court's judgment three days after

\textsuperscript{44} (1903) 1 CLR 181 at 202, 201.  
\textsuperscript{45} (1903) 1 CLR 181 at 207.  
\textsuperscript{46} DT 29 Mar 1904, p. 4; SMH 29 Mar 1904, p. 4.
it was handed down and decided to seek counsel’s opinion on its effect.47

The Employment Relationship

It soon emerged that the High Court’s limitation of the Act to mutual relations between employers and employees had far-reaching effects on hiring practices and industrial relations generally. At a meeting of the Sydney Labor Council in May, a delegate from the Milk and Ice Carters’ Union complained that the decision had enabled employers to evade the Early Closing Act and made it impossible to make an industrial agreement a common rule. Representatives of the Hairdressers’ Union added a warning that bogus arrangements for employees to become independent contractors were already being made.48 The union later tried to enforce the hairdressers’ award against owners adopting the tactic of leasing chairs out for a weekly rent which was deducted from each journeyman’s takings, but Cohen held that a penalty could not be imposed as no relation of employer and employee existed, even though the shop owner involved confessed that the contractual arrangement had been inspired by the High Court ruling and was introduced to evade the Act.49 After the Brickmakers’ award came into effect in December 1904, the Newtown Brick Company dismissed all its brickcarters and agreed to take them back by leasing its horses and carts to the workers, who continued to work exclusively for the company and were subject to its directions. Cohen found that because the workers had willingly participated in the new arrangement, the award was inapplicable. Other such contracting arrangements developed to evade awards.50

The existence of a legal relationship of employer and employee in a particular work relation was by no means clear. At least by the 1890s, the relationship of employer and employee was considered equivalent to that of master and servant,51 but no single rule determined whether

47 DT 31 Mar 1904, p. 5.
48 DT 27 May 1904, p. 6.
49 Re Cooper and Brady [1904] AR 387.
such a relationship existed. Usually an employment relation was assumed to have been established where the worker was subject to the control of the hirer as to the manner in which the work was undertaken.\(^{52}\) Thus, as a consequence of Clancy's Case, when the arbitration court was asked to impose a penalty for breach of an award it had to ascertain whether the facts of the particular work arrangement showed a sufficient degree of control for the worker to be classified legally as an employee. Difficulties arose in group hiring arrangements, such as butty gangs which were common in labouring work. Often a group of workers hired themselves out as a team, splitting the normal wages for the job between them. As these forms of hiring did not conform to the individualistic notion of master and servant, it was difficult to establish the existence of an employment contract. In March 1904 a gang of six non-unionist wharf labourers had begun unloading a cargo of bitumen for the Patent Asphaltum Company after their leader, James Campbell, was approached by a merchant acting as agent for the company. Campbell signed a contract with the company and the payments received were split evenly among the members of the gang. The Wharf Labourers' Union tried to enforce its award by claiming that he was carrying on the business of a stevedore, but Cohen found that Campbell had entered into the contract on behalf of the other workers and had no right of dismissal. As there was no relation of employer and employee between Campbell and his co-workers, the court held that it was bound by Clancy's Case so the award did not apply.\(^{53}\) The union then summoned the company as the employer of the men, but Cohen and Cruickshank stuck by their original ruling that the arrangement was purely one of contract and no employment relationship existed at all. Smith strongly demurred, saying that unless there was in some way an employment relation, the potential for evasion was enormous. The award would become meaningless, "and there would be no need for this Court at all."\(^{54}\)

At a time when many working arrangements were casual and the modern notion of permanent full-time employment was extremely limited, the High Court's approach would exclude many workers from the arbitration system altogether. The court was faced with the competing interests of employers who demanded a flexible pool of labour-power to

\(^{52}\) *Yewens v Noakes* (1880) 6 QBD 530 per Bramwell B at 532-533.

\(^{53}\) *Re Campbell* [1904] AR 244.

\(^{54}\) *Re Patent Asphaltum Company* [1905] AR 186 at 190.
respond to fluctuating output demands, and the unions which sought stability and permanency for at least a core of members. The western coalminers' award had addressed this conflict by allowing surface shiftmen to hew small coals when the miners were fully employed. In May 1904 the Lithgow Valley Colliery laid off its miners, a temporary practice adopted when demand was low. After the notices took effect it began receiving orders for small coal and, instead of re-hiring the miners immediately, it put shiftmen to work at the coal face at lower rates. When prosecuted by the union for breaching the award, the company argued that as there was no employment relationship with the miners the court had no jurisdiction over the matter. Cohen, however, did not feel bound to apply Clancy's Case extensively. After initial hesitation he distinguished it as relevant only in situations where no employment relation existed at all, while in the instant case there were still some employees involved. Recognising the continuing industrial relationship between the company and the miners, he also construed the definition of industrial matters as extending to future employment and held that since the miners were available for work they should have been employed.55

According to Beeby, the best illustration of the introduction of contract labour was to be found in the brickmaking industry. By the turn of the century manual forming of bricks was replaced by machines and contract labour was introduced as part of the new labour process.56 To limit the effects of the new technology, the Brickmakers' Union tried to have the award set the minimum number of workers employed at each machine, but the employers' association objected that Manning levels were not an industrial matter. After the court held otherwise, the association went to the Supreme Court; relying on Clancy's Case, it argued that the Act interfered with common law rights and the court should lean in favour of excluding jurisdiction as "it was never intended that the owner of a business should yield the entire control of that business to the Arbitration Court." Although Darley held that such matters were part of the terms and conditions of employment and therefore capable of being included in an award, he vented his ire by condemning the arbitration system for producing "the most alarming and deplorable amount of litigation" which forced

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55 Re Lithgow Valley Colliery Company Ltd [1904] AR 3 at 5-6.
56 Beeby, Three Years of Industrial Arbitration, p. 17; Warwick Gemmell, And So We Graft from Six to Six: the Brickmakers of New South Wales (Sydney: Angus & Robertson, 1986).
employers and employees into "hostile camps." These remarks were seized upon by employers and the conservative press. The president of the Master Builders' Association saw them as "an endorsement by one of the highest authorities in the State" of public opinion against the Act. Darley's comments were even published in pamphlet form by the national employers' body, the Central Council of Employers of Australia, as part of its ammunition against the federal Conciliation and Arbitration Bill.

Prompted by the sawmillers, who raised an "emphatic protest" at the chief justice's remarks, the Labor Council condemned Darley for stepping beyond his duty in criticising a law he was bound to enforce. A detailed reply was drafted which took issue with his reflections on the invasion of rights and liberties. Darley's statement that the Act was in derogation of the common law — really only a recital of the prevailing approach to statutory interpretation — received the harshest rebuke:

What is common law. Common law is built up on musty old statutes and previous decisions. This means that common law denies a people to develop a higher sense of justice, for the sense of justice in a people changes with their economic conditions, and the stage they have reached in civilisation. Each new statute is simply an outcome of the sense of justice of the community, and does away with the anomalies created by common law coming into conflict with new conditions and ideas. Judges who cannot grasp these conditions and ideas must lose the confidence of the community, and should give way to men who can.

It was outdated laws and conservative judges, they argued, which had reduced the effectiveness of industrial arbitration. The large amount of litigation in the court was put down to the presence of "the lawyer class" obstructing proceedings with obtuse arguments, aided by legalistic procedures: "take away the many legal technicalities, and we will have a Court for settling industrial disputes."

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57 Ex p Brickmasters and Pipe Manufacturers' Union (1904) 4 SR 226 at 229.
59 SMH 27 May 1904, pp. 6, 7 (J.R. Dacey); SLC Minutes 2 Jun 1904, ML A3838/69; SMH 3 Jun 1904, p. 6; Worker 4 Jun 1904, p. 4.
60 SMH 1 Jul 1904, p. 8. Copies of the reply were distributed among labor candidates and affiliated unions: SLC Minutes 21 Jul 1904, ML A3838/116.
61 SMH 1 Jul 1904, p. 8.
The Restriction of Preference

The issue of preference was ripe for challenge under the doctrine of supervening common law rights. Employers were united in seeing the provision as an invasion of the right to manage their own business as they saw fit. The matter was raised at the first annual meeting of the Employers' Federation in 1904 by the Master Carriers' Association delegate who called upon his fellow capitalists for support if the pending carters' award granted preference "in any way antagonistic" to the employers. The carters' union had applied for a form of preference clause, awarded in one of the first arbitration cases, which required employers to notify the union secretary when labour was required and compelled non-unionists to join the union within 14 days of commencing employment. When the court accepted these conditions in November the master carriers immediately applied for a writ of prohibition. Their legal costs were largely paid by the Employers' Federation as a test case.

Finding the preference section destructive of common law rights, Darley and Pring rejected both requirements of the clause as going beyond the express provisions of the Act. Instead they supported the liberty of the employer "who should best know who is and who is not a suitable workman for his business." Owen, however, adopted a less restrictive approach and held that the clause in the award was within the court's power as a "logical [con]sequence" of s.37. The majority decision was confirmed when the carters' union appealed. All three High Court judges supported the employers' contention that since the preference clause purported to regulate conditions before the employment relationship had been entered into, it was ultra vires the Act. Also, s.37 was read as being directed to the creation of equality between unionists and non-unionists, so to require that the union be informed of any job vacancies would give its members an unfair advantage contrary to the supposed purpose of the section.

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64 Ex p Master Carriers' Association (1905) 5 SR 77 per Darley CJ at 82, Owen J at 83-84.
justification for the invalidation of the preference clause was its violation of the fundamental and "natural" right of every worker to obtain employment as well as the employer's right to hire freely, though once the judges found that the arbitration court's award was not expressly authorised by the words of the Act they presumed its jurisdiction to be excessive.65 W.M. Hughes, the president of the carters' union, responded to the decision by calling on all sections of the labor movement to unite and press the Carruthers government for an amendment to the Act so that employers were clearly required to notify unions of labour needs, for without an effective preference provision the benefits to unionists were illusory.66

Awards, Agreements and the Common Rule

The extension of conditions throughout an industry by the court's declaration of a common rule had proved to be one of the most contentious provisions during the Act's passage. The original bill stated that the court could prescribe a common rule only when it determined the meaning or application of an industrial agreement. Wise had explained that the common rule "can only apply, and is only intended to apply, where there is a collective agreement"; it could not be imposed unilaterally by a trade union in an ex parte application.67 As finally enacted by s.37, though, a common rule could be applied in all proceedings, including an award. The court's power over agreements was unclear: the list of the court's powers of enforcement contained no mention of agreements,68 but under s.15 the court was given "full and exclusive jurisdiction" over an agreement which, "as between the parties bound" by it, was to have "the same effect and may be enforced in the same way as an award". As we have seen with Clancy's case, the extension of an industrial agreement by a common rule was a means by which employers could impose restrictions on their competitors. It was particularly useful in reducing uncertainty by "taking wages out of the market", as economists describe the process.

65 Trolley, Draymen and Carters Union v Master Carriers Association (1905) 2 CLR 509.
66 Worker 24 June 1905, p. 4.
67 IA Bill 1900 (LA), cl. 30; NSWPD vol. 103 (4 Jul 19001) p. 654.
68 IAA 1901, s. 37. The court had power to interpret agreements under s. 26 (a) (ii) as the interpretation of an industrial agreement was included in the definition of an industrial matter in s. 2.
This tactic was advanced by Cohen's assumption that the court could not interfere with industrial agreements, since the main purpose of the Act was to promote collective bargaining. Thus employers objecting to the extension of an agreement by a common rule were forced to either oppose the entire agreement or else prove a right to exemption by reason of their exceptional circumstances. An agreement between the retailing firm Lasseters and unions representing the shop and grocers' assistants was registered in December 1903. A second agreement made at the same time, providing that the first agreement would not come into force until its terms were made a common rule, was registered six days later. When the application for a common rule came up, Anthony Horderns and the Master Retailers' Association objected that there was no valid industrial agreement as it was not yet binding on the parties. They also argued that the arbitration court had no jurisdiction to declare an industrial agreement a common rule without first adjudicating all its terms and setting them in an award. Cohen rejected this interpretation as "too technical and rigid": if employers could not protect themselves by requiring that an agreement be extended to their competitors, "a destructive blow to industrial agreements would be effectively dealt, and the other method of having disputes settled by the Court would in every case be resorted to." Coincidentally a similar arrangement had been concluded by unions representing the employers and employees in the woolscouring industry. The Wool and Basil Workers' Union had obtained concessions over conditions after a conference with the employers' association in October 1903 on the condition that existing wage rates were not disputed. The employers insisted that the terms be made constant throughout the state, so an agreement was framed which would remain inoperative unless it was made a common rule. Cohen, following his decision in the retailers' application, declared this too a valid agreement. Objections were mainly raised by James Magrath of Penrith who, unlike the large woolscourers at Botany, did not operate on commission but traded directly in clean wool. His claims of disadvantage were overruled and the court allowed the common rule since the majority of employers, who were "unquestionably the best judges of what will be conducive to their interests," had agreed to the terms.

69 Ex p Hordern [1904] AR 88 at 93, 96.
70 Wool and Basil Workers' Association v Wool Scouring and Fellmongering Employers' Association (1903) AO 2/5709/210-212, 224; [1904] AR 277 at 280.
The applications for judicial review by the Master Retailers' Association and Magrath were heard together by the Supreme Court in May 1904. Both were unsuccessful. The judges adopted a broad approach in order to carry out the spirit of the Act, particularly as the purpose of the common rule was the maintenance of equality between employers. So it was held that the retailing agreement was a valid industrial agreement though in a state of suspension, while the woolscouring arrangement was not strictly an agreement since it was for an indefinite period; but as both were dealings in relation to an industrial matter they could be used to found jurisdiction for a common rule.\textsuperscript{71} Magrath left the matter there, but the Master Retailers' Association instituted an appeal.

Alarmed that the agreement seemed to be a "complete code" for the regulation of business, the High Court judges displayed a deep antagonism to its extension by common rule. In overturning the common rule, the judges stressed that the arbitration court was a judicial tribunal limited to the Act's purpose of settling disputes. The object of the Act was "not to constitute a board of trade, or a municipal body with power to make by-laws to regulate trade, but a Court of Arbitration, for hearing and determining industrial disputes and matters referred to it".\textsuperscript{72} The judges interpreted an industrial dispute in the same terms as a legal dispute, involving a "contest between parties" over a claim of rights. By creating the arbitration court in words appropriate to an adjudicative tribunal, the legislature had provided the safeguard of requiring a judicial decision "in the presence of the parties interested in setting up the opposite view". Once this legislative intention to protect the public was found, it was conclusive that the statute must be interpreted strictly and so a common rule could be granted only after the court had delivered an award.\textsuperscript{73} Nor, it was later held, could the court extend an agreement by adopting its terms in an award which was then made a common rule, unless the award was consequential to a valid reference of an industrial dispute;\textsuperscript{74} so employers were no longer encouraged to make agreements which did not prejudice themselves.

\textsuperscript{71} \textit{Ex p Master Retailers' Association; Ex p. McGrath} (1904) 4 SR 384 at 390, 394.

\textsuperscript{72} \textit{Master Retailers' Association v Shop Assistants Union and others} (1904) 2 CLR 94 at 95, 107.

\textsuperscript{73} (1904) 2 CLR 94 at 113.

\textsuperscript{74} \textit{Ex p Hermanson} (1905) 5 SR 607.
When the wool and basil agreement was next considered in the arbitration court, Cohen found that as no judicial order had been made the common rule was invalid and the application would have to begin afresh.\textsuperscript{75} The High Court's decision was later estimated to have affected common rules in 13 trades which had been based on industrial agreements.\textsuperscript{76} As they could no longer establish a common rule by filing an agreement, unions and employers making an agreement sometimes deliberately left a matter undecided, so that the court would have to make a judicial determination which could then form the basis for a common rule. Edward Aves, an English visitor investigating arbitration and wages boards for the Home Office, attended one such meeting, which he described as "a voluntary wages board, acting with the knowledge that the Arbitration Act at a later stage would give validity to its decisions."\textsuperscript{77} Heydon did not object to this ploy, as it allowed him to alter the conditions agreed by the parties and submitted as a consent award.\textsuperscript{78}

**Defining Industrial Disputes**

If the approach taken in Clancy's Case were followed completely, the court would be unable to decide industrial disputes which resulted in the employment relation being terminated. A strike does not itself end the contract of employment, but as it was often customary for workers to begin a strike after giving notice, many disputes would no longer involve a subsisting legal relationship between employers and employees. In November 1904 coal trimmers at Newcastle walked off the job in a dispute over extra payment for King's Birthday. Employed to level coal cargoes so that they did not shift during the voyage, the trimmers were hired on a casual hourly basis: so once an hour's notice of cessation of work had been given they were no longer employed at law. The stevedoring company referred the dispute to the arbitration

\textsuperscript{75} Re Wool and Basil Workers Agreement [1905] AR 157.


\textsuperscript{78} Brewery Employees' Union v Brewers' Association; United Grocers' Assistants v Retail Grocers' Association [1905] AR 344 at 345. Beeby admitted that this approach was designed to evade the Master Retailers' decision.
court, which issued an ex parte injunction ordering the men back to work. The union sought judicial review and the order was declared ultra vires by the Supreme Court in February 1905 on the ground that once notice had taken effect there was no contract and therefore no industrial dispute, which was assumed to be necessary for s.34 to apply. Under s.34 the criminal offence of striking was defined to include cessation as well as discontinuation of employment, but this was ignored in the judicial interpretation of the Act. Particular exception was taken to the mandatory injunction, which was treated as a violation of an employee's legal right to dispose of his own labour — a right which had not been expressly extinguished by the Act.79

While the coal trimmers emerged from the Supreme Court as victors, having evaded heavy fines for striking, the same legal principles were soon used by employers to frustrate union attempts to obtain benefits under awards. The northern coal miners had originally filed a dispute against J. & A. Brown in October 1903 after the combined proprietors decided to reduce hewing rates in accordance with the sliding scale embodied in the 1900 collective agreement. During the long wait for a hearing the issues in dispute widened and the union tried to bring each new one within the terms of the original reference, while the company stalled by continually raising preliminary objections. Frustrated by the delays, the miners began a series of strikes in 1905; in June the owners treated a complete stoppage as a mass resignation, replacing the strikers with non-unionists. When the case was next mentioned the union attempted to include the fresh dispute in the reference but Edmunds, the employer's counsel, responded that the court no longer had jurisdiction to hear the case as no members of the union were employed at the mine and "it was for them to continue the jurisdiction of the Court by continuing their contract." Heydon wanted to proceed to the actual dispute and rejected this argument as allowing either party "to deprive the Court of all power of dealing with the matter."80 The new issues were added to the claim in preparation for a conclusive determination of the dispute, two years after it had originally arisen.

79 Ex p Eiffe; the Newcastle Stevedoring Company (Respondents) (1905) 5 SR 118 per Darley CJ at 121. Pring J said more directly that "unless there is an existing employment there can be no such thing as a strike": at 122.
The company's next step in preventing an award was the Supreme Court. It argued that the union could not pursue a dispute when none of its members were employed by the respondent. The union replied that a subsisting employment relation was unnecessary to found the arbitration court's jurisdiction as the union had a statutory right to litigate a dispute independently of the individual employees: the Act contemplated collective, not individual rights of appearance. This contention was rejected as going completely beyond the purposes of the Act, which was designed to settle real disputes between employers and their employees. According to Cohen, now returned to general duties after his spell on the arbitration bench,

it would be monstrous to place in the hands of any union engaged in any industry a sort of roving commission to raise a dispute between an employer and a body of employees, who might be non-unionists, and who might be perfectly satisfied ... in order that abstract conditions of employment might be fixed in a manner satisfactory to the minds of the union.\(^8\!1\)

The union appealed. As the case was treated as concerning only future conditions of employment, it turned on whether the union itself had a right to bring a dispute. Griffith, giving the reasons of the High Court, decided that it did not. Starting from his findings in the Master Retailers' Case that the arbitration court was a judicial tribunal, he imported the notion that in litigation before courts of justice there must be a plaintiff with a legal interest to protect. Since the definition of an industrial dispute depended on a continuing disagreement over industrial matters between an employer and his employee, a union had no direct interest in a dispute, even though only a union could refer a dispute to the court. Unless the union acted on behalf of the individual employees claimed to be in dispute, it had no legal interest in the dispute and therefore could not initiate proceedings. Otherwise a union could invoke the court's aid "not to quiet an existing dispute, but create one and get it settled," which Griffith could not believe was the intention of the legislature.\(^8\!2\)

The High Court's decision in Brown's case in December 1905 was the most severe limitation of the arbitration court's jurisdiction so far. The miners' defeat in the courts was one of the chief reasons for their abandonment of compulsory arbitration and their return to collective

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\(^8\!1\) Ex p Brown; the Colliery Employees' Federation, Respondents (1905) 5 SR 412 at 417-418.

\(^8\!2\) Colliery Employees Federation of the Northern District v Brown (1906) 3 CLR 255 at 266-268.
bargaining. At first, few unionists appreciated that the decision threatened to destroy the unions' power to bring award claims. A month after the judgment was issued Edward Riley, the employees' member on the court, issued a statement condemning the High Court's reasoning. He argued that it had been the legislature's intention to create "a board of conciliation, with power to determine the fair working conditions of any industry in the State"; but the courts had contrived to place the arbitration court "on exactly the same footing as courts of litigation governed by the rules which regulate the proceedings of other tribunals." After the latest decision, he ventured, none of the cases remaining in the lists could be concluded.

Heydon had expressed doubts over the Supreme Court's judgment before it was confirmed on appeal. He was particularly concerned that the result would prevent semi-permanent and casual workers from ever being able to approach the court. "The Act," he mused, "does not say that the dispute must be between employer and employee; that is inferred from the Act by the Courts ... and what the Courts mean by that itself requires further analysis perhaps."

In February 1906, after a request by the union solicitor, George Beeby, for an interpretation of Brown's case, Heydon delivered a series of guidelines for the conduct of disputes. In future, the court would hear only genuine disputes "arising from a real dissatisfaction" between an employer and his employees, not those originating in the service of demands by a union. The court would intervene only after initial steps had been taken between the parties to resolve their disagreements, and while it was not necessary for the workers to approach their employer personally, the union could negotiate only at the request and as the agent of the employees. Riley's prediction proved correct when Heydon went through the list of pending cases on 2 March to determine which had been affected by the decision. Case after case was withdrawn as Beeby revealed that the claimant union could no longer establish jurisdiction since it was unable to prove that a union member employed by the respondent employer had requested

83 Robin Gollan, *The Coalminers of New South Wales* (Melbourne: UP, 1963), p. 113; *NSWPD* vol. 29 (1908) p. 386; see chs. 6, 9.
84 *SMH* 26 Jan 1906, p. 6.
85 Wharf Labourers' Union v Interstate Steamship Owners' Association and Coastal Steamship Owners' Association (1905) AO 2/61/2069; cf [1905] AR 367 at 372.
86 *SMH* 27 Feb 1906, p. 5.
the union to act on his behalf. Over 40 applications were wrecked by Brown's case; and by the end of the month, to Heydon's frustration, the court was running out of work as each application had to begin again. Beeby later claimed that the decision practically suspended the court's operations for six months. After Brown's Case, the court adopted the practice of requiring claimants to prove jurisdiction in an initial hearing, at which all the necessary preliminary steps were closely examined. These hearings allowed counsel for employers to delay the progress of a case by arguing over the admissibility of evidence and contesting the union's standing to include claims.

The conditions imposed by Heydon, combined with the strict enforcement of s.28 which required a special meeting of the union to decide to refer a dispute to the Court, meant that several steps were required before a claim could be brought. First, a meeting of employees at a particular workplace would have to agree to demand specific conditions and request the union to present them to the employer on their behalf. Next, armed with a letter of authorisation to act, the union secretary "waited on" the employer for a reply to a letter of demand. If the claims were refused or no reply was given within a reasonable time, a special meeting of the union was held under the rules after notice had been given to all members. The dispute was taken up and the union's committee of management might then appoint the secretary to conduct the case. Only then could the real preparations for the case, such as the organisation of witnesses and written evidence, begin. The need to prove all these steps resulted in the proliferation of documents and the possibility of paper disputes emerged. Heydon said in November that these preliminary proceedings tended to be so artificial that "with a little encouragement they would become legal fictions". In two instances in 1906 the Supreme Court held that the arbitration court's jurisdiction had been exceeded when unions added claims which had not been specifically authorised by a meeting of the employees it was representing. As the names of employees who had sought union

87 (1906) AO 2/73/9 et seq; (1906) 2/73/177; SMH 18 Feb 1908, p. 11; Beeby, NSWPD vol. 29 (19 Mar 1908), pp. 317, 320.
88 Saddle and Harness Makers' Trade Society v Cooper and Fox (1905) AO 2/69; Shop Assistants' Union v Mark Foy (1906) AO 2/87.
89 AO 2/89/67-71; Firemen & Deckhands' Association v Sydney Ferries Ltd (1906) 6 SR 639.
90 (1906) AO 2/87/414.
91 Ex p W.D. & H.O. Wills (1906) 6 SR 461; Ex p Commonwealth Portland Cement Co. (1906) 6 SR 720.
assistance emerged in evidence presented to prove that the union was acting on their behalf, victimisation by employers was always a possibility.92

The extreme point in the limitation of the court's powers came in the Master Tailors' Case in May 1906. Just before the tailors' award was due to expire at the end of 1905, the union sought to have it extended for a further three months pending a new reference.93 It had been assumed by the arbitration court that its power to vary its own orders included the ability to extend an award.94 The Supreme Court denied that this power existed because the object of industrial arbitration was the conclusive determination of disputes, and once an award was given the dispute was terminated. An award of the court was, in Darley's words, "as final and conclusive between the parties as a judgment of the Supreme Court in an action at law."95 All the judges thought that an extension would prevent the parties from knowing the extent of their legal obligations and reduce confidence within the industry. The union's argument that the power given to the court by s.26(o) to vary its own orders at any time included the capacity to vary or extend awards was rejected because an award was of superior status to an order of the court. Heydon regarded this restriction as a severe limitation on his ability to prevent industrial unrest as it indirectly hampered the adjustment of common rules to ensure fairness to all employers. Within a month of the Supreme Court's decision he circumvented it by delivering an award while reserving the right to vary it at a later stage. He had come to believe that the only way the court could operate effectively was by industry-wide regulation rather than the resolution of individual disputes, because unlike an ordinary court there could be no finality between parties who were in continual association under constantly changing circumstances.96

From 1906 the detrimental impact of the judicial review cases became a central aspect of the labour movement's demands for amendment of

92 In United Labourers' Protective Society v Commonwealth Portland Cement Co [1906] AR 302, it was found that of 86 signatories, 31 were dismissed soon after the date of the union's affidavit and 16 were sacked but re-employed as casuals subject to instant dismissal.

93 Re Tailors' Award (1905) AO 2/69/260.

94 Re Saddlers' Award [1905] AR 329.

95 Ex p Master Tailors' Association (1906) 6 SR 253 at 254.

96 Newcastle Wharf Labourers' Union v Hudson, Livingstone, and West [1906] AR 189 at 192.
the arbitration system. The subject was raised by the Labor Council in their discussions with the Employers' Federation in May. In response to the Council's suggestion that judicial review of the arbitration court should be abolished, Carruthers blamed the judicial status of the court:

The answer was that if the court were retained as at present constituted as a Court of record and law, it must be liable to be restrained by a writ of prohibition. The more it partook of the nature of a Wages Board, free from the formalities of a Court of justice, the less occasion would there be for writs of prohibition. It could not be promised that the board would be absolutely free, but the Attorney-General [Wade] was of opinion that for all practical purposes the Wages Board would be free from the processes of a Court.97

At the Employers' Federation conference in September, the High Court's decision against the coal miners was applauded for changing the arbitration procedure so completely that union agitators were excluded, and the shrinking list of disputes awaiting a hearing was put down to the withdrawal of unjustifiable cases. T.E. Spencer of the Master Builders' Association explained that the reduction in employers' fears was to a great extent "due to the way the Federation had fought the Act, and in very many instances the decisions given by the High Court were on appeal first instigated by the Federation."98 It has been noted in other areas that by selecting a series of test cases, interest groups can "draw the [reviewing] Court into developing and extending a particular legal doctrine with progressively wider public-policy consequences."99 Increasingly, this was happening with industrial arbitration as judicial review decisions cumulatively restricted the court's powers. However the initial antipathy of many employers to compulsory arbitration seems to have been reduced by their ability to use judicial review as a brake on the unions' seemingly unlimited demands to control their businesses. Seeing that there were limits to the court's power which reserved capital's control over management and profitability — that "the power of the unions to interfere is

97 SMH 3 May 1906, p. 8; SMH 28 Jun 1906, p. 9.
carefully safeguarded" by no less a body than the Supreme Court — some form of wage regulation became more palatable.\textsuperscript{100}

Towards the end of 1905, the carpenters’ union obtained an award which set a minimum wage and outlawed piece-work except for floor-laying.\textsuperscript{101} It was made a common rule in February 1906 on the application of the union, which sought to prevent the practice of tendering for "labour only" contracts which often resulted in carpenters being paid far less than the minimum award wage.\textsuperscript{102} The union then began enforcing it by bringing four test cases involving "labour only" contracts between carpenters and Haberfield Pty Ltd, which was busily developing a subdivision of the new garden suburb. Each of the elegant middle-class federation houses sold by the company was constructed under progress-payment contracts with the tradesmen (only the plumbers were directly employed), which the company claimed were introduced to eliminate the need for employing foremen.\textsuperscript{103} When the summonses for breach of the common rule were heard by the arbitration court, counsel for the company argued that the contracts put its operations beyond the reach of the court as there was no power to regulate industries generally and no relation of employer and employee existed; but after hearing evidence which showed that the company exercised complete control over the time, manner and order in which the carpenters worked, Heydon found the offences proved.\textsuperscript{104}

The company sought to have this decision subjecting it to the award overturned by the Supreme Court. After hearing the applicant’s counsel argue that at law there was no employment relationship because no duty of personal service existed, Darley delivered an unreserved judgment in February 1907 which characterised the matter as "purely one of contract" whose consensual sanctity must be protected from the imposed conditions of the award. Viewing Heydon’s decision as establishing a precedent with enormous potential for logical extension, Darley granted prohibition because the consequence of

\textsuperscript{100} This was the opinion of "a member of the bar having a very large experience in the Arbitration Court": see Curlewis, \textit{The Mirror of Justice}, p. 225.

\textsuperscript{101} \textit{Carpenters and Joiners' Union v Master Builders' Association} [1905] AR 394.

\textsuperscript{102} \textit{Carpenters and Joiners' Union v Porter and Green} [1906] AR 82; \textit{Worker} 28 Feb 1907, p. 4.

\textsuperscript{103} Amalgamated Society of Carpenters and Joiners v Haberfield Pty Ltd (1906) AO 2/88/83, 97.

\textsuperscript{104} AO 2/88/106; \textit{Re Haberfield Pty Ltd} [1906] AR 367 at 371.
allowing the penalty to stand would be to say that all contracts for the supply of labour gave rise to an employment relationship, which would be "a disastrous interference with individual rights."\(^\text{105}\)

Warning that award provisions could now be effectively evaded by written contracts which would destroy union attempts to establish minimum wages, the \textit{Worker} accused the Full Court of open hostility towards the spirit of arbitration, as shown by the latest decision which resulted in the Arbitration Act being "practically wiped out of existence". Heydon echoed these fears when, travelling to Cobar to hear a long-standing claim, he encountered the problem of contract work. The Wrightville branch of the Amalgamated Miners' Association, which represented two-thirds of the copper miners in the far west of the state, had initially applied for an award in December 1904. Like many other claims, it had fallen foul of the requirements for proving an industrial dispute, and the whole matter was re-commenced in August 1906. Almost all the miners were formally engaged on a contract basis, but the mine managers retained complete control over their operations. The union claimed that the contracts were "merely a cloak" for wage labour at piece-rates, and threatened the mine owners with strike action if technical objections to jurisdiction were raised.

Heydon did not blame them: in fact, he said that in view of the difficulty of sustaining a case, which required "skill resembling that of a special pleader," it was understandable that strikes persisted. The contention that a dispute over contract prices for mining labour was not an industrial dispute seemed to him "at first blush simply ridiculous"; after all, it was neither a trading nor a commercial dispute. In a rare and well-publicised touch of eloquence, he defended his failure to stop strikes in the light of restrictions on the Act's meaning and the consequent disillusionment of workers:

\begin{quote}
The barque of the industrial Arbitration Act made a brave show with sails and bunting at its launching ... but since I took the helm, the Act has been riddled, shelled, broken fore and aft, and reduced to a sinking hulk. No pilot could navigate such a craft. Do
\end{quote}

\begin{itemize}
\item \(^\text{105}\) \textit{Ex p Haberfield Pty Ltd} (1907) SR 247 at 251-252; \textit{DT} 20 Feb 1907, p. 6.
\item \(^\text{106}\) \textit{Worker} 28 Feb 1907, p. 4.
\item \(^\text{107}\) AMA Wrightville, \textit{Annual Reports} 1904-1907, ML Q334.7/A.
\item \(^\text{108}\) \textit{Amalgamated Miners' Association}, \textit{Wrightville v Great Cobar Ltd} [1907] AR 53 at 57; (1906) AO 2/90/890.
\end{itemize}
not say, however, that no ship can sail the seas, because this one has been so badly built.\textsuperscript{109}

The superior court judges had reached the limit of their intervention: any further and the Act would lose all meaning. The decision in the Haberfield case was overturned by the High Court six months later. All three judges held that the Supreme Court had no power to inquire whether the arbitration court's decision was erroneous or not, but as they did so by distinguishing between a decision on whether jurisdiction existed and a finding that was essential to the court's trial of a matter, the initial difficulties of establishing jurisdiction remained. Isaacs, hearing his first such case, thought the question whether the person charged was an employer was a question of fact "perhaps depending upon circumstances which the Arbitration Court from its special constitution is better fitted to determine than the ordinary Court of law."\textsuperscript{110} Griffith's decision was far more elaborate and went further than was necessary to uphold the appeal. He started by deciding that the arbitration court's powers were conferred by s.37 of the Act which established a twofold jurisdiction: an arbitral jurisdiction to determine disputes between employers and employees, and a punitive jurisdiction (shared with magistrates empowered under the Act) to inflict penalties for breaches of awards and common rules. The High Court's previous decisions restraining the court were only concerned with the arbitral jurisdiction, while different considerations were involved in the exercise of punitive powers.\textsuperscript{111} In his examination of this second jurisdiction, Griffith stressed both the supremacy of parliament and the juridical normality of the arbitration system's penal process. The present charge involved the breach of a common rule which "had the effect of the law of the land ... in the same way as a by-law of a municipal authority". Such charges were apparently within the jurisdiction of the arbitration court to determine, and in so doing it was necessary to inquire into whether the relationship of employer and employee existed.\textsuperscript{112} Griffith noted parliament's intention to make the arbitration court's decisions unreviewable, remarking that "if the legislature chooses to set up a Court of that kind it is perfectly free to do so." Charges heard by a magistrate could be taken on appeal to

\textsuperscript{109} [1907] AR 53 at 59.

\textsuperscript{110} Amalgamated Society of Carpenters and Joiners v Haberfield Pty Ltd (1907) 5 CLR 33 at 54.

\textsuperscript{111} (1907) 5 CLR 33 at 41.

\textsuperscript{112} (1907) 5 CLR 33 at 43, 39, 45.
the arbitration court, which had originally been presided over by a judge of the Supreme Court. As this process did not dramatically alter the situation existing before the Act was passed, there was "nothing suspicious" in the court's decisions being final when it sat at first instance. So although he inclined to think the arbitration court's decision was erroneous, as the law presently stood it could not be reviewed by the superior courts.\textsuperscript{113}

The High Court's latest decision at least allowed the arbitration court untrammelled exercise of its powers of enforcement. And because Heydon insisted on proof of jurisdiction before hearing the substantive issues in an award claim, the prospects of further judicial review were greatly diminished. In fact, no further cases involving the three-member arbitration court were heard by the Supreme Court. Once jurisdiction was established, Heydon was free to act, as long as he observed the niceties of applying his "judicial mind" to the facts.\textsuperscript{114} In response to the superior court decisions, Heydon had come to think of the court's function as less adjudicative and more regulatory. The court's power, he thought, "is more in the nature of a legislative power ... and any attempt to force it into another mould is perfectly useless."\textsuperscript{115} Eager to perform his function of resolving disputes, Heydon willingly participated in the superficial observance of formal requirements that the court act as a body dealing with judicial adjudications. The preliminary jurisdiction hearings became an elaborate form of theatre as the union secretary was led through the heavily-documented steps required to prove the existence of a dispute. The judicial review cases required union officials to observe closely the steps involved in establishing a dispute. This increased the pressures on unions to become more bureaucratic, while the specialised legal knowledge reinforced the development of a clique of industrial lawyers and advocates. Once the participant actors in the arbitration system had adapted to the formal requirements imposed by the superior courts, the court was free to act in a relatively autonomous manner. Heydon, however, shared many of the assumptions implicit in the judicial review cases, and applied them when deciding the actual

\textsuperscript{113} (1907) 5 CLR 33 at 46. Isaacs, on the other hand, said he was "by no means convinced" that the Arbitration Court's decision on the "real relationship" between the parties was wrong: 5 CLR at 55.

\textsuperscript{114} Operative Bakers' Association v Sydney and Suburban Master Bakers' Association (1906) AO 2/73/19.

\textsuperscript{115} Re Shore Drivers and Firemen's Award [1907] AR 195 at 197.
content of awards. From 1907 fewer claims were struck out, and the court had begun clearing its backlog of cases by the time its time expired in June 1908.

The judiciary's limitation of the Arbitration Act was by no means unique. The High Court adopted the same restrictive approach in reviewing decisions of the Commonwealth arbitration court; after first interpreting its powers widely, the common rule was declared unconstitutional, while the meaning of "industry" was confined. Then, with the change in the composition of the court in 1913, Higgins' range of powers was progressively widened by a liberal interpretation of "industry" and "dispute". The initial restrictive approach was not confined to industrial arbitration either: the first High Court bench, and Griffith especially, was hostile to all statutes which were regarded as substituting new statutory rights in derogation of existing common law ones. The judicial limitations were made possible by employers' organised resistance to progressive legislation. The Central Council of Employers' Associations initially financed jurisdictional challenges to Higgins' arbitration decisions as part of a wider and very successful campaign of destroying all of the legislative planks of the New Protection policy. Four of the eight legal challenges demolishing federal protectionist legislation were organised and financed by this body.

Undoubtedly judges like Darley and Griffith were opposed to the idea of compulsory arbitration and were not unhappy to restrict its application. But they did this within a legal tradition which required legislative innovations to be accommodated to the existing system of juridical relations, even if it meant spurning the will of parliament. The


117 Eg Great Fingall Consolidated Ltd v Sheehan (1906) 3 CLR 176 (WA workers' compensation Act).

rights which they saw fit to uphold, based on freedom of contract and individualistic notions of property, inevitably conflicted with the indeterminate and collective rights introduced by the Arbitration Act. Characterised as a judicial tribunal, the arbitration court was particularly susceptible to restraint when it attempted to resolve the basis of disputes by regulating industrial conditions. The result was a system that was legalistic in appearance and procedure, and subordinate to the established legal structure.
Chapter 8

The Work of the Arbitration Court, 1902–1908

During its six-year life, the New South Wales Court of Arbitration made only 89 awards, yet heard over 800 applications of various kinds. The bulk of the court’s time was taken up with preliminary matters and the extension, variation and enforcement of awards. The court was thus confined to the continued supervision of a limited number of trades, principally in the mining, shipping and land transport, building, clothing and food industries, with a miscellany of small manufacturing trades. No records were kept on the number of workers covered by awards, but a rough estimate is that 60,000–70,000 employees, about 15% of the state’s employed workforce, worked under an award or common rule of the court at some time during the Act’s operation. While the court’s direct impact on working life was limited to a small number and range of workers, the reach of the arbitration system was much wider. At the time of the Act’s expiry it was estimated that 50,000 workers and over 1,250 employers were working under registered industrial agreements. While the court was excluded from direct regulation of these agreements after 1904, it was still responsible for their enforcement. And the effects of the arbitration system were also felt through its regulation of organisations registered under the Act.

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1 This is a conservative approximation, based on a table drawn up by the Attorney-General’s Department around April 1905 (AGJ Letters, 7/5424) and the list of awards in Official Year Book of NSW 1908 compared with the employment and union membership figures given in the appendix. At the end of 1903, there were 22 awards affecting 14,452 employees and 145 employers: B.R. Wise, The Industrial Arbitration Act of New South Wales: A Reply to Critics (Sydney: 1904), p. 16. Most early awards were for a limited period; by August 1907, 37 awards were still in force: Great Britain, Home Office, Report ... on the Wages Boards and Industrial Conciliation and Arbitration Acts of Australia and New Zealand by Ernest Aves (London: HMSO, 1908), p. 136.

2 SMH 30 Jun 1908, p. 6. At the end of 1906 there were 65 agreements covering 28,700 employees and 1,100 employers: Official Year Book of NSW 1906, p. 791.
This chapter is based on a computerised database of all 344 cases decided by the Court of Arbitration, president and registrar, and published in the New South Wales Arbitration Reports between 1902 and 1908. The cases were classified by parties, judgment date, tribunal, workers, industry, case type, litigant type, keywords, and counsel. As the published reports are not comprehensive, they were supplemented by the records and appendices produced by the registrar and published at the end of the Reports, as well as the register of applications to the court, which was kept by the registrar. As in chapter 7, these sources were supplemented by Cohen's notebooks, newspaper reports of court proceedings and the near-complete collection of transcripts of cases before the court, although the sheer volume of the transcripts prevented their use in more than a small proportion of cases. These sources allow a picture of the daily work of the court to emerge. Considering the frequent claims of the restrictions and inflexibility of its statutory framework and legal environment, the court's activities show a surprising degree of variation and adaptation. The court responded to problems, particularly its overwhelming caseload, by developing procedures and new methods of regulation and dispute resolution. As specialist advocates emerged, the parties also adapted quickly to the new environment. The result was a pattern of behaviour which bears many similarities to the modern industrial arbitration system, though highly legalistic in several respects.

The Registrar

As a lawyer, administrator and court official the registrar, George Addison, was responsible for a fledgling bureaucracy that mediated between the executive and court. He was the head of the Office of Industrial Arbitration within the Attorney-General's Department, reporting to the departmental under-secretary on the conduct of business and relying on the department for resources. The staff, eventually numbering 12 (a chief clerk, six clerks, two shorthand writers, two typists and a messenger) were subject to the Public Service Board, although Addison had some discretion in the appointment of temporary staff. By 1904 the annual budget for the administration of the Act had reached £6,000 and the registry (divided into a court branch and a registry branch) occupied permanent offices in Queen's Square. The office was appraised of industrial developments through police reports,
departmental correspondence, the daily newspapers, and by telephone connected to the city, Newcastle and Mt Victoria exchanges.³

The registrar exercised a mixture of judicial and administrative functions. Apart from daily administration of the Act and assisting in the formulation of policy, Addison drafted regulations and amendments, and was responsible for arranging prosecutions under the Act. Some executive and prosecuting power was retained by the department, but after Wise's departure the registrar assumed greater control over the Act's implementation. The registrar's precise position in relation to the bureaucracy and court was never clarified. His subordination to the court was less evident in Cohen's day, but with Heydon's appointment the president assumed a greater part in the direction of the system.⁴

The registrar exercised a range of statutory powers and duties. The registration of unions was largely administrative, although his application to the court to cancel registration was held to be judicial in nature. The registrar had the discretionary power to dispense with the requirement of a special union meeting to authorise the commencement of court proceedings.⁵ He could also refer a dispute or breach of an award to the court. This power was generally exercised at the direction of the court, although Addison referred disputes involving unregistered unions on his own initiative.⁶

In spite of its heavy workload, the court made little use of expert assessors. Instead, the registrar was frequently delegated adjudicative functions under awards. This technique first emerged with the saddlers' case in 1903, where the court provided that disputes arising from the log of piece-rates would be determined by the registrar, with an avenue of appeal to the court. Although problems occurred when alleged breaches turned on interpretation of the award, the court later

³ Chief Clerk, Report on Cost of Administration of Justice, 16 Apr 1904, AGJ Letters AO 7/5397; Acting Under-Secretary's Minute 10 Apr 1905, AGJ Letters AO 7/5402; AGJ Index to Letters Received 1907, AO X2070. Most of the correspondence concerning the Act has been destroyed, although summaries are contained in the departmental letter indexes.

⁴ AGJ Index to Letters Received 1904, AO X2067; ibid 1905, AO X2068.

⁵ IAA 1901 s. 28(b); applied in Slaughtermen and Journeymen Butchers v Carcase Butchers' Association [1906] AR 284.

⁶ Re Rugless [1904] AR 218. In Re Wharf Labourers' Award [1904] AR 290, the court instructed the registrar to file an affidavit bringing the union's restriction on entrance before it. For reference of disputes, see NSW Government Railways Traffic Employees' Association v Railway Commissioners [1905] AR 323; Re Wharf Labourers' Award [1908] AR 51.
included the clause in the common rule for the industry.\textsuperscript{7} The procedure was followed in the bakers' agreement made in August and in the western coalminers' case decided in December, where the registrar was designated as the umpire of a local committee of arbitration, again with an appeal lying to the court. In the broom makers' case the court awarded preference with the condition that Addison should finally determine whether particular non-unionists might be employed.\textsuperscript{8} By 1905 it was standard practice for the court to include in its awards and common rules a clause providing that disputes be referred to a committee appointed by the parties and, if not settled, thence proceed to the registrar and ultimately the court. Other clauses reserved contentious factual questions (such as slow workers and casuals) to the registrar. Addison, sitting as the registrar of the court, dealt judicially with an average of 63 incidental matters annually.\textsuperscript{9} The cases where the registrar's decision was appealed to the court give some indication of the work undertaken in this area. In one, he was called upon to decide whether women employed to side-stitch mattresses were mattress makers or not. After viewing the work, he held that they were. The registrar also determined that a handyman employed by a furniture store was a french polisher, fixed the wage of a slow timber worker, and held that the sawmillers' award did not apply to casual hands.\textsuperscript{10}

Lawyers

Within two years of the court's establishment, a small group of specialist industrial lawyers and lay advocates had developed. Although unionists complained at the presence of lawyers in the court, particu-


\textsuperscript{8} Sydney and Suburban Master Bakers' Association v NSW Operative Bakers' Association [1903] AR 438; Coal-Miners' Association of Western District v Western Coal Association [1904] AR 125 at 135; Broom Workers' Union v Brush and Broom Manufacturers' Association [1904] AR 250.

\textsuperscript{9} AR Records [1904] 440; AR Records [1905] 436; AR Records [1907] 278; This function continued with the introduction of the Industrial Disputes Act: the registrar handled 92 such matters in the first half-year of its operation: AR Records [1908] 441.

\textsuperscript{10} Re Furniture Trades Award [1905] AR 276; Re United Furniture Trades Award [1906] AR 351; Re Sawmill and Timber-Yard Employees' Award [1908] AR 55; Re McEnroe [1907] AR 14; Re Pittman [1906] AR 298.
larly their cost, unions were not disadvantaged in legal representation. Analysis of those who appeared before the arbitration court during its first six years\(^\text{11}\) shows that while employers were more frequently represented by lawyers, unions were capably represented in the bulk of cases. Of the 296 reported cases between unions and employers or employer associations in which both sides appeared, 70 percent were conducted by lawyers or very experienced lay advocates (those with ten appearances or more) on both sides. Union representatives faced lawyers or experienced advocates in a further 20 percent, while the situation was reversed in five percent of cases. In the remaining five percent of cases, neither side had such representation. When it is considered that often the union secretaries had more arbitration court experience than their legal opponents (most of whom appeared in the court only once or twice), the picture appears more balanced. Lawyers usually bowed out of cases between unions, leaving both sides to be presented by their secretaries. Table 8.1 shows that employers and employers’ associations relied heavily on barristers, while unions predominantly used solicitors and their own officials.

\[\text{Table 8.1}
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\begin{center}
\begin{tabular}{|l|c|c|c|}
\hline
Party & Barrister & Solicitor & Other \\
\hline
Employer Assn & 70 & 24 & 10 \\
Employer & 105 & 40 & 22 \\
Union & 51 & 148 & 126 \\
Worker & 2 & 8 & 1 \\
\hline
TOTAL & 228 & 220 & 159 \\
\hline
\end{tabular}
\end{center}

\textit{Source: NSW Arbitration Reports 1902-1908; NSW Law Almanac. Notes: Principal parties means claimant or applicant and respondent (or association if joined). The reported cases omitted many summonses for penalties.}

That the unions were effectively represented was largely due to George Stephenson Beeby, the pre-eminent practitioner in the industrial jurisdiction. A former pupil-teacher and sometime journalist, Beeby

\(^{11}\) Material on appearances in this section was compiled from a comprehensive database of cases reported in the \textit{Arbitration Reports}, and compared with the \textit{NSW Law Almanac} for various years. The figures record only appearances for principal parties; third parties, intervenors and objectors are not included.
had been involved with the Labor party from its beginnings. He became a key proponent of the Labor solidarity pledge and one of the party's leading intellectuals, associating closely with Holman. After standing as Labor candidate on several occasions, he won the seat of Blayney in 1907. Along with Hughes and Holman, Beeby was one of the first crop of Labor stalwarts to enter the law. He was enrolled as a solicitor in 1901 and his firm of Brown & Beeby began specialising in industrial law soon after the arbitration court opened. His first few cases as an industrial advocate were for the wharf labourers and carters, the unions dominated by Hughes, but he branched out after taking up the tailoresses’ case. Beeby's record in industrial advocacy during the life of the first court was phenomenal. He appeared, for either the applicant or respondent union, in 25 percent of all reported cases. In 1906 J.B. Holme, the first chief clerk of the arbitration court, joined Beeby's firm. He had resigned from his former position in 1903 when he failed to have his position re-graded, and practised in the industrial jurisdiction before moving to the country.

Other legally-qualified Labor stalwarts also practised in the industrial jurisdiction. Both Holman and Hughes made a handful of appearances; Holman's union clients were varied, but Hughes appeared exclusively for those unions with which he was closely associated. Philip Sullivan, who had been admitted in 1882, was another solicitor active in pleading the union cause, and the firm of Sullivan Brothers established the largest union practice after Brown & Beeby. Sullivan had been elected as Labor member for Darlington in the 1901 elections, when he made compulsory arbitration a key element of his campaign. During the parliamentary debate that year he emerged as the Labor member most familiar with the bill's objects and specifics. D.R. Hall, a


13 The Arbitration Reports show Beeby appearing for an employer on one occasion, but this may have been a mistake: Ex p. Petchell & Co [1905] AR 13.

14 J.B. Holme to Registrar, 5 Nov 1903, J.B. Holme to Registrar, 16 Nov 1903, AGJ Letters Received, AO 7/5398; (1906) AO 2/73/11; AO 2/73/177; NSW Law Almanac 1908, p. 75.

15 NSWPD vol. 1 (4 Sept 1901), p. 1107ff; SMH 10 Jul 1901, p. 8; Heather Radi, Peter Spearritt and Elizabeth Hinton, Biographical Register
member of the party's central executive and MLA from 1901, appeared in five arbitration cases after being admitted to the bar in 1903. These men apart, the unions also relied on the established legal profession. Barristers were engaged in the early cases, but in time unions tended to rely on their own solicitors or on union secretaries to present their cases, particularly for the enforcement of existing awards.

But not all, or even the best, advocates were lawyers. After Beeby, the most practised advocate in the court was Albion Richard Croft, who became something of a specialist lay practitioner in the industrial jurisdiction.16 Appearing first for the ferry employees and milk carters in September 1905, he rapidly assumed the carriage of penalty applications for a wide variety of unions, conducting 41 reported cases. Some union secretaries, like Curley (northern coalminers), News (butchers), Harry Holland (tailoresses), Catts (railway workers), Kelsey (hairdressers), Roe (painters) and H.A. Mitchell (enginedrivers) gained considerable experience through the conduct of penalty cases and matters consequential to awards. Most of the carters' litigation from 1906 was handled by the union secretary, Mick Connington, who later became one of the leading industrial advocates.17 Labor politicians were also drafted to the fray: Dacey put the woolscourers' case for an award, while Spence conducted the breadcarters' application. At this stage, though, Croft was the only lay union advocate to represent more than one union.

About a third of the New South Wales bar appeared before the court during its six years, but most were engaged for only one or two cases. Only nine regularly practising counsel appeared more than five times, and then mainly for employers. The leading employers' advocate was Arthur Kelynack, a junior barrister who represented the major associations and many individual employers. Of the barristers who appeared most frequently in the court, Campbell and Watt specialised in the mining and shipping trades, appearing for either side. Before becoming Attorney-General, C.G. Wade mainly represented the coal proprietors, suggesting that he was kept on retainer. The four most experienced

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industrial barristers — Kelynack, Wade, Broomfield and Rolin — invariably appeared for the employers' side. Employers and their associations often kept to their own solicitors, though at least two solicitors soon emerged as industrial arbitration specialists. John Stinson, the president of the reactionary PRL and partner of the leading firm Pigott & Stinson, built up a practice representing the associations of master bakers, breadcarters, brickmakers and tanners as well as individual employers. Alfred Nathan of Westgarth Nathan (afterwards Minter Simpson) began by representing the master tailors, but soon added the master brewers, grocers and stevedores to his books. The secretary of both the Clothing Manufacturers' Association and Employers Federation, Frederick Wegg-Horne, also became a prominent advocate. Though not yet legally qualified, he appeared for the clothiers, iron trades employers, carcase butchers and individual respondent employers.

Apart from generalised contempt (as exemplified by Spence) for their class bias and mercenary lack of commitment, the cost of legal representation was the greatest cause of the unions' disaffection with lawyers. Figures collected by Ernest Aves showed that between 1904 and 1906, unions spent an average of £167 annually in arbitration proceedings. A large part of this cost consisted of witnesses' expenses (unions insisted on paying their witnesses for time lost) and the preparation of transcripts. Only half of the £115 spent by the saddlers went in lawyers fees, while the Lithgow coal miners paid £60 to witnesses, £75 to their lawyer and £57 for court records. Eight unions spent more than £250 in arbitration expenses between 1904 and 1906, but most of these were involved in judicial review cases. The highest costs were incurred by the coal unions, which often indulged in the luxury of silk. Yet for a small union (most had less than 200 members) the expense of engaging just a solicitor would have been high. The cost of obtaining and administering an award would have been all the more keenly felt because lawyers' fees were not recovered in orders for costs, while the court placed a limit on membership subscriptions.

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19 Bennett, *History of Solicitors*, p. 221.

20 *RCIA*, p. 704; *SMH* 15 May 1903, p. 6; Ryan, *Two-thirds of a Man*, pp. 77, 84.
(usually 6d per week) as a condition of awarding preference. Unions also incurred large legal expenses not directly related to arbitration cases, but which may have been the result of their new-found legal status.  

Procedure

The labour movement's claims that lawyers tended to prolong cases and obfuscate issues are only partially borne out. Although barristers did over-indulge in cross-examination, union leaders were also guilty of calling numerous witnesses to give repetitive or useless evidence. Sullivan claimed that much of the congestion was the result of "secretaries of unions often taking trivial cases there for the purposes of advertising themselves — cases which had no right to go to court." Lawyers (and the court members) showed remarkable aptitude for picking up the technicalities of work processes. They were also less likely to become entwined in detail than many unionists, who were often bent on proving the complexity and uniqueness of their particular trade. Argument was generally confined to the facts and legal precedents were infrequently cited; when the law reports were referred to, it was usually on the exercise of the court's or president's powers. The greatest intrusion of case law came from the restrictions laid down by the jurisdiction cases. From 1905, when minute attention to proof of jurisdiction became crucial, legal advice (though not representation) was a necessity. As Heydon said to one union secretary, "If your union can raise the funds, I advise you to go to some competent solicitor, and act under his advice. There are a number of pit-falls in this Act, and you want a guide to avoid them." Heydon made great allowances for lay representatives, and frequently advised them from the bench on the best way to proceed. While proceedings were conducted in a relatively informal manner, to the worker spectators in the court the proceedings must have seemed far removed from the swift hearing and simple justice they expected.

Hearings were conducted according to legal procedure, though with less formality. Award applications often entailed several appearances

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22 SLC Minutes 13 Jun 1905, ML A3838/370.
23 Electrical Trades Union v Electrical Employers' Association (1906) AO 2/73/123.
(beside mentions) before the actual hearing. Often the applicant sought
directions from the court on the service of documents and made applica-
tions to join or substitute respondents, while sometimes the issues in
dispute were clarified by a preliminary hearing. The rigours of proving
the court's jurisdiction to hear the claim were tackled in a separate
preliminary hearing at which evidence was adduced to show that the
conditions laid down by the superior courts had been observed. Early
award cases often continued for several weeks, but from about 1906
the hearing itself generally ran for between four and eight days. First
the claimant opened the case (Beeby took this opportunity to give an
overview of the union's log and the history of the dispute), then
witnesses were sworn, examined, cross-examined and sometimes re-
examined. The union secretary was the chief witness, supported by a
procession of workers in various branches who came to recount the
mysteries of their branch of the trade or simply to have their say. The
length of the hearing depended mainly on the number of witnesses
called by the claimant, and the rigour with which they were cross-
examined. Usually the respondent employer or association called only an
employer or manager, whose main task was to explain the ruin that
would eventuate if the union's claims were countenanced. The judge
often interrupted with questions to witnesses and counsel; lay members
of the court confined themselves to points of factual clarification. The
only written pleadings were the claim (supported by affidavits from the
union secretary) and answer, but written exhibits were introduced at
any stage. At the conclusion of the evidence, counsel delivered their
addresses, taking the issues in dispute seriatim. This stage of the
proceedings, which might last for two or three days, often turned into
lengthy discussions between the advocate and the judge, with frequent
contributions by opposing counsel. Each side tried to impress a general
picture of working conditions, profitability, the state of the industry
(especially interstate competition, when Victorian wages board decisions
were examined) and the principles to be observed. Previous awards
would be compared, along with the minimum terms that each side was
willing to accept. The court would then retire to pore over the
transcripts and exhibits, delivering their judgments a few weeks later.

The Act allowed the court to admit "such evidence as in good con-
science it thinks to be the best available whether strictly legal
evidence or not." Thus while the rules of evidence (eg the rule
excluding hearsay) were not to be strictly observed, the court was still
instructed to observe the "best evidence" rule, the general principle governing the probative value of testimony. The president alone was given the power to determine the admissibility of evidence, but this power was rarely exercised. The ingrained habits of lawyers and the retention of court procedures in the examination of witnesses ensured that most aspects of the law of evidence, including the law of hearsay, were only slightly relaxed. For example:

BEEBY [examining union secretary]: What is the output from the log band saw as compared with one of the old frames?
SHAND [barrister for respondent association - to witness]: Do you know that?
WITNESS: From information I have received.
SHAND: I object to it.
BEEBY: I will get it from one of the witnesses later on.24

The Search for Principles

We have seen how Wise attempted to disarm criticism of his bill by leaving contentious questions to the court's discretion. As the Act contained no obvious principles to guide the exercise of the court's considerable powers, the court was forced to invent them. Initially Cohen and his colleagues interpreted the aims of the Act, and therefore its functions, in the widest terms. In the court's first award case Cohen held that a completely new régime had been created in industrial relations: "the absolute freedom of contract that existed prior to the passing of [the] Act has been considerably modified by its provisions." Henceforth the employment conditions of those covered by the Act could not be altered unilaterally; unless an industrial agreement was concluded, the court was the sole arbiter of any change to existing relations.25 This argument was used to evolve a new remedy, the summons to preserve existing conditions, which was issued when employers altered the terms of employment before a dispute could be heard.26

In Cohen's view, the lack of prescriptions or restrictions in the Act was a sign that the legislature intended the court do anything which in its conscience achieved the aim of resolving disputes.27 But as the

24 Sawmillers' Case (1905) AO 2/5719/54.
25 Newcastle Wharf Labourers' Union v Newcastle and Hunter River Steamship Co Ltd [1902] AR 1 at 7-8.
26 Lithgow District Smelters and Workers v Great Cobar Copper-Mining Syndicate [1903] AR 130 at 131.
27 Ex p Lithgow Valley Colliery Co Ltd [1902] AR 71 at 76.
Act's policy was the encouragement of collective bargaining, the court should not interfere with industrial agreements; the parties knew better than the court what was best for the trade.\textsuperscript{28} Cohen refused to accept strict interpretations which limited the making of industrial agreements; anything that encouraged them was justified by the policy of the Act. Similarly he interpreted "industrial matters" as relating to all aspects of the conditions of employment.\textsuperscript{29} Cohen regarded the court's jurisdiction according to the apparent objectives of the legislation, resulting in a reading that was restrictive but not formalistic. In two early cases, employers argued that they were engaged not in industry but in domestic service, which was specifically excluded from the court's jurisdiction. On looking at the definition of "industry" in the interpretation section, Cohen found that the legislature's intention was to give the court jurisdiction over businesses carried out for profit. Restaurants were engaged in a business and not domestic service, but employees of a private, non-profit club fell outside the court's purview because their position was much closer to domestic employment.\textsuperscript{30} But once Cohen returned to the Supreme Court bench, he fell in with the restrictive formalist interpretation of the court's jurisdiction.

The court under Cohen did not develop a coherent policy of wage fixation, preferring to rely on abstract and ad hoc notions of fairness in each industry. The problem of determining wage rates did not arise as often as might be expected because a high proportion of award claims were really consent awards based on an agreement between the union and the employer association: the real issues in dispute were hours, preference and the number of apprentices or improvers. When complicated price lists for piece rates were involved, Cohen sometimes referred the details to a committee drawn from the union and the employers.\textsuperscript{31} The court at least attempted some consistency within an

\textsuperscript{28} Ex p Walker [1903] AR 207 at 211; (1903) AO 2/5708/212. \\
\textsuperscript{29} Ex p Hordern [1904] AR 88 at 93-94; Ex p Brickmakers and Pipe Manufacturers' Union [1904] AR 226. \\
\textsuperscript{30} Hotel, Club, Restaurant and Caterers' Employees' Union v Caterers and Restaurant Keepers' Association [1902] AR 77 at 78; Re Civic Club [1904] AR 231. By s. 2, "industry" meant "business, trade, manufacture, undertaking, calling, or employment in which persons of either sex are employed, for hire or reward ... but does not include employment in domestic service." \\
\textsuperscript{31} Eg Amalgamated Journeymen Tailors' Association v Master Tailors' Association [1903] AR 445; NSW Saddle and Harness Makers' Trades
industry: the minimum wage for textile cutters was set at the same level as that for pressers and journeymen tailors.\textsuperscript{32} The coal mines, with large variations in the condition of seams, defied standardisation in hewing rates, so the results of previous agreements were taken as a benchmark. Evidence of the wages paid by "respectable" employers carried great weight. When piece or casual rates were common, Cohen attempted to fix a minimum rate based on the earning capacity of the average worker.\textsuperscript{33} Within Cohen's ad hoc approach lay a combination of two incipient doctrines: a reasonable minimum or living wage, limited by the industry's capacity to pay. In the Broken Hill miners' award of 1903, he said "there naturally arises a desire to grant the demands where they are reasonable in themselves," but ignored the higher cost of living at the Barrier and refused to award an increase because the low profits of the industry and the limits of the "wages fund" could not support it.\textsuperscript{34} Here, as elsewhere, Cohen found principles in the Act as and when he needed them: he could not award different rates among the mines because the policy of the Act required equality and uniformity. Cohen expressed himself most clearly in the bookbinders' award, which was formulated in 1904. The union argued its entitlement depended on a high degree of skill but Cohen, while recognising that wages should vary proportionately with skill, could not accept that it was the sole principle guiding the court:

Far and above all is the industry itself: What can the industry afford to pay: And in connection with that we have to consider are the workmen or workwomen employed in the particular industry underpaid, in the sense that they are getting a wage which might be classified as far below a living wage, or as a wage which is below the ruling rates of the industry.\textsuperscript{35}

The industry was in strong competition with Victoria and Britain, so the minimum wage was fixed at 52/-, the prevailing rate for ordinary

\textsuperscript{32}Cutters and Trimmers' Union v Wright [1905] AR 55.


\textsuperscript{34}Barrier Branch of the Amalgamated Miners' Association v Broken Hill Proprietary Co Ltd [1903] AR 525 at 528, 531. Cohen did not actually subscribe to the wages fund theory: it was simply used as a shorthand for capacity to pay.

\textsuperscript{35}Bookbinders and Paper Rulers' Union v Master Printers and Connected Trades' Association [1905] AR 209 at 212-213.
competent journeymen. In the ferry employees’ case, the court refused to grant an increase in wages because the industry, since the decline of sailing ships, was in a bad state with highly depreciated assets. In assessing an award claim, the court had to see that the industry "is in a position fairly and reasonably to carry the additional burden, or any portion of it."36

In contrast with Cohen, Heydon embarked on a search for statutory principles as soon as he was appointed president. In his first case, involving sawmill and timber yard employees, the main point in contention involved casual workers who unloaded timber at the suburban yards. Most other workers were semi-skilled saw operators or highly skilled machinists operating under an agreed classification. In reply to the employers’ contention that the court should not fix a minimum wage for casual workers, Beeby argued that the first duty of the court, recognised by its previous practice, was to set a minimum living wage based on "the earning capacity of the fair average man." Troubled by the insubstantial nature of the decision he was called upon to make, Heydon asked for some principle to guide him. The employers had argued that market rates and the industry’s capacity to pay should govern the court’s determinations, but now Beeby was presenting a different doctrine:

There is one solid principle one can get hold of, and it is a great blessing even to get that; ... that in the case of the [unskilled] labourer it must be a fair living wage. But when you get above him on what principle are you to base the award? Is it to be the practice which has hitherto prevailed? Is it to be the price of labour in the open market? If one is to have no principle to go on, you are embarked on an ocean without a rudder. I should like to get some guide.37

Beeby replied that the level beyond a bare living wage was determined according to skill and limited by what the industry could afford to pay; in a unionised workforce with a recognised work structure, market rates no longer had any relevance.

When Heydon delivered the court’s judgment, he first found it necessary to propound the principles upon which he would discharge

36 Sydney and Manly Ferry Employees’ Union v Port Jackson Co-Operative Steamship Co Ltd [1905] AR 253 at 257; also Tanners, Curriers and Leather Dressers’ Association v Master Tanners and Curriers’ Association [1904] AR 261.

37 NSW Sawmill and Timber Yard Employees’ Union v Sydney and Suburban Timber Merchants’ Association (1905) AO 2/5719/557.
his duties. The greatest difficulty he found was that while the Act conferred extensive powers on the Court, it provided little guidance on how they were to be exercised. Clearly a new system of settling disputes had been established,

but as to what the results of the new method are to be the Act is silent. It says nothing as to whether the Court is to aim at making the terms of its award such as the parties themselves would have reached; or as to the principles on which the Court is to act in arriving at its decision.38

From this silence Heydon concluded that the changes effected by the arbitration system were not intended to be great, and "the considerations which would have influenced the parties in their debates under the old system should influence the Court also under the new." In other words, the court was to frame its awards by substituting its reason for the agreement that would have been reached by the will of the disputants. The main factors which activated each side, and which the court should therefore rely upon, were the duty to prevent sweating by establishing a minimum wage, labour supply and demand, and the prosperity of the industry. While the last two should be assessed according to what the parties would have considered in private negotiations, the minimum wage was less sensitive to market fluctuations: it was the aim, "universally recognised" though not guaranteed, of arranging business so that "every worker, however humble, shall receive enough to enable him to lead a human life, to marry and bring up a family, and maintain them and himself with, at any rate, some small degree of comfort." The living wage was a long-cherished aim of the labour movement, embodied in the demand for 7/- for an unskilled adult male working an eight-hour day. This was the figure requested in the sawmillers' claim; it was also the level later adopted by Higgins in the Harvester judgment of November 1907 after using similar language to Heydon's.39 Heydon set his minimum living wage at 6/- for an eight-hour day, the amount advocated by the employers, although casual workers were given more (1/- per hour) to compensate for slack

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38 NSW Saw-mill and Timber-yard Employees' Association v Sydney and Suburban Timber Merchants' Association [1905] AR 300 at 309.

39 Higgins ostensibly arrived at this figure by examining a small sample of household budgets, but Macarthy suggests it was adopted because it was the minimum acceptable to the unions, and was the level which Higgins thought would result from collective bargaining: P.G. Macarthy, "Justice Higgins and the Harvester Judgement", Australian Economic History Review 9 (1969), pp. 31-35.
time. Semi-skilled or experienced workers received 6/4 to 7/- a day, while skilled workers were awarded 9/-.40

In settling the remaining issues in dispute, Heydon continued his quest for guidance by turning to the judicial decisions on the court's jurisdiction. The Supreme and High Courts had given clear directions on the court's objects and powers: it could not infringe unduly the common law rights of parties, engage in general industrial regulation, or interfere with the managerial rights of employers. Here, at last, Heydon found some true principles which, "though actually applied to define the jurisdiction of this Court, should also, in my opinion, be applied by this Court in dealing with questions within its jurisdiction."41 So even when settling industrial matters specifically conferred by the Act, the Court should confine itself to the parties to the employment relations before it and should refrain from meddling in the general course of the industry. Heydon accepted these restrictions gladly because they accorded with his belief in collective bargaining and minimal state regulation. His early legalistic view of industrial disputes as isolated litigation over determinate claims would later change in response to ongoing, apparently irresolvable conflict, and the demands of both unions and employers for industry-wide regulation.

Heydon thereafter attempted to apply with consistency the principles outlined in the sawmillers' case. In the interstate and coastal wharf labourers award, heard the following month, Kelynack for the employers argued that the Act did not empower the court to award a living wage which was, moreover, an indefinable concept; the only sure principle that could be applied to the value of labour was its market price as evidenced by existing wage rates. The industry was marked by a large number of part-time casual labourers and a select group of "preference men" who worked regularly for particular stevedores. Billy Hughes, appearing for the union, urged that a living wage, which secured a minimum standard of living accepted by society, should be awarded for at least the preference men without whom the industry could not operate. As the Act outlawed the unions' chief bargaining weapon, the strike, wages could no longer be calculated fairly according to supply

40 [1905] AR at 320. The award actually set a 48-hour week with five days of 8 3/4 hours and Saturday of 4½ hours, allowing a Saturday half-holiday. This became the norm for most industrial work.

41 [1905] AR 300 at 311.
and demand. While standing by his previous commitment to the living wage, Heydon replied that there was nothing in the Act to say that the market price of labour should be disregarded. The only direction he could find in the Act was implicit: in allowing the court to examine company books, the legislature must have intended that an award have at least some connection to profitability and market wage rates. This inclined him to believe that above a bare living minimum for unskilled labour, wages should be set according to the level that would have been reached by negotiation between the parties. This was the only solution that allowed some measure of objectivity and consistency:

If I am to arrive at the fair price for labour without any principles to guide me in the Act, then I must go by my own principles I suppose; and you may have one Judge today with one set of principles, both economic and ethical, and tomorrow you will have another Judge with another set... That cannot be the way in which an important jurisdiction is to be carried on. There must be some fixed principles for every Judge who sits here to go by, and if it is not the price of labour, or as far as the Court could find out what the price of labour would be if the parties had threshed it out between themselves, if it is not that, then what fixed principle am I to go by at all?

Hughes' reply, that there was no single principle but a number of factors, did not soothe Heydon's disquiet. In his decision Heydon adhered to his belief in the judicial nature of his task. While it would be better to hear claims together and frame consistent awards, the court's "duty in each case is simply to decide the issues raised, and to do what seems to it to be fair between the parties."

Heydon engaged in elaborate calculations to obtain justice. He decided that as the relative bargaining position of the parties strongly favoured the employers, the union would have been unable to obtain a wage increase. Then, after examining past employment records to determine the industry's labour requirements, he concluded that the fairest way to increase the wages of the underemployed casuals was to redistribute work from the preference men, so he raised the ordinary rate while reducing the overtime loading. The end result would be to increase the total wage bill, but since the companies were prospering and would benefit from the change, he thought the result just. While this byzantine method of

42 Wharf Labourers' Union v Interstate Steamship Owners' Association and Coastal Steamship Owners' Association (1905) AO 2/61/2108.
43 Wharf Labourers' Case (1905) AO 2/61/2124.
44 Wharf Labourers' Union v Interstate Steamship Owners' Association and Coastal Steamship Owners' Association [1905] AR 367 at 375.
calculation paid obeisance to market conditions, it bore no resemblance to the result that would have obtained under collective bargaining, for the simple reason that the union adhered to the principle of the eight-hour day, which entailed penalty rates for overtime. So Heydon's solution represented what he considered should have resulted if both sides had engaged in utilitarian bargaining with the common objective of improving wages without unnecessarily inflating the companies' labour costs. Both the union and some employers regarded the award as impracticable; in 1907 Hughes negotiated an agreement with the interstate owners, though the coastal trade remained under the award.45

Heydon was unperturbed by the difficulty of guessing the outcome of notional bargaining. His task was made easier by concentrating on market factors. In fixing the coal-lumpers' award, Heydon concluded that the employers would have succeeded in any dispute, although the union "would defend itself with immense resolution."46 Under Heydon's principle, unskilled workers were unlikely to obtain increases whenever labour was in good supply. In the Cobar copper miners' case, though, the principle worked to the workers' advantage because of a shortage of labour and high union solidarity. The court was "satisfied that if the matter had been thrashed out by the parties themselves, the men would have obtained a large part of what they asked. It has, therefore, been our duty to give it to them in our award".47 Heydon considered that in setting awards the court was making an industrial agreement for the parties when they could not do so themselves: in other words, he was making a contract based on their presumed common intention. This resembles the judicial approach to ordinary contracts, which the courts interpreted according to an "objective" assessment of its purpose,48 implying terms "from the presumed intention of the parties with the object of giving to the transaction such efficacy as both


46 *Coal-Lumpers' Union v Steam Collier Owners and Coal Stevedores' Association* [1905] AR 17 at 31, 32; Industrial Arbitration - Excerpts and Transcripts, AO 7/1857.

47 *Amalgamated Miners' Association, Wrightville v Great Cobar Ltd* [1907] AR 53 at 54.

parties must have intended that at all events it should have."\textsuperscript{49} Heydon's principles were an attempt to give "business efficacy" to industrial relations by assuming the interests, relative strength and probable outcome of a contractual resolution.

Macarthy argues that the result of Heydon's sawmillers principle was to apply a "strike-outcome-equivalent" by awarding what the court considered the union could have obtained by industrial action.\textsuperscript{50} However, the relative industrial strength of each side was only a factor, and was always limited by profitability. Heydon assumed that no employer would accede to demands which reduced profits below commercially acceptable levels. The outcome of the putative bargaining, moreover, was invariably limited by the employer's right to conduct his business as he saw fit. Heydon regarded managerial prerogative as inviolable; the employees' only right was to reasonable wages and conditions, and there was no question of participation in decision-making.\textsuperscript{51} Likewise, remuneration based on a share of the profits was a political question that was not endorsed by the Act, which assumed existing industrial conditions.\textsuperscript{52} Heydon's acceptance of the doctrine of a living wage may have been influenced by his Roman Catholic faith; his enunciation of it is similar to the injunction in the 1891 papal encyclical \textit{Rerum Novarum} that wages must be sufficient "to support the wage-earner in reasonable and frugal comfort".\textsuperscript{53} But it was his social paternalism, economic rationalism and legalistic frame of mind that produced the content of Heydon's apparently ethical principle.\textsuperscript{54} For above the floor of his living wage, which he perceived as a bare subsistence (at 36/- a week it was just that), the requirements of capital accumulation and the rigour of economic laws were given free reign. The actual level of the living wage was always flexible and

\begin{itemize}
\item \textsuperscript{49} The Moorcock (1889) 14 PD 64 per Bowen LJ at 68.
\item \textsuperscript{50} Macarthy, "Wage Determination in New South Wales", p. 196.
\item \textsuperscript{51} Sawmillers' case [1905] AR 300 at 314; Milk and Ice Carters v Whitehurst [1907] AR 84 at 98; Stove and Piano Frame Moulders and Stove-Makers' Employees' Union v Fred Metters & Co [1907] AR 183 at 189.
\item \textsuperscript{52} Coal Lumpers' Union v Steam-Collier Owners and Coal Stevedores' Association [1906] AR 17 at 32.
\item \textsuperscript{54} N.G. Napper, "Mr Justice Heydon and the Living Wage: Industrial Arbitration in NSW, 1905-1914" (BEd Hons thesis, Dept of Industrial Relations, University of Sydney, 1983), pp. 13, 15.
\end{itemize}
subject to the capacity of the industry to afford it. In times of prosperity, the level might rise, but equally if there was strong interstate or overseas competition, or if profit rates were unacceptably low, the court might decline to raise wages to the minimum standard.55

Unions

Unions gained considerable benefits from registration. Foremost was the right to conclude industrial agreements or to apply for an award, which might include preference to union members. Even when awards were not sought, registration was still regarded as a valuable asset: union leaders in particular regarded it as conferring legislative approval and social legitimacy. Real legal benefits also accrued to registered unions: they gained corporate legal status and could hold property in their own names, although this advantage was tarnished by the potential for civil liability under the Taff Vale doctrine. More importantly, the rules of registered unions finally attained legal status. Apart from the Act, union subscriptions and levies had been unrecoverable at law,56 but under s.12 industrial unions could recover fines, penalties and arrears of subscriptions up to £10 by bringing a summons before the president of the court. During the first two years of the arbitration system's operation 439 such summonses were issued, as many as for the enforcement of awards.57 The power to impose legally recoverable fines allowed unions a high degree of self-regulation in the control of members, as s.12 stated that any dispute between a member and the union should be determined according to the procedure laid down in the rules. Although it was the president's responsibility to enforce union penalties, he was given no overt discretion so the union's rules theoretically gained legislative effect. In practice, though, the enforcement of union rules was subordinated to the imputed purposes of the Act.

Unions registered under the Industrial Arbitration Act occupied a peculiar legal status. While the statute conferred corporate identity on

55 Sydney and Manly Ferry Employees v Brown [1906] AR 49 at 50; Shop Assistants' Union v Master Retailers' Association and Mark Foy [1907] AR 139 at 149; Boot Operators and Rough-Stuff Cutters' Union v Boot, Shoe and Slipper Manufacturers' Association [1908] AR 74; Napper, "Mr Justice Heydon and the Living Wage", pp. 49-53.
56 Ex p Curley (1893) 14 NSWLR 261; 9 WN 181, and see ch. 2.
registered unions, this was only for the purposes of the Act, and then only while they remained registered. In order to become registered, unions had to adopt rules dealing with specified matters, but the actual content of these rules was not prescribed. The court had the power to cancel a union's registration either on an application by the registrar (after he had found, *inter alia*, that its rules were inadequate or had not been bona fide observed) or in any other proceedings before it. Other than this most drastic step, however, the court was given no specific powers or duties to regulate the conduct and internal management of unions: any control which the court chose to exercise must come from its interpretation of the objects of the Act and from the general power to give orders and directions in any hearing before it. Yet, as the arbitration court was the appointed venue for determining rights under the Act, some degree of regulation was inevitable.

A range of models of juridical regulation was available. At one extreme was the unincorporated private club or voluntary association. Unless the determinate property rights of a member were involved, the courts were reluctant to intervene in the internal affairs of clubs, regarding them as essentially private, non-legal arrangements. Even when property rights were in dispute, the law required only that the club's rules were observed and proceedings were conducted fairly.\(^58\) Trade unions were treated as private associations, and disputes over membership were not justiciable in the courts.\(^59\) At the other extreme were statutory authorities, such as municipal corporations. Such bodies were formed for specific purposes and could only operate within the strict terms of their charter: activities not specifically authorised by statute were *ultra vires*.\(^60\) The control exercised over limited liability companies lay somewhere between these extremes. While governed by its constitution (the memorandum and articles of association) and originally a creature of equity law, by the late nineteenth century the company was a purely statutory entity, gaining its powers from conformity to, and always subject to the restrictions of, the Companies Act. While the internal management of the company was generally


\(^{59}\) The courts regarded trade unions as non-legal and "strictly personal in nature" even apart from the doctrine of restraint of trade and the provisos to the Trade Union Acts: *Rigby v Connolly* (1880) 14 ChD 482 per Jessel MR at 487.

protected from legal interference, the courts could intervene to ensure that a minority was not treated unfairly.\(^{61}\)

Any approach that asserted the arbitration system's independent interests was likely to conflict with notions of union self-governance and industrial regulation. The older craft unions were already highly formal organisations, with extensive written rules and organisational structures, and this pattern was adopted by the newer trade unions. Unionism, both old and new, regarded unfettered self-regulation as a fundamental democratic right. This republican ideal would inevitably conflict with any juridical notion that registered unions were subject to the purposes of the Act. The most cherished rules designed to strengthen unionism — such as restrictions on working with non-unionists or former scabs, levies for political purposes and to support fellow unionists on strike — were not recognised by the Act and might be seen as contrary to its objects.

The court initially adopted a contractual approach to unions, similar to that of private voluntary associations. Applying the law of clubs, Cohen held that members had a right to be heard before being legally expelled, and that decisions made in contravention of the union's rules were invalid.\(^{62}\) However, the court would not intervene when the common law requirements of natural justice were fulfilled by procedures established under the union rules, which were then followed: in Cohen's view, "the parties are bound by the rules of the union of which they become members, and all that I have to see is that the rules ... are properly observed."\(^{63}\) Nor could a member complain that the rules were unreasonable: in joining, the worker not only consented to the rules, he "entered into a contractual relation with the union" and made obligations which he was bound to fulfil while he remained a member.\(^{64}\) When the coalminers sought to recover strike levies raised to support striking miners in Victoria, Cohen applied principles governing the enforceability of ordinary contracts. The resolution authorising the strike levy was a contract between the assenting mem-


\(^{62}\) *Ex p Bourke* [1903] AR 1.

\(^{63}\) *Re Anderson* [1904] AR 360 at 361.

\(^{64}\) *Professional Musicians Association of Australia v Summerhayes-Jeboult* [1903] AR 105 at 107.
bers, but because the Act made strikes illegal, the levy was void on the grounds of public policy and could not be enforced in any court. He later changed his reasoning and held that section 12, allowing recovery of union fines and subscriptions, was limited by the purposes of the Act:

It seems absurd to suppose that the Legislature ever intended that the Court should be concerned in directing the payment of moneys to be used for a purpose so absolutely distinct from the true industrial purposes of the industrial unions themselves, as contemplated by the Act.

Besides, the levy could not be recovered under the section because the Act only related to industrial conditions within the state.\textsuperscript{65}

Heydon adopted an elaborated version of this approach: trade unions might be considered autonomous organisations, but once they registered under the Act they became subject to the principles of the Act. Unions, he reasoned, incurred certain restrictions in return for the considerable advantages gained by registration. In particular, the Act limited their right to control membership, since the object and effectiveness of the Act were based on organised labour, and registered unions were the vehicle for this policy. The court also had the duty to protecting the rights of individual workers, to see that they were not tyrannised by other workers who might refuse membership for personal or political reasons and thereby infringe their right to work. Thus

upon broad constitutional principles of the highest importance it must be held that the right of vote possessed by trade unions has been taken away from industrial unions, and the admission of members into the latter must be carried out on principles to be decided by the Court and not by the union.\textsuperscript{66}

Similarly, the union had no absolute right to have its registration cancelled if it so desired. Before granting such a request, Heydon scrutinised the union’s existing commitments to see that other parties were not disadvantaged and that the operation of the Act would not be impaired.\textsuperscript{67}

This view implied a far greater regulation of union affairs, based on an idea of registered unions as essentially statutory creatures and the court as the sole guardian and oracle of the Act. The problem, though, was that the court had no specific powers to regulate unions. Cohen

\textsuperscript{65} Re Gilmore [1904] AR 140; Re Crawford; Re Anderson [1904] AR 371.

\textsuperscript{66} Re Wharf Labourers’ Union [1906] AR 225 at 247–248.

\textsuperscript{67} Eg Re Master Builders’ Union (1906) AO 2/77/189.
had recognised that the court had no power directly to alter the rules or control the internal management of unions; its only means of regulation lay in making orders which overrode objectionable rules or were conditional on an alteration of rules.68 For example, it became standard practice to award preference for only so long as the union admitted all competent workers and retained low membership subscriptions. Heydon adopted a more direct approach: he was more willing to vary awards if unions failed to amend their rules to bring them into conformity with the objects and principles of the Act. The court's ultimate control over unions, which Heydon was not afraid to use, was cancellation of their registration.

Registration under the Act was governed by an elaborate procedure administered by the registrar and court. A proviso to s.5, designed to ensure that each class of employer or employee was represented by a single body, stated that a union could not be registered if its members could "conveniently belong" to an already registered union. Section 8 provided that if a union had been registered by mistake, had failed to perform its obligations under the Act, or had "wilfully neglected to obey any order of the court", and additionally "for any reasons appear to him to be good", the registrar should apply to the court for the cancellation of the union's registration. Once deregistered, a union suffered a form of civil death,69 since it lost its right to bring claims before the court as well as its corporate identity and statutory protection, although it was not relieved of its industrial agreement or award obligations and was still liable for penalties incurred before cancellation.

The first application for deregistration came soon after the court was established. At its annual conference in January 1902, the Australian Workers' Union (AWU) had decided to obtain registration under the Act and seek an award covering shearing rates for the coming season. The pastoralists were keen to have the 1894 individual shearing agreement adopted by the arbitration court. Its terms, particularly that giving

68 Sydney Wharf Labourers' Union v Sydney Stevedores' Wool-Dumping and Lighterage Association [1903] AR 143 at 145; Re Wharf Labourers' Award [1904] AR 290 at 291; Laundry Employees' Union v Wilson [1905] AR 16.

69 At common law a person convicted of a felony (whose punishment was death) suffered attainder, or civil death. The courts regarded an attained felon as legally dead, and therefore unable to bring a civil action: see Dugan v Mirror Newspapers (1978) 142 CLR 583 per Jacobs J at 602-603.
the employer the power to determine differences arising under the contract, were anathema to most shearsers.\textsuperscript{70} Uncertainty reigned over the principles that the court would use in making awards, especially as there would no doubt be a claim for preference by the AWU. Press reports soon revealed that a previously unknown body, the Machine Shearers' and Shed Employees' Union (MSU), had also been registered under the Act.\textsuperscript{71} At the end of April, the MSU concluded an agreement with the pastoralists that was based on the 1894 document but excluded the objectionable clauses and made several significant concessions to shearsers. It was registered as an industrial agreement, giving it the same status as an award.\textsuperscript{72} The AWU maintained that the MSU was formed with the backing of the pastoralists as "simply a dodge to try to defeat the AWU from getting an Award" according to W.G. Spence's later account.\textsuperscript{73} The union was supported by shearing contractors and became decreasingly distinct from the Pastoralists' Union, but there is no direct evidence that it was actually started by the employers. John Merritt has concluded that the MSU consisted largely of contract shearers, those who had scabbed as far back as the 1891 strike and objectors to the AWU's political involvement with the labor party, and that it was founded by genuine unionists who wanted to be "fair to both sides".\textsuperscript{74} MSU members objected most strongly to the AWU's rules which forbad members from engaging in contract shearing or voting against selected Labor candidates, exacted a levy for political purposes and imposed heavy fines on all those who had at any time participated in strikebreaking against the union.

Deciding that the purposes and language of the Act showed that the legislature had not intended separate registration for "two trade unions representing the same industrial interests, and composed of members following the same occupation within the same area", Addison applied to the court for the deregistration of the MSU.\textsuperscript{75} Before the court, the MSU defended its separate registration on the grounds that

\textsuperscript{71} W.G. Spence, \textit{History of the A.W.U.} (111; Sydney: Worker Trustees, 1961) p. 94.
\textsuperscript{72} \textit{SMH} 30 Apr 1902, p. 5; \textit{SMH} 1 May 1902, p. 4; Merritt, \textit{Making of the AWU}, pp. 303-305; [1902] AR Records 152.
\textsuperscript{73} Spence, \textit{History of the A.W.U.}, p. 94.
\textsuperscript{74} Merritt, \textit{Making of the AWU}, p. 301.
\textsuperscript{75} \textit{Australian Workers' Union v Machine Shearers' and Shed Employees' Union (No. 1)} [1902] AR 16 at 26.
its rival contravened the legitimate functions of a trade union by promoting strikes, acting in restraint of trade and restricting individual rights. It argued that a union was, like a company, a statutory creation and could not legally do anything other than the activities described in the Trade Union Act. The AWU’s promotion of the Labor party, involvement in strikes and support of the *Worker* newspaper were not functions authorised by the Arbitration Act and were contrary to its spirit. By contrast, in forming an agreement with the Pastoralists’ Union, the MSU was acting fully within the spirit of the Act by acting "for peace and not warfare." The court (Sam Smith dissenting) held that the promotion of political activities and support for a newspaper could be regarded as legitimate union activities for the advancement of its industrial interests, but found objectionable the AWU’s rules forbidding members from voting against Labor candidates at elections, disqualifying from office those who had ever scabbed, and prohibiting contract shearing. The court, held Cohen, "should not compel a man either to join a body which has established this *imperium in imperio* or to remain aloof from the benefits which the Act we are administering contemplates."76 Cohen dismissed the question of the MSU’s bona fides by referring to the leading company law case *Salomon v Salomon & Co* in which the House of Lords had held that a corporation, as an artificial legal person, must be treated independently of its promoters or members because it was "essential to the artificial creation that the law should recognise only that artificial existence — quite apart from the motives or conduct of individual corporators."77 Once a union was registered, therefore, a "corporate veil" descended to separate its organisers and their motives from the legal entity. Like the House of Lords in that case, this was probably because Cohen did not relish the prospect of having to divine the intentions of the legislature as to what constituted a bona fide organisation. The AWU’s application was refused, but without prejudice to a further action once the disfavoured rules were amended.

Although the AWU’s rules provided that they could only be altered at the annual conference held in January, the executive purported to have them changed by plebiscite and, when this was successful, lodged them with the registrar. The MSU then sought an injunction from the

76 [1902] AR 16 at 33; Australian Workers’ Union v Machine Shearers’ Union, Cohen J, Notebooks, vol. 1, AO 2/2673/32-34..

77 [1897] AC 22 per Lord Halsbury LC at 30.
Supreme Court to restrain the application from proceeding, but was unsuccessful. The AWU recommenced the cancellation proceedings before the registrar, emphasising the MSU's bogus character. This argument was rejected by Addison: the Act required him to exercise judicial discretion in deciding whether to apply to the court, and he was not satisfied that the MSU was acting contrary to the interests of its members under the Act. The AWU's failure to validly amend its objectionable rules meant that both unions must continue to be registered as each contained members who could not conveniently belong to the other. Here the action stopped for although the Act stated that a decision of the registrar could be taken on appeal to the president of the arbitration court, Cohen had decided in a previous case that in an application for deregistration under the general ground in s.8(a) the registrar's refusal to apply to the court could not be overturned. However, undeterred by this second rebuff, the AWU altered its rules at the next annual conference and again applied to the registrar who confirmed his earlier decision. This time he based his refusal on the AWU's involvement in industrial action taken against the pastoralists during 1902 to enforce its demands for increased shearing rates; this complicity in "violent and illegal acts", as already determined by the Equity court in proceedings against the AWU, was sufficient to allow the continuance of the machine shearers as a separate union: if they were forced to join the AWU by having their union cancelled they

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78 The full court held that since the matter was the same as that determined by the arbitration court in deregistration proceedings, and that court had been specially appointed to hear such matters by the exercise of judicial discretion, the Supreme Court should not interfere by injunction. However the judges expressly left open the question of whether there were any circumstances in which they should restrain the arbitration court from hearing a case: Machine Shearers' and Shed Employees' Union v Australian Workers' Union (1902) 2 SR(Eq) 220; [1903] AR 109.


80 United Labourers' Protective Society of NSW v Builders' Labourers' Union (No. 1) [1903] AR 32; United Labourers' Protective Society of NSW v Builders' Labourers' Union (No. 3) [1903] AR 226; Cohen J, Notebooks vol. 2, AO 2/2674. The reasoning here was specious: Cohen held that as an affirmative decision to apply for cancellation was heard by the full three-member court, the president alone could not reverse the registrar's decision not to apply for cancellation; yet an appeal to the president would not have determined the actual question of cancellation.

81 Keogh v Australian Workers' Union (1902) 2 SR 265; see ch. 6.
would be stamped with the odium of illegality and might be held liable for the union's misdeeds.\textsuperscript{82}

The AWU then switched its campaign to the political arena. Wise's amending bill of 1903 was partly prompted by the dispute between the AWU and MSU: it would have prevented the registration of more than one union in an industry and allowed an appeal from the registrar's decisions.\textsuperscript{83} Following the bill's failure, the AWU obtained a select committee and then a royal commission to investigate the MSU's registration. Despite attempts by pastoralists to boycott the inquiry by refusing to answer questions (a right rejected by both the Supreme and High Courts), the commission concluded that the MSU's registration was an evasion of the Industrial Arbitration Act, but that it did not impede the court's resolution of disputes in the pastoral industry. The MSU flourished during the 1905 season as an arm of the Pastoralists' Union, but had virtually disappeared by the time the AWU amalgamated with the Queensland shearers' union and obtained a federal award in 1907.\textsuperscript{84}

The reasoning used by Cohen in the shearers' case reflects his belief that the Arbitration Act created a new realm of legal relations. As he saw it, the Trade Union Act prescribed the legal identity of unions; unions registered under the Arbitration Act were not organic entities at all, but instruments for the representation of common "industrial interests for the purposes of the Act". This doctrine was evident in the arbitration system's handling of the dispute between the United Labourers' Protective Society (ULPS) and a breakaway group, the Builders' Labourers' Union (BLU).\textsuperscript{85} Both had been registered under the Act and the ULPS twice failed to convince the registrar that the members of the BLU could conveniently belong to it. Addison decided that "freedom of individual contract having been taken away, it

\textsuperscript{82} \textit{Australian Workers' Union v Machine Shearers' Union} [1903] AR 366.

\textsuperscript{83} Industrial Arbitration Act Amendment Bill 1903, cl. 2; \textit{NSWPD} vol. 10 (15 Jul 1903), p. 684; see ch. 6.

\textsuperscript{84} \textit{Ex p Leahy} (1904) 4 SR 401; \textit{Clough v Leahy} (1905) 2 CLR 139; Merritt, \textit{Making of the AWU}, pp. 323-324; Royal Commission on Formation, Constitution and Working of the Machine Shearers and Shed Employees' Union of Employees, \textit{Report} (1905), p. 23.

\textsuperscript{85} For the struggle between the ULPS and BLU (a group of antagonists from the Newtown branch, numbering at most 120, who seceded from the ULPS in 1901), see SLC Minutes, 30 Apr 1902, 10 Jul, 17 Jul, ML MSS A3836/271, 380, 391; Peter Sheldon, "In Division is Strength: Unionism among Sydney Labourers, 1890-1910", \textit{Labour History} 56 (1989), pp. 52-53.
is clear that workers should be grouped in such industrial unions as are most likely to further their industrial interests through and by means of the Act" and that "the nature of their work and the community of their interest" were the factors which determined whether separate registration would be allowed to continue. He found that builders' labourers constituted a separate class of labour whose interests could not adequately be represented by the ULPS; because it was governed by the whole membership, the larger union was not "fully representative" of the builders' labourers' class.86

As more workers were brought under the control of the court and the variety of matters expanded, the early reservations at interfering in the existence of unions receded behind the day-to-day problems of running a complex and haphazard organisational system. One shortcoming of the Act was that it did not give individuals standing to enforce union rules or practices. An application for deregistration soon became a means of bringing grievances before the court; because it was the registrar who brought the case, the bar to individual standing was avoided. An application for cancellation of the union, on the grounds that it had failed to abide by the Act, did not afford "reasonable facilities" for membership, or had not properly observed its rules,87 thus became simply a means of getting the union before the court which could then use its other powers or its informal authority to ensure compliance with the imputed purpose of the Act. Addison recognised the need for such a procedure as the only effective means of controlling unions, and often referred applications for deregistration to the court when the real motive of the complainant was to enforce the union's rules or to gain admission.88

Refusal of membership was the greatest source of individuals' complaints against unions. The complaint was more likely to be pressed when the union had been given preference, as refusal to admit a worker could result in loss of livelihood. Cohen had initially endorsed the right of unions to control membership by restricting it to sober and competent workers, or to reserve employment for existing members.89 In one case the applicant had been refused membership of

86 United Labourers' Protective Society of NSW v Builders' Labourers' Union (No. 2) [1903] AR 42 at 45, 48.
87 IAA 1901 s. 8(c) in conjunction with Schedule 1, cl. 9.
88 Re Newcastle Coal-trimmers' Union [1906] AR 185 at 186 (Addison R); NSW Official Year Book 1906, pp. 790-791.
89 Re Byrnes [1903] AR 349.
the Journeymen Coopers’ Society because he had failed an admission test that "tried out" his ability to make any kind of barrel. The registrar initially decided that the rule establishing the test was unnecessarily restrictive but did not apply for deregistration. However, the union continued to claim that it was entitled to maintain craft standards and persisted in refusing to admit the complainant or change its rules. When deregistration proceedings were brought, the court held that the aggrieved worker was entitled to admission as a competent cooper because his work entailed making only specific types of barrel.90 The case was adjourned to allow the union to change its admission test, and the court then refused the application for cancellation while approving the union's new rules: the threat of deregistration was sufficient to bring the union to heel.

With their determination to restrict the number of casual workers and introduce compulsory unionism, the wharf labourers also ran foul of the court. Proceedings for deregistration were brought in 1906 by a labourer who had been denied membership for working during a recent strike. Riley, the employee member of the court, defended the union's position that "the Union have the right to reject men". Heydon replied: "But not if it is registered as an Industrial Union and if the court says it must not. It must cease to be registered as an Industrial Union if it wishes to assert that liberty. The court is not brought into existence to be flouted."91 The court removed the preference clause from the union's award and adjourned the matter to enable the complainant to be admitted. The matter again came before the court after a general meeting of the union refused to comply, despite the efforts of its secretary, Billy Hughes, to have the restrictions removed and so save the union's privileges. Heydon decided to deregister the union for denying the complainant's right to work, taking upon itself the right of governance which the Act gave to the court, and defying the court, but for once he found himself in the minority. The employer member of the court, J.P. Wright, in an exceptional move, sided with Riley on the grounds that the cancellation of preference was a sufficient remedy and that the union's deregistration would jeopardise the industrial interests of the employers.92 But after a further strike in January

91 *Re Sydney Wharf Labourers’ Union* (1906) AO 2/86/12.
92 *Re Wharf Labourers’ Union* [1906] AR 225 per Heydon P at 255-256; contra Wright at 257. It later emerged that Wright, a leading light
1907, the same problem of the union's refusal to admit scabs recurred and this time Wright concurred with the president on the grounds that the union had obtained preference in an industrial agreement, which Heydon held the court could not alter. The Wharf Labourers' Union was deregistered in March 1907. Disillusioned with the state court, it contented itself with existing as a branch of the Waterside Workers' Federation, which had obtained registration under the Commonwealth Arbitration Act. In October a national agreement was concluded with the interstate steamship companies. The cancellation of the union did not allow it to escape the court's control entirely, however. In April 1908 the registrar referred a dispute to the court after the coastal steamship owners' association complained that union members were refusing to work under the award. The court ordered the deregistered union to file an answer to the claim. But Heydon subsequently concluded that cancellation extinguished even liabilities incurred by the union under an industrial agreement.

The restriction of registration to one union representing the industrial interests of a group of workers could produce conflicts between occupation-based and industry-based unions. Overlapping coverage by unions was not uncommon; many workers belonged to both a general industry union as well as one representing a particular craft. Inter-union competition was strongest in the government railways and tramways where, in addition to craft unions representing tradesmen employed in the workshops and sectional unions covering different organisational branches of the service, there was a general "all-grades" union, the Amalgamated Railway and Tramway Service Association (ARTSA) that was open to all employees. Because one-fifth of its members were drawn from the traffic branch, ARTSA's chief rival was the Railway Traffic Employees' Association (RTEA), formed in 1902 with the assistance of the other sectional unions. Even without an award, registration under the Act was important because Wise had forced the

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of the Employers' Federation, had acted on behalf of the Steamship Owners' Federation which opposed the cancellation of the union: Re Wharf Labourers' Union (1907) AO 2/92/84, 98; on Wright, see C.R. Hall, The Manufacturers: Australian Manufacturing Achievements to 1960 (Sydney: Angus & Robertson, 1971), p. 159.

93 Re Wharf Labourers' Union [1907] AR 19. Although IAA 1901 s. 15 said that as to industrial agreements "the court shall have full and exclusive jurisdiction in respect thereof."

94 Fitzhardinge, That Fiery Particle, pp. 198, 296.

95 Re Wharf Labourers' Award [1908] AR 51; Re Wharf Labourers' Union [1908] AR 61 at 64.
railway commissioners to recognise registered unions. ARTSA and two sectional unions (covering tramways employees and engine drivers) quickly registered under the Act, and in November 1902 the RTEA attempted to follow suit. ARTSA's objection to the RTEA's registration was upheld by Cohen, who argued that all traffic branch employees could be effectively represented by the general union.

The traffic union would continue to be kept from registering by the "conveniently belong" proviso as long as ARTSA remained on the register. Thus it kept up a long campaign to have its rival cancelled and get before the court by any means available. Heydon, though, was cautious not to override judgments of his predecessor. The RTEA's attempt to come before the court by the registrar's reference of an industrial dispute was denied on the ground that its registration had already been refused: as Heydon put it, "this Court cannot play fast and loose with its own decisions or ignore a finding of that kind".

Both contending unions were excluded from registration under the federal Arbitration Act when ARTSA, in a move to block the traffic union, argued that state railways were beyond the Commonwealth's power and the High Court agreed. Despite registration, ARTSA's membership declined and in 1903 the new secretary, J.H. Catts, embarked on a drive that succeeded in greatly increasing its members. In response to this incursion seven craft unions with members in the railway service mounted a challenge to its registration in 1906, claiming that it represented not one industry but a number of industries. This argument was dismissed by the registrar, who found no requirement that a union cover only a single industry. The legislature, in basing the industrial union on the trade union, had allowed workers the

98 Ex p Railway Traffic Employees' Association [1905] AR 408 at 415; AO 2/87/351.
99 Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees' Association (1905) 1 CAR 112; (1906) 4 CLR 488.
100 Dorothy M. Catts, James Howard Catts (Sydney: Ure Smith, 1953), pp. 15–16.
freedom to organise along lines as they chose, subject only to the restriction on multiplicity. The all-grades union represented "common industrial interests peculiar to them as servants of the Railway Commissioners" and therefore deserved to be registered separately.101

Registration, then, could be used as a weapon in inter-union disputes involving political and industrial struggles. The court's policy of allowing registration for only those unions covering separate "industrial interests" gave greater focus to such disputes. Such registration battles were not confined to trade unions. In 1903 the master retailers opposed the registration of a separate association of country storekeepers. The registrar decided to refuse registration and by the time the appeal was reached in 1906, it was announced that an amicable arrangement had been concluded.102 Conversely, the arbitration system could also be used to settle demarcation disputes: in 1905 the painters and the ship painters and dockers signed an industrial agreement which specified the work to be done by members of each union.103

Preference

Undoubtedly the most contentious issue which the court was called upon to determine was preference to unionists. Section 37 of the Act allowed the court to direct that, as between members of registered unions and other persons "offering their labour at the same time", unionists should be preferentially employed, "other things being equal." Unions regarded the award of preference as a talisman of their new status and power; equally it was detested by employers as a fundamental invasion of their right to conduct their business. Preference provides the best perspective of the problems faced by the court in attempting to construct guiding principles in the process of making ad hoc decisions in divergent situations.

Many unions, especially those in industries where work was unskilled and casual, attempted to regulate the labour market by setting themselves up as the source of labour for employers. Such arrangements

101 Re NSW Amalgamated Railway and Tramway Service Association [1906] AR 99 (Addison R).
103 [1905] AR Appendix, xxiv.
were frequently accepted by employers, since it relieved them of the burden of finding experienced and reliable workers. This kind of arrangement was at the heart of the first dispute to be settled by the court. An agreement between the Newcastle wharf labourers and the major local shipping company, granting the union a virtual monopoly in the supply of labour, had recently broken down. In order to preserve the *status quo ante*, the court stipulated that the union provide all labour required by the company, but that non-unionists could be engaged to fill any deficiency.104 Most of the early awards contained variations of this approach, granting preference in return for the union’s commitment to provide labour when required by employers. Employers were charged with the responsibility of ensuring that unionists were engaged preferentially.105 The undertakers’ award required employers to "use all reasonable endeavours to procure members of the claimant’s union" except in emergencies. The union arranged so that employers could engage available members by telephoning the Mortuary station, and employers who failed to use the procedure were punished for a breach of the award.106 The problem of providing special skills was resolved in the confectioners’ award by granting the union preference on the condition that it kept an employment register, available to employers, detailing each member’s availability and competencies.107 Organised capital increasingly opposed this sort of arrangement as a usurpation of an employer’s right to hire: one critic condemned it as "an absolute reversal of the intention of the Act, which indicates that the employee must offer his services to the employer, whilst the court directs that the employer shall apply for the employee’s labour."108 Cohen also held that the court could equally require that future employees join the union: the court’s preference power was not restricted to the specific provision in s.37, but extended to its general supervision of industrial matters in settling disputes.109

104 *Newcastle Wharf Labourers' Union v Newcastle and Hunter River Steamship Co Ltd* [1902] AR 1 at 10-11, 15.
105 *Re Channell* [1903] AR 426; *Re McDonald* [1904] AR 120.
107 *NSW Journeymen Confectioners' Union v Manufacturing Confectioners' Association* [1903] AR 8 at 13.
109 *Bread-Carters' Union v Langer* [1902] AR 85 at 91.
This approach retained the employer's choice in engaging labour, while demanding that all workers who benefited from the union's endeavours should also bear the cost. In these early cases, the court was flexible in the conditions which it imposed; it was apparently guided by the acceptance that not only was preference necessary to guarantee strong unions, it was advantageous to employers in securing a pool of permanent and competent workers.

Preference was the strongest cause of disagreement on the three-member bench. Sam Smith, the employee member, considered preference as an incident of collective representation, required by the object of the Act. The employer member, J.P. Wright, would approve preference only where there was evidence of discrimination against union members. Like Smith, Cohen embraced preference as the key to the fulfilment of the Act's aim of replacing strikes with collective bargaining. When unions regularly began to apply for its inclusion in awards, he accepted the condition as reasonable wherever the union could demonstrate by a high level of membership that it substantially represented the employees involved. The laundry workers were refused preference because the union's coverage was low, but the court provided that there should be no discrimination against unionists. Because it had the potential to create antagonism, he was reluctant to impose preference where it did not seem necessary. Thus Cohen saw no reason to make a compulsory order in the professional musicians' case because the union already enjoyed de facto preference from the leading impresario, J.C. Williamson.

Early problems with enforcing preference were highlighted by the hairdressers, where preference was granted as part of a common rule which had been made on the back of an industrial agreement. Although the employers' association had consented to a bare preference clause, which did not make the union responsible for providing all labour, many employers objected to the condition. The court soon recognised that when such clauses were awarded without requiring employers to notify the union wherever a vacancy arose the clause would become a nullity because union members might never hear of the vacancy.

110 Laundry Employees' Union v Wilson [1905] AR 16.
111 Professional Musicians' Association of Australasia v Williamson [1903] AR 17 at 23, 24.
112 Master Hairdressers v Hairdressers Employees Union [1903] AR 231; Re McDonald [1904] AR 120.
Employers also argued that they should be left to judge which applicant was the most competent. Cohen emphasised that the administration of preference was the court's responsibility since it was an important incident to the conclusion of the agreement: he doubted whether the union would have consented to "leaving the absolute discretion under all circumstances to the employer in the selection of the men whom he may wish to employ."\(^{113}\)

Deeming it his duty "to do that which will promote the policy of the Act", and finding that policy to be the promotion of dispute settlement by collective bargaining, which could only be accomplished by the encouragement of unions, Cohen granted preference to the carters' union in November 1904. Because the operation of the Act depended on unionism, and preference was the only provision favouring unions, preference should be awarded "where the industrial union fairly and practically and substantially represents the industry".\(^{114}\) The award required preference to be given to union members and that the union secretary be notified of labour requirements where reasonably practicable. The master carriers sought judicial review of this provision, arguing that it went beyond the court's jurisdiction. In June 1905 the High Court confirmed the Supreme Court's ruling that because the arbitration court's jurisdiction depended on a contract of employment, it could not restrict an employer's freedom before an employment relationship came into existence.\(^{115}\)

After this decision, the court under Cohen continued to award preference where unionists were a majority.\(^{116}\) But when Heydon came to decide on preference he followed the principles enunciated by him in the sawmills' case, incorporating both the superior court rulings on jurisdiction and the ideology behind them into an approach which relied on the ideal of contractual bargaining. He rejected the argument that preference was a right to which unions became entitled in return for succumbing to the control of the court. The granting of preference was a matter of judicial discretion which the legislature, in its silence

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\(^{113}\) *Re Wild* [1904] AR 110 at 112.

\(^{114}\) *Trolley, Draymen and Carters' Union v Master Carriers' Association* [1905] AR 38 at 45.

\(^{115}\) *Ex p Master Carriers' Association* (1905) SR 77; *Trolley, Draymen and Carters' Union v Master Carriers' Association* (1905) 2 CLR 509.

\(^{116}\) *Bookbinders and Paper Rulers' Union v Master Printers and Connected Trades Association* [1905] AR 209 (award delivered six days after Supreme Court judgment in Master Carriers' case).
on the principles to be applied, had deliberately left to the members of the court:

The Legislature has simply given this Court the power to grant preference to unionists, without any direction as to how to exercise the power. By giving the power and leaving it to the discretion of the Court to exercise it or not, it has, it seems to me, indicated that in some cases preference should be granted and in others refused. It follows that all general grounds, on which it would always be granted, or always refused, are impliedly condemned.... In this position the only principle which I can discover is that which was explained in the sawmillers' case, viz., that as far as possible the same result must be given in the award as would have been arrived at by the parties themselves.117

In this case, applying the principle was simple, as the wharf labourers had won preference by agreement. Heydon's putative bargaining approach meant that when a preference claim was disputed (as it usually was) the court refused preference to the weaker unions. Hence the carpenters, plasterers and ferry employees failed to obtain preference because, applying the sawmillers principle, they would have been unable to obtain it themselves. In practice Heydon's test reverted to the extent of the union's coverage: thus in the mattress makers' award of 1906 he would concede preference only where a large majority of workers were members of the union.118 This approach was taken to extremes by Street during his spell as Deputy President. In 1908 the ferry employees were again refused preference because the union did not represent "substantially the whole" of the industry, even though 100 of the 130 workers were members. Understandably, Sam Smith strongly dissented from this result, considering that it contravened the spirit of the Act and the principles laid down by the court.119 Yet the bakers' union obtained preference because it "practically and substantially" represented the skilled operatives, and also kept an employment

117 Wharf Labourers' Union v Interstate Steamship Owners' Association and Coastal Steamship Owners' Association [1905] AR 367 at 388; AO 2/61/2229.
118 Re Wire Mattress Makers' Award [1906] AR 293 at 295. Heydon continued to use this test, refining it in Re Iron and Ship Building Trades No 15 Award [1915] AR 270; see Ting Tsz Ko, Governmental Methods of Adjusting Labor Disputes in North America and Australasia (1926; repr New York: AMS Press, 1968), pp. 178-179.
119 Carpenters and Joiners' Union v Master Builders' Association [1905] AR 394 at 402; Operative Plasterers v Master Plasterers' Association [1906] AR 54; Firemen and Deck-Hands' Association v Sydney Ferries Ltd [1907] AR 111; Firemen and Deck-Hands Association v Sydney Ferries Ltd [1908] AR 36 at 37 (Street DP).
register which was used by the employers.\textsuperscript{120} The earlier practice of setting the union up as the provider of new employees was dismantled. Heydon held that the employer did not need to ask whether the employee was a union member, and was not bound to notify the union of vacancies.\textsuperscript{121} In these circumstances, the preference power was as good as worthless: added to the difficulty of proving equal competency, the unionist and non-unionist had to offer their services at the same time. Yet unions continued to insist on the clause mainly, one suspects, as a symbolic endorsement of unionism by the court.

As Victor Clark noted, the granting of preference "gives the court a strong hold over the organization receiving the right for securing compliance with an award," as deregistration meant loss of the additional benefit.\textsuperscript{122} The court could also amend or cancel the preference clause if the union failed to abide by the requirements of the Act, as it did with the wharf labourers in 1906 after the union restricted entry by closing its books.\textsuperscript{123} As the union gaining preference was required to conform to the court's standards of openness and moderation, the power indirectly increased the juridification and subordination of unions. The painters were forced to change their rules to allow open membership,\textsuperscript{124} but Heydon had no objection if the union restricted membership to "competent" workmen, since it assisted the employer. The Burrara copper miners were granted preference despite such a restriction because the court was persuaded that they were "a very respectable body of men, and not likely to make trouble."\textsuperscript{125}

Penalties and Enforcement

Most of the cases heard by the court involved the enforcement of awards, agreements and common rules. Nearly all were brought by unions against employers. A peculiar feature of the 1901 Act was its virtual reliance on unions for enforcement. The ability of union secretaries to monitor employers' observance of awards and gather strong evidence of breaches, and the extent of reporting and cor-

\textsuperscript{120} \textit{Operative Bakers' Association v Sydney and Suburban Master Bakers' Association} [1908] AR 96 (Street DP).

\textsuperscript{121} \textit{Re Morgan} [1907] AR 94.

\textsuperscript{122} Clark, "Labor Conditions", p. 107.

\textsuperscript{123} \textit{Re Wharf Labourers' Union} [1906] AR 225.

\textsuperscript{124} \textit{Re Horne; Re Lyon} [1905] AR 162.

\textsuperscript{125} \textit{Miners' Association, Burrara v Lloyd Copper Co} [1906] AR 210.
roboration by members, were crucial in enforcing the Act. The strength of the union, the drafting of the award, and the nature of the work largely determined the success of enforcement. Unions with high membership rates and a concentrated industrial workforce were most successful.\textsuperscript{126} Outwork and complicated piece-rate schedules made it difficult to detect and prove breaches of awards. The ferry employees and undertakers' assistants were vociferous and highly successful pursuers of misfeasant employers, while the carting and clothing unions were generally unsuccessful.

Table 8.2 shows that summonses for penalties generally diminished with time, although the number of such applications which did not proceed to court fluctuated. The large increase following the introduction of the Industrial Disputes Act relates both to the larger number of awards in force and the appointment of special inspectors to enforce the Act.\textsuperscript{127} The shifts in enforcement depended on the number of active awards, many of which expired from 1906 although the court had by then begun making awards with no specified time limit. The pattern of penalty cases was strongly related to specific union campaigns, the success of which cannot be measured solely by the number of applications upheld by the court. Cases were mostly struck out because the applicant union failed to appear, which suggests that either these actions had been commenced as a means of intimidation, or that they had been resolved by the time they came to court.\textsuperscript{128} Sometimes unions commenced a large number of applications against the same employer, rather than issue one summons alleging a number of counts. This tactic was adopted by the tailoresses; the union's failure to prove under-award payments explains the apparently dismal result in 1905.\textsuperscript{129} It was more intimidating to issue separate summonses, and more costly to the employer if all were proved.


\textsuperscript{127} IDA, s. 58. Under this statute, the Industrial Court was responsible for all penalties, though s. 3 of the Industrial Disputes (Amendment) Act 1910 (assented to, 9 Aug 1910) allowed the court to remit a case to a magistrate or the registrar for determination.

\textsuperscript{128} Statistics under IDA show that most cases were struck out because the matter had been settled: see ch. 9.

\textsuperscript{129} Court of Arbitration, Register of Applications to Court 1905, AO 7/5366; [1905] AR Records 430-433; see \textit{Re Turnbull} [1904] AR 178.
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Source: Official Year Books of NSW.

Notes: ¹ Calendar years except 1911 (1 Jan–30 Jun) and 1912–1913 (1 Jul–30 Jun).
² Percentage of cases proceeded with resulting in conviction, ie excluding withdrawn or struck out.
³ Includes dismissed, withdrawn and struck out.
⁴ Cannot be calculated as figures for 1913 are not broken down sufficiently.

Awards generally required that each employer maintain a time and wages book to ensure compliance; usually, though not always, the award allowed the union secretary to inspect the records (though not necessarily to enter the premises to do so). A high proportion of early summonses alleged failure to keep proper employment records; employers were usually content to leave the completion of the book to individual employees. The butchers' union even issued employers with time and wages sheets to make its enforcement task easier. In fact, one of the effects of the court was the introduction of standardised employment records, which had been unusual even in medium-sized workplaces.

The enforcement of awards by union secretaries entailed entering workplaces and insisting on checking the time and wages book, perhaps also inspecting the shop floor and quizzing employees. Nothing could have been more calculated to outrage employers and engender conflict. Some refused to allow the secretary onto their premises; more often an extended struggle ensued as the employer made himself unavailable and the secretary became increasingly pugnacious. Awards often failed to give union officials the right to enter factories and
shops; the secretary and assistant secretary of the butchers' union were reduced to hiding in bushes outside suspect shops to observe the hours worked. One master painter persistently resisted the inspection of books by the union secretary, even though it was authorised by the award. Union secretaries spent much of their time attempting to enforce awards, but the impossibility of comprehensive inspection and the resistance of employers led the unions to demand that special inspectors be appointed to police the Act. Another option endorsed by some unionists was the delegation of local police as inspectors "with power to examine books and take testimony of workers under oath, and forward the same to the court."

The Act did allow penalties to be recovered before the petty sessions courts by factory inspectors, in which case there was an appeal to the arbitration court. Although Cohen urged that summonses be taken out in the petty sessions courts in order to reduce the workload of the court and allow more award applications to be heard, few unions complied with his request. There were only two appeals from decisions of police magistrates for breaches of awards, both brought in 1905 by the secretary of the southern coalminers after failing to obtain penalties for a breach of the award before the police magistrate at Wollongong. The first appeal was unsuccessful, but the second, which turned on the definition of a coal seam in the award, was upheld by majority. From the perspective of the unions, there were several factors militating against use of the petty sessions courts. The arbitration court was perceived as the unions' court. Its members were supposedly familiar with industrial conditions and the meaning of its awards; it could also be expected to have an interest in ensuring that awards were enforced. The ordinary courts might not be sympathetic towards unions or compulsory arbitration. As appeals from magistrates to the arbitration court relied on the record of evidence in the lower court, and it was clear that employers were willing to appeal decisions where possible, it would be safer and cheaper to go directly to the arbitration court. There were also doubts whether a magistrate had the power to remit a penalty to a union or underpaid worker.

131 Clark, "Labor Conditions in Australasia", p. 129.
132 IAA 1901, s. 37(b); Rule 82 (24 Mar 1905); Re Kirby [1903] AR 343.
133 Banks v North Bulli Colliery [1905] AR 289; Re Vickery & Sons Ltd [1906] AR 5; Illawarra Colliery Employees' Association v Vickery (1906) AO 2/79/1.
The court under Cohen had held that it had no criminal jurisdiction and that breaches of awards were not strictly offences.\textsuperscript{134} Such breaches were in a curious juridical position: strictly they were an infringement of a court order, and were punished by a "fine" or "penalty", but the applicant "sued for" their recovery.\textsuperscript{135} The Act provided that the court could direct to whom the penalty should be paid. The normal practice was for the union, as the applicant, to receive the sum, but where the employer had underpaid his workers, usually a portion of the penalty was directed to be remitted by the union secretary to the workers as compensation for lost wages.\textsuperscript{136} In later cases the court began ordering the payment of due wages as well as imposing a penalty. This remedy, however, did not replace the existing methods of proceeding by a civil action or under the Truck or Masters and Servants Acts. The payment of penalties to unions engendered resentment among employers, encouraging the view that the court was biased towards unions. But as the maximum sum recoverable was usually £5 and only limited costs were recoverable at the court's discretion,\textsuperscript{137} a successful union would usually recover no more than its actual expenses.

The imposition of a penalty called for a stricter adherence to formalities than in other cases. Because the summons was the means by which the respondent obtained notice of the alleged breach, failure to adequately disclose the nature of the particular breach could prove fatal to the applicant's case, although the omission of details could be ignored if the respondent was not misled.\textsuperscript{138} Also, s.28 specifically stated that a union could bring an application for enforcement only after a resolution authorising action was passed at a specially convened general meeting. As this was a statutory requirement, the court

\textsuperscript{134} Cigar Makers' Union of Australia v Hirschmann [1902] AR 61 at 65; Cohen J, Court of Arbitration Notebooks vol. 1, AO 2/2673/89.

\textsuperscript{135} IAA 1901, s. 37 (7), (8).

\textsuperscript{136} Re Claxton [1903] AR 428; Re Freidenreich [1904] AR 243.

\textsuperscript{137} The Rules allowed costs only for preparation, filing and service of documents. In Ex p Godfrey [1904] AR 264, the registrar held (on taxation of costs) that unless specifically awarded by the court, these were the only sums recoverable. The court refused to award costs if its decision was not unanimous, only part of the claim was upheld, or if summonses had been issued indiscriminately: Re Boese [1904] AR 107; Re Bowman [1904] AR 241; Re Port Jackson Co-Operative Steamship Co [1906] AR 381.

\textsuperscript{138} Re Horne; Re Lyon [1905] AR 162; Re Coulton [1907] AR 96; Re Grace Brothers [1905] AR 278 at 281; Re Seaton [1904] AR 76.
demanded that it be carried out to the letter, or beyond it. Thus Heydon insisted that the meeting be called in strict accordance with the union rules, and the notice of the meeting should state precisely those breaches which were to be voted on. It became common for respondent employers to allege that the requirement had been insufficiently observed, and several cases were lost on this technical ground.139

In determining whether an award applied to particular circumstances, the court was required to interpret its own awards. At first an expansive literal approach was taken, applying awards to all types of work capable of being covered by them. This test was replaced by one which characterised the substantial nature of the employer's business. An employer was bound by the award if the business was of essentially the same class as that undertaken by those subject to the award. The intention of the court when framing the award and the object of the award were also considered.140 Cohen took the view that awards should be given a liberal construction: "they must be taken in a full and generous spirit, and the general scope and purpose of the award must be taken into consideration."141 Heydon was concerned to see that awards were not extended beyond their intended ambit, but seemed resigned that the legislative character of the court's work would inevitably produce incongruities: "We have got to lay down general rules, and with general rules one of the difficulties ... is that they are misfits."142 When forced to adopt a literal reading which applied the award beyond its intended ambit, he attempted to minister justice by discretion over the amount of the penalty and the award of costs.

While the court attempted to establish principles governing the penalties imposed, the subjective factors of each case prevented the creation of strict rules. The attitudes expressed in his decisions, however, showed that Heydon's concern was for the preservation of the court's authority as much as the protection of workers. The amount of the penalty seemed to depend on the degree of culpability rather than the harm that resulted. An inadvertent breach would result in a nominal penalty; conversely, a deliberate evasion met with harsh punishment. Heydon tended to be lenient if the breach resulted from a

140 Re Co-Operative Wholesale Society Ltd [1903] AR 432 at 435, 436; Re Grace Brothers [1905] AR 278 at 286; Re Brown [1907] AR 35.
141 Re Bull [1903] AR 335 at 337; (1903) AO 2/5700.
142 Re Fenwick [1907] AR 32 at 33.
genuine misinterpretation of the award or a bona fide belief that it did not apply.\textsuperscript{143} The court was reluctant to inflict a penalty when casual workers were briefly employed during emergencies or rush periods; but when casuals were taken on to evade the award, the full penalty was imposed.\textsuperscript{144} The court was unwilling to allow mitigation of even trivial breaches when there was a history of persistent breaches or resistance to awards in the industry. Although the court had no power to punish for contempt committed outside the confines of the court-room, it could issue injunctions backed by severe penalties. In one case the master of an American ship used his crew to unload the vessel contrary to the wharf labourers award and, claiming that foreign vessels were immune from the court’s jurisdiction, threw away an injunction issued to retrain him from committing further breaches. Cohen treated these actions as a gross affront to the legal system warranting a £50 fine in addition to the full £5 penalty for breach of the award: the court’s awards and orders were entitled to the same respect as any other law.\textsuperscript{145}

\textsuperscript{143} Re Hawkesbury Steam Navigation Co [1904] AR 174; Re Roberts [1907] AR 4.

\textsuperscript{144} Re Hartley [1904] AR 306; Re Wood [1907] AR 234.

\textsuperscript{145} Re Ranselius [1904] AR 54 at 58.
Chapter 9

The System in Transition, 1908–1912

By the beginning of 1908 many observers detected a growing state of industrial unrest across the state. Increases in the cost of living and a temporary economic downturn led even craft workers to contemplate strike action. To employers the Arbitration Act was an undoubted failure because it had not stopped strikes. Arbitration could only succeed in its object of preventing industrial disputes if strikes were punished by the swift and sure imposition of fines backed up by imprisonment. It was also complained that the "spirit of conciliation" had disappeared. The Employers' Federation's suggestion for a conciliation board to settle grievances was quickly rebuffed by the president of the Labor Council, Frank Bryant: there could be no industrial peace without compulsory arbitration. The labour movement blamed the continuing failure of the arbitration court to meet the demand for hearings. Amendment of the Act was discussed by the Labor party at its annual conference in January 1908. Recognising the need for a more streamlined procedure, most delegates approved the idea of "direct representatives" appointed by the parties to act as assessors and thereby reduce time taken up by the calling of witnesses. Beeby led the campaign for amendments: "if unions could come to the court without fear of delay and unnecessary litigation they would trust the court every time." Beeby continued to propound his scheme of subsidiary boards for each trade in dispute, with a permanent court for the general administration of the Act. Disquiet among workers turned into action. Over 3,000 timber workers went on strike in February after a month of unrest; the dispute was settled by compromise after five days. Painters also took industrial action after being refused a

1 SMH 8 Jan 1908, p. 8; SMH 14 Feb 1908, p. 4; SMH 18 Feb 1908, p. 11.  
2 SMH 28 Dec 1907, p. 10; SMH 1 Jan 1908, p. 6.  
5 SMH 13 Feb 1908, p. 7; SMH 18 Feb 1908, p. 7.
conference by employers. Continuing trouble on the wharves eventually led to a strike in March, which threatened to cripple shipping and spread across the transport industry. Wade announced a state of industrial crisis, declaring that the strike proved the failure of arbitration, and urged that the situation not be used to political advantage. The strike was only limited by Hughes’ strong intervention.6

The increasing number of national union federations, led by Victorian unionists’ desire to obtain an award from the commonwealth arbitration court, increased the arbitration system’s problems. The shearers and wharf labourers had already committed themselves to the federal system: the Australian Workers’ Union obtained a national award in 1907, while the Waterside Workers’ Federation had registered an industrial agreement with the steamship owners. The Newcastle miners had also opted out of the state system, though in a different manner. In November 1907 another large strike had broken out on the northern coalfields. The introduction of coal-cutting machinery after the Teralba dispute in 1904 had sharpened industrial relations on the coalfields, while the miners’ disillusionment with the arbitration court was fuelled by the spread of militant socialism. The northern union, led by Peter Bowling from 1906, had come to reject compulsory arbitration in favour of direct action. The miners struck at a strategic moment, following a long wheelers’ strike when coal reserves at the pit head were seriously depleted. Moves had already been taken to federate the unions on the major coalfields (the coal owners had re-united in October 1905), so the strike threatened to spread across the state.

Before the strike Wade offered to mediate and promised to establish a government inquiry for both sides to present their case.7 The miners went out but continued negotiations with Wade; they refused to go before the arbitration court because of the owners’ past actions in overturning awards by judicial review. The strike ended after a fortnight when the miners and owners agreed to accept Wade’s plan for a special court established by royal commission and consisting of a judge and two experts nominated by the parties. Among the conditions of settlement were that no legal points would be raised, the procedure

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7 SMH 11 Nov 1907, p. 5; Wade, NSWPD vol. 27 (14 Nov 1908), p. 987.
would be informal, the parties had the right to withdraw if a strike or lock-out occurred, and neither side would seek judicial review of the decision. Heydon was appointed chairman of the commission, and the miners nominated Bowling as their representative. The union's management committee favoured co-operation with the commission, but it was unable to control the lodges. A rolling wave of localised strikes ensued and Heydon, at the insistence of counsel for the proprietors (who threatened to withdraw), refused to sit while some of the miners were on strike. The commission did not have any judicial status, but Heydon insisted on observance of the strike settlement agreement and, holding the union responsible for all strikes, would not allow his authority to be flouted by direct action. As a result, the commission failed to conduct any business for four months. After a further strike at Teralba in March, Heydon decided to resign as chairman and resume his duties on the arbitration court, although he later returned to the commission for a time at the request of the parties.

The Industrial Disputes Bill

Wade had issued instructions for alterations to his wages board bill just after the elections in September 1907. Its true character was admitted by transforming it from a bill amending the Arbitration Act into one introducing a completely new system. The arbitration court would be abolished. Boards were to make awards rather than "determinations". The deficiencies in enforcement would be remedied by the appointment of special inspectors with broad powers to examine workplaces and scrutinise time and pay sheets; they would report directly to the minister who would initiate all prosecutions. Penalties for breach of board awards could be recovered in the District Court, while other penalty cases would be heard by magistrates. No enforcement hearing would be subject to appeal or judicial review. Wade remained tight-lipped about the nature of his legislation, although many assumed it would ensure the continued existence of a permanent arbitration court.

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8 NSWPD vol. 28 (21 Nov 1907), p. 1184ff; SMH 22 Nov 1907, pp. 5-6.
9 Royal Commission on Coal Mining Disputes, First Report, AGJ Special Bundles, AO 5/7752/1; Transcripts, DLI Miscellaneous Files, AO 2/5811; NMH 18 Mar 1908, p. 4; WN Covers 12 (17 Mar 1908), p. 13.
10 DT 21 Mar 1908, p. 10; NMH 29 Apr 1908, p. 4.
11 Drafting instructions for "Wages Board Bill", 20 Sept 1907, AGJ Letters AO 7/5424.
At the opening of parliament in March Wade announced the impending introduction of a bill to replace the Arbitration Act, which was due to expire in July. When it was declared that the court would be replaced with "boards of conciliation," McGowen promised the full opposition of the labour movement. Wage boards were unacceptable because they allowed the victimisation of worker members by their employers, and the hearings did not allow the public revelation of industrial conditions. He offered a compromise based on Beeby's scheme: wages boards would be established, but under the control and supervision of the arbitration court, which would be a court of appeal allowing a "full judicial inquiry". Wade replied that the tribunals that would be established — he did not mind what they were called — would practically be courts of conciliation with compulsory powers, marked by expertise and informality. A court in the ordinary sense would reintroduce lawyers, technicalities and writs of prohibition. Beeby retorted that even the Victorian system now had an appellate court to supervise the boards. The wages boards system was not designed to settle industrial disputes, and did not even eliminate sweating; the arbitration system, though, went beyond the living wage to give workers the right to a fair and reasonable wage.\(^{12}\) Two days later Wade moved the suspension of standing orders to bring in his Industrial Disputes Bill in the hope of passing it within a few weeks.

The bill provided that awards of the arbitration court would continue until their expiry dates, but the court itself would disappear. Instead separate boards would be established for every industry, about 50 in total. Wade denied that the bill introduced the Victorian wages board system: the boards he proposed would have far wider jurisdiction. They would consist of up to ten experts actually working in the industry, elected by the employers and employees, with either a judge or a person appointed by the Supreme Court as chairman. As the chairman would in most cases be a judge, he would be able to enforce the award when breaches were brought to his notice by the inspectors. Unions registered under the Arbitration Act would have their registration preserved, and would continue to be able to enter into enforceable industrial agreements. However, there was no provision for further registration under the new measure or for the award of preference to unionists. Although unions would have no special standing before the boards, penalties could be imposed upon unions as well as individuals.

\(^{12}\) *NSWPD* vol. 29 (10 Mar 1908), pp. 22, 25, 51-52, 57.
Lawyers would be barred from appearing unless by the consent of all parties, while awards and penalties would be immune to appeal or judicial review. Strikes and lockouts were made a crime punishable by a penalty of a £1,000 and two months' imprisonment.\textsuperscript{13}

Wade imagined that boards would be established as disputes arose, and would act mainly as conciliators with the power to conclude an award which would effectively become an industrial agreement extended by a common rule. Board decisions would be by majority, but Wade expected that if there was disagreement the chairman would attempt to conciliate before exercising his casting vote. He based these expectations on the experience of voluntary conciliation boards in Britain as well as the Victorian system where, he supposed, the chairman's casting vote was rarely exercised — an impression that was unfortunately erroneous.\textsuperscript{14} Although not completely antipathetic to unions, he regarded it as illegitimate for parliament to encourage them directly: particularly as they attempted to restrict the employment of ordinary competent workers who happened to be non-unionists. However, he had no objections if employers agreed to preference in an industrial agreement.\textsuperscript{15}

Wade's bill drew criticism from all quarters. A deputation from the Labor Council met him to protest at the bill, particularly its recognition of non-unionists and the harsh penalties for striking. The bill struck at the principles of unionism and was sure to promote industrial troubles, they said. Frank Bryant met with applause when he said that the labour movement insisted on a "right of full judicial inquiry by a permanent Court." At the council meeting the following week, Bryant called for class solidarity to defeat the bill, and it was suggested that unions should boycott the boards. Several unions petitioned parliament, requesting amendments to provide for a permanent appeals court, exclusive representation by unions and jurisdiction over all matters involved in an industrial dispute.\textsuperscript{16} The Employers' Federation was also less than enthusiastic, preferring wages boards with a court of appeal.


\textsuperscript{15} Wade, \textit{NSWPD} vol. 29 (19 Mar 1908), p. 308.

\textsuperscript{16} \textit{DT} 18 Mar 1908, p. 13; \textit{Worker} 19 Mar 1908, p. 13; \textit{Worker} 26 Mar 1908, p. 12; \textit{VPLANSW} (1908) 143-145.
The *Sydney Morning Herald*, which had opposed compulsory arbitration at every turn, counselled compromise with the unions, as their acceptance of the system was crucial to its success. The Chamber of Manufacturers approved the scheme and had only minor amendments to suggest.\(^{17}\) H.R. Curlewis, a barrister with some experience of the arbitration court, objected that the exclusion of judicial review in the bill infringed a valuable aspect of individual liberty: without the supervision of the superior courts a man could be hanged for wearing tan boots with evening dress.\(^{18}\)

Beeby responded to Wade by arguing that the present Act had not been a failure: the defects were the result of Wade’s refusal to amend it by abolishing the unnecessarily strict interpretations of the superior courts, which were "out of touch with the industrial affairs of this country and out of sympathy with industrial unions". He presented five conditions on which the Labor party would accept the bill: continuance of a permanent industrial court, presided over by a judge, and available for appeals from boards at the judge’s discretion; restriction of parties before the court and boards to registered unions; power to award preference discretionally; extension of the scope of the boards to all matters involved in an industrial dispute; and power to examine profits of an industry in fixing awards.\(^{19}\) If these conditions were met, the labour movement would accept the stringent penal provisions of the bill. By far the most important demand was the provision of a court to guard against domination of the boards by employers. "We will accept your wages boards if you will give us a higher Court," McGowen offered to Wade.\(^{20}\) Most Labor members regarded a Supreme Court judge as the only person available with sufficiently high status and independence from direct pressures, though they preferred the appeals court to include lay assessors to ensure it did not become legalistic.\(^{21}\) A judge could also be trusted not to exceed his jurisdiction.


\(^{18}\) DT 24 Mar 1908, p. 9.

\(^{19}\) Beeby, *NSWPD* vol. 29 (19 Mar 1908), pp. 317, 325.

\(^{20}\) NSWPD vol. 29 (19 Mar 1908), p. 298.

No doubt prompted by the unions' threat to refuse to participate in the boards, the premier had already been making conciliatory noises. To the surprise of Labor members, many of the opposition's proposals for amendment were accepted during the committee stage. At Beeby's insistence, provision was made for the registration of future unions as well as the continuance of the status of those already registered under the former Act. Wade eventually conceded the appeals court, but drew the line at the appointment of lay members as the court would deal mainly with legal questions. The Labor party accepted Heydon's reappointment, and suggested his elevation in status to that of a Supreme Court judge. Many of the powers given to the minister would be exercised at the instance of the court: the judge would recommend appointments to the board following elections for nominees, and would also recommend the constitution of boards. The court would also recommend the appointment of chairmen following nomination by the board members. Wade accepted this change "to have the whole administration of the machinery in the hands of the Industrial Court." Wade had originally wanted both lawyers and advocates (i.e., union officials) excluded from board hearings unless admitted by unanimous consent; however, a union delegation convinced him that expert representatives might be an advantage to the proceedings. As a compromise, the discretion to admit them was left to the board chairmen.

The most intense debate occurred over Labor's proposal for a clause stating that wage-fixing should require a living wage and the consideration of profits. This was steadfastly resisted by the government: the boards must be allowed discretion, while the living wage and profits were impossible to define. The power to award preference to unions was conceded by including it in the definition of "industrial matters", but Wade would not agree to unions being given exclusive rights of representation as no one should be excluded from the right to appear before a court of justice. To prevent evasion, the Act's jurisdiction was also extended to include contractors as employees. At the end of

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22 SMH 18 Mar 1908, p. 7; SMH 20 Mar 1908, p. 6.
23 NSWPD vol. 29 (1908), pp. 535-538.
24 Wade, NSWPD vol. 29 (1908), p. 573.
25 Industrial Disputes Bill 1908 (LA), cl. 38(f); NSWPD vol. 29 (1908), pp. 639-642; SMH 31 Mar 1908, p. 6; IDA s. 37(f). Labor members were divided over allowing appearances by lawyers.
26 NSWPD vol. 29 (1908), pp. 587-616.
the committee process Beeby congratulated the Labor party for having turned the boards practically into courts of law. Wade later claimed that the changes had not affected his fundamental principles, but the result was regarded as a compromise between a wages boards system and compulsory arbitration. The Legislative Council insisted on only a proviso making clear that the boards were not obliged to grant preference, and the bill became law on 24 April. On 29 June the Court of Arbitration sat for the last time to deliver its award in the painters' dispute. The next day Heydon sat alone as the new Industrial Court, to decide penalties for breaches of the former court's awards.

The Labor party had won a great victory — three of their five conditions had been conceded — but the unions did not see it that way. The Act's recognition of non-unionists was taken as giving preference to blacklegs and the measure was presented as designed to destroy the power of unions. In April the Sydney Labor Council agreed to recommend that unions refuse to participate in the new system and revert instead to the method of strikes. Labor parliamentarians were denounced by many for failing to oppose the bill completely; they had fallen into a trap cunningly laid by Wade. The Labor Council reaffirmed its stance in June, but union secretaries remained silent as to their intentions. By the time the new court was ready to sit, three unions had already registered, and another six (some of the most ardent customers of the former system) had applied for registration, claiming that the Act served their purposes adequately. Other unions soon followed suit, though several resolved not to register, and the Labor Council was forced to dilute and eventually rescind its motion. The first state-wide Trade Union Congress in August rejected the Labor Council's stance and voted instead to support amendments which strengthened unionism. The SLC continued its opposition until it was

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28 Beeby, *NSWP*D vol. 29 (1908), pp. 790-792; *SMH* 8 Apr 1908, p. 10; *SMH* 13 Apr 1908, p. 6.
29 Industrial Disputes Bill 1908 (LC), cl. 35; IDA s. 35(3).
30 *SMH* 1 Jul 1908, p. 9; [1908] AR 297, 299.
31 *Worker* 9 Apr 1908, pp. 1, 11; *NMH* 9 Apr 1908, p. 4.
32 SLC Minutes 9 Apr 1908, ML A3839/380-381; *DT* 10 Apr 1908, p. 7.
33 SLC Minutes, 4 Jun, 18 Jun 1908, ML A3839/412, 422; *SMH* 8 Jun 1908, p. 7; *SMH* 23 Jun 1908, p. 7; *SMH* 30 Jun 1908, p. 6. The unions already registered were the musicians, butcher shop employees and waterside workers. Those applying were the storemen, undertakers' assistants, caterers, carters, tailors and breadcarters. H.A. Mitchell of the engine drivers publicly supported resort to the Act.
discovered that by September nearly two-thirds of the affiliated unions had registered under the new Act. After first being diluted, the boycott resolution was eventually rescinded in May 1909.34 Heydon, who approved of the changes wrought by the new Act, was relieved at the Labor Council's failure, and looked forward to his new activities.35

Amendment

The new system failed to work as Wade had envisaged. Many unionists continued to regard the Act with resentment, considering its prohibition of strikes and failure to fully recognise unions an assault on the principles of unionism. In the first four months only 38 of the smaller unions registered; the large and powerful unions preferred to bargain directly. The initial refusal of unions to participate in the new system led to delays in the establishment of the boards. It was not until September that the board system began in earnest, and twelve boards were operating before the end of the year. The method of electing board members proved too unwieldy and time-consuming, so Heydon adopted the practice of appointing up to five members from each side after obtaining recommendations from the union and employers' association. In only three cases were elections for members held, and two of these produced complications. In one, two unions contested the positions and the smaller union failed to have a representative elected, even though it represented the workers with the real grievance.36 The provision for appeal from a board to the Industrial Court also presented problems. In accordance with Wade's vision of boards being chaired by District or Supreme Court judges, Justice Street had presided over the first successful board, covering tramway employees. Yet the Labor party's insistence of an avenue of appeal meant that Heydon, a District Court judge, might have to sit in judgment on the decision of a judge superior in rank and status. Such a prospect was clearly contrary to the natural order of things. In the

34 Trade Union Congress, Official Report 1908, pp. 11-15. A motion to expel unions registering was lost decisively and in May 1909 the rescission was carried narrowly: SLC Minutes 17 Sept 1908, ML A3839/474; Labor Council Minutes 13 May 1909, ML A3840/77; J.T. Sutcliffe, A History of Trade Unionism in Australia (Melbourne: Macmillan, 1921), pp. 171-172.


36 Wade, NSWPD vol. 32 (25 Nov 1908), pp. 2804, 2806.
tramways case, Street followed the superior court decisions on the meaning of "industrial dispute" and held (in relation to the dismissal or refusal to re-employ unionists who had taken part in the recent tramways strike) that a board could exercise jurisdiction over only those disputes which originated between existing employers and employees concerning their employment relation. He also ruled that a board could not dictate how an employer was to conduct his business, or lay down general rules for the regulation of an industry.37 So the jurisdictional defects of the arbitration court, which Wade had assured his opponents would be remedied by a wages board system, were being reproduced by a judicial approach to dispute resolution.

The delineation of the boards also produced problems. The list of boards in the schedule to the Act was unworkable from the beginning. Some of the industry classifications were simply absurd: for example, there was to be a single iron trades board responsible for engineering, moulding, coppersmithing and shipbuilding. Others incorporated work that appeared to comprise a single industry, but which operated under different processes or catered to separate markets. Long-standing divisions between workers of different trades were ignored. Many workers and employers would be unrepresented if a single board were constituted for a whole industry. Unions applied for separate boards to cover their members on a craft or occupational basis, while employers mostly preferred boards constituted on an industry-wide basis as this would reduce their total attendance time and the number of different awards with their potential for conflicting provisions. When the stationary engine drivers and firemen applied for separate boards they were opposed by the coal proprietors who wanted a board covering all occupations in each mining district, arguing that the schedule was exclusive and did not allow the creation of sectional boards.38

From his experience on the court Heydon recognised that it was unrealistic to expect a single board to handle all the strongly demarcated trades and occupations within an industry; such arrangements would take away the rights conferred by the former Act, which permitted "each real division in the industry getting its own disputes

37 NSW Government Tramways Employees Union v Chief Commissioner for Railways and Tramways [1908] AR 373 (Government Railways and Tramways Board).

38 [1908] AR Records 429-431; (1908) AO 2/5722; Re Shore Drivers and Firemen's Union [1908] AR 353; papers re northern and southern coal boards, 1909, AGJ Letters, AO 7/5423.
settled separately", and would hardly be conducive to the settlement of industrial disputes. He decided to engage in some creative statutory interpretation: while a "superficial" reading of the Act required boards to be constituted as laid out in the schedule, the statute's wording did not preclude the establishment of different boards for each of the occupations mentioned.39 Before Heydon began to determine the merits of the engine drivers' application, the coal proprietors attempted to restrain him by a writ of prohibition from the Supreme Court. The judges, however, held that judicial review was inappropriate as Heydon's function of recommending the constitution of boards was ministerial rather than judicial. An application for special leave to appeal was refused by the High Court on the same grounds: the recommendation, in Chief Justice Griffith's words, "cannot be regarded as a judicial proceeding."40 Although Heydon's solution could not be challenged directly in the courts, it was still doubtful whether the creation of sectional boards was authorised by the Act.

To remedy these problems, Wade introduced an amending bill at the end of November. He recognised that the board system was not working exactly as intended. Unlike the Victorian wages boards, where proceedings were conducted informally and with a spirit of conciliation, in New South Wales the experience of a formal court had meant that the boards "were apparently wedded to the old system in which they had been trained ... and began their proceedings by taking evidence in great detail and at great length." Accepting this transformation of the boards into miniature courts, Wade proposed expediting proceedings by removing all references to elections for membership while reducing the maximum number of representatives to four, with provision for assessors to be appointed by the chairman. The schedule would be expanded, while the court could divide or combine the industries into boards based on occupation or locality as it saw fit. Appeals to the Industrial Court would be removed where the chairman was a judge; they could safely be entrusted with questions of law, while their training reduced the likelihood of their making erroneous decisions on the facts. In proposing this amendment, Wade was implicitly recognising that chair-

39 *Re Shore Drivers and Firemen's Union* [1908] AR 353 at 355, 357.
40 *Ex p Newcastle Coal Co* (1908) 9 SR 335 (SC); (1908) 8 SR 60 (HC). The Supreme Court judges left open the question of whether IDA s. 52 validly excluded judicial review; Pring expressed doubts whether ouster of the prerogative writs was a valid exercise of parliament's power.
men were effectively responsible for making decisions of the boards. Judicial review of the constitution of boards would be specifically excluded, and the status of boards already constituted would be confirmed. Also, the Industrial Court would be made responsible for the recovery of costs, making the court "a law unto itself" by reducing its reliance on other courts. 41 Street's decision in the tramways board would be addressed by giving boards jurisdiction to determine industrial matters whether or not there was a dispute.

Holman congratulated Wade on the amendments, which he saw as a step back from the false principle of wages boards. Experience of the Act had shown that only unions could represent the interests of workers, so he urged that unions be given the right to appoint employee representatives; in fact, union officials should be permitted to represent workers, as ordinary workers could easily be victimised by employers. The abolition of appeals from boards chaired by judges was also supported; Holman suggested that the principle be taken further so that Heydon and another industrial judge would chair all boards.42 Beeby too considered the amendments a movement towards arbitration and the acceptance of the labour movement's fundamental principle, that

where there is an absolute taking away of the right to strike, you cannot expect the trade unionists of this community to have confidence in a measure unless their grievances are tried before a judicial body exercising ordinary judicial functions.43

The party supported most of the amendments, while claiming that they did not go far enough; however Arthur Griffith objected to the judge and chairman being given complete power over membership of boards and the appointment of assessors. At the Labor party's insistence, the provisions preventing judicial review of decisions of the court or boards were strengthened, and several additions to the schedule were accepted;44 but the government rejected the opposition's attempts to increase the representative status of unions and require all board chairmen to be appointed from the judiciary. Apart from the exclusion of lawyers from hearings on the constitution of boards, which was excised by the Legislative Council, the bill became law at the end of

44 *NSWPD* vol. 32 (26 Nov 1908), pp. 2920–2921.
December.\textsuperscript{45} The effect of the amendments was to bring the system even closer to that demanded by the Labor party: unions were not given exclusive representation, but the abolition of elections meant that their nominations would almost invariably be accepted, and non-unionists would find it almost impossible to find a voice even if they wanted to. The concentration of powers in the hands of the board chairmen and the Industrial Court approximated the scheme preferred by the labour movement, a series of subsidiary courts with a court of appeals.

Judicial Review after 1908

One of Wade's chief justifications for a system of wages boards was that as an administrative rather than a judicial system it would not be liable to interference by the courts. To combat interference by the Supreme Court s.52, after repeating the words of the 1901 Act's ill-fated s.32, added that the validity of any decision of the new Court "shall not be challenged by prohibition or otherwise." Whether the additional words of s.52 abolished judicial review was raised though not decided in the coal companies' attempt to block Heydon's decision to establish separate boards for stationary engine drivers employed at coal mines. Both the Supreme and High Courts held that Heydon's recommendation to the Governor for the constitution of a board was ministerial (or executive) in nature and not a judicial proceeding, so prohibition could not be issued. However, the Supreme Court judges refrained from deciding whether parliament had the constitutional power to exclude the royal prerogative and so the significance of the more explicit words remained unresolved.\textsuperscript{46}

It did not take long before the matter arose again. In October 1908 Baxter's, a Goulburn bootmaking company, was fined by the Industrial Court for paying its apprentices less than the rate specified in a common rule made by the former court; as the matter had been pending when the court was abolished, it was heard under the continuation provisions of the new Act.\textsuperscript{47} Baxter challenged the penalty by seeking prohibition on the ground that the court had no power to make an

\textsuperscript{45} NSWPD vol. 32 (10 Dec 1908), pp. 3641-3642; Industrial Disputes Amendment Act 1908, No. 24.
\textsuperscript{46} Ex p Newcastle Coal Co (1908) 8 SR 335 (SC); (1908) 6 CLR 466, (1908) 8 SR 60 (HC).
\textsuperscript{47} Clickers' Association v Baxter & Co [1908] AR 363.
award affecting pre-existing indentures of apprenticeship. Acting Chief Justice Stephen followed the Haberfield case in holding that it was within the power of the Industrial Court to decide whether such individual agreements were covered by the award, and thus prohibition was not available even if the court's decision was erroneous in law. Furthermore, he thought that the additional words in s.52 "were expressly intended to get rid of the previous decisions" on judicial review and that they were sufficient to remove the Crown's prerogative of review. Cohen found that the Act had not shown an intention to take away pre-existing rights (he drew on his arbitration experience to assert that the court did not affect existing contracts), and that the additional words in s.52 were not sufficiently strong to show any intention to oust review by the superior courts. He reasserted the Supreme Court's previous view that a writ could be issued against inferior court decisions that were contrary to natural justice though intra vires. Pring regretfully found that s.52 ousted judicial review once a decision had actually been given, although prohibition could still issue to restrain a court from deciding a case. At the hearing Pring had raised the question whether, since it purported to remove a royal prerogative, the Industrial Disputes Act had been specially reserved for royal assent in London, but was satisfied when it emerged that the Colonial Office had waived any objections.

The High Court granted Baxter special leave to appeal, but rescinded it after deciding that the case turned on particular facts and was not of sufficient general importance to be dealt with. However the judges did proceed to deliver judgments on the issues. Griffith, Barton and O'Connor all held that as the penalty had really been imposed under the Industrial Arbitration Act, Clancy's case applied and prohibition could issue against the court's decision. They went further and held that s.52 of the Industrial Disputes Act did not completely abolish judicial review: the Industrial Court could be restrained by prohibition if it made a decision that, on the face of it, did not deal with an industrial matter as defined in the Act. However, if the issue was prima facie an industrial matter, the court was not subject to judicial

48 Ex p Baxter (1909) 9 SR 201.

49 SMH 19 Feb 1909; Wade, Minute, 19 Feb 1909, AGJ Letters AO 7/5422. The matter was probably settled by the Colonial Laws Validity Act 1865, 28 & 29 Vict, c. 63, s. 4, which stated that no colonial statute was void because the governor's assent had been given contrary to his instructions.
review.\textsuperscript{50} Isaacs dissented, holding that the words of s.52 were "clear, distinct and unmistakeable" and prevented review of Industrial Court decisions if its power had been exercised \textit{bona fide}. Decisions of the Industrial Court were arbitral or supervisory rather than judicial in nature: unlike ordinary courts it both created rights and enforced them. It was understandable that parliament should prefer that a specialised and experienced judicial tribunal might accidentally step beyond the exact limits of its powers, rather than permit the confusion that would result if the strict rules of common law prohibition were applied to nullify awards and decisions.\textsuperscript{51} While the majority judges stressed that there must remain some capacity for the superior courts to restrain inferior tribunals from exceeding their domain, the decision indicated that in future judicial review should be exercised only when the Industrial Court or the boards, in interpreting their jurisdiction under the Act, had manifestly exceeded their proper sphere. While no further applications for prohibition were brought during the life of the Industrial Disputes Act,\textsuperscript{52} the power of judicial review remained. After 1912 the arbitration court was occasionally restrained by the prerogative writs in spite of even more emphatic language in later statutes.\textsuperscript{53} But never was the basis of the statute challenged and restricted so severely as it had been between 1903 and 1907.

\textbf{The Court and Boards}

In the view of F.A.A. Russell, an industrial lawyer with a wide experience of the boards, Wade's Act "introduced a larger measure of Industrial socialism [by which he meant regulation of industry by the state] than the Parliament which passed it, or the public for whom it

\textsuperscript{50} \textit{Baxter v New South Wales Clickers' Association} (1909) 10 CLR 114 per Griffith CJ at 132; per O'Connor J at 148.
\textsuperscript{51} (1909) 10 CLR 114 per Isaacs J at 156, 161.
\textsuperscript{52} \textit{IDA} s.52 was raised in an application for habeas corpus following a conviction for striking under s.42, but the Supreme Court refrained from deciding the issue since the High Court's judgment in Baxter's case was not yet available: \textit{Ex p Young} (1910) 10 SR 183.
\textsuperscript{53} \textit{IAA} 1912, ss. 13, 58; \textit{Ex p Brennan} (1915) 15 SR 173. Another two rules \textit{nisi} were issued against the court constituted under the 1912 Act, though they were never made absolute: F.A.A. Russell, \textit{Australia's Industrial Problems} (Sydney: Butterworths, 1918), p. 3. See also \textit{Bank of NSW v United Bank Officers' Association} (1921) 21 SR 593; \textit{Minister for Labour and Industry v Mutual Life and Citizens' Assurance Co Ltd} (1922) 30 CLR 488; \textit{Rylands Bros (Australia) Ltd v Morgan} (1927) 27 SR 161.
was passed, realised at the time".54 As Russell recognised, the Act turned out to be more a continuation of the system established under Wise's Act of 1901 than a departure from it. Although the boards in New South Wales were popularly described as wages boards, they resembled the Victorian bodies neither in form nor content. While the Victorian boards could only determine minimum wages, maximum hours and apprentice numbers, the New South Wales boards could additionally make an award fixing a wide range of industrial matters (which was defined in the same terms as in the Industrial Arbitration Act, with the addition of preference to unionists).55 Thus the boards' jurisdiction was at least as wide as the former court's in making awards; in some respects it was wider, since they could regulate contract workers.

Under the Industrial Disputes Act, 270 boards were created, covering 213 different areas (many boards were reconstituted), which made 404 adjudications in three years. The average sitting time of each board was over 64 hours, though because many boards issued more than one award, the average production time for awards was 43 hours.56 Wade had contemplated using judges to act as chairmen, but this occurred rarely: Street chaired the tramways board in 1908, while eight boards, dealing mainly with coal mining, were conducted by Judge Scholes. Of the 57 different chairmen, 44 were practising barristers — a quarter of the bar.57 Most chaired only one or two boards, but much of the work was done by Walter Edmunds (28 boards), H.M. Hamilton (17), A.B. Piddington (14), E.M. Brissenden (13) and F.A.A. Russell (10). Addison undertook a large share of the work, presiding over 41 different boards, while his chief clerk, E.W. Wickham, ran the two dealing with wire-netting.58 The only non-barrister with a large number of appointments was the building contractor and balladist T.E. Spencer, who headed 21 boards before his death in 1911.59 The former MLA, John

55 IDA ss. 27(1), 4 (definition of "dispute" and "industrial matter"); cf IAA s. 2; Factories and Shops Act 1905 (Vic), ss. 75, 90, 91.
57 For lists of boards and chairmen, see (1913) 3 IG 739 et seq.
58 Addison's duties increased enormously under the new Act: see letters from Addison to Under-Secretary, Mar-Sept 1909, AGJ Letters, AO 7/5445.
59 Spencer was the employers' representative on the arbitration court from 1907 (and the author of "How McDougall Topped the Score"): David Headon, "Thomas Edward Spencer", *ADB* vol. 12, p. 33.
Fegan, chaired three boards. Often a chairman was appointed to the two or three boards covering the same trade in different localities, while less frequently the same chairman was responsible for a group of boards in the same industry. Because the boards were chaired by barristers, most sittings occurred at night and were conducted intermittently. Records from 1909 show that usually two or three boards met each evening in the rooms specially set aside in Young St near Circular Quay, and the same board often sat several times a week.\(^{60}\)

Surviving transcripts and records of boards confirm the oft-repeated criticism that they operated as miniature courts. There was extensive examination and cross-examination of witnesses, with the lay board members acting as advocates for their respective sides.\(^{61}\) Lawyers (usually solicitors, though sometimes barristers) often appeared for both sides, although unions were frequently represented by their secretaries. The calling of numerous witnesses continued, prompting A.B. Piddington (who was appointed royal commissioner to inquire into the arbitration system in 1913) to remark that "it would almost appear that, in matters of industrial litigation, parties had begun to be infected by the Hindoo notion that a Court decides, not according to the weight of the evidence given so much as according to the number of witnesses who give it."\(^{62}\) The chairmen's lack of authority meant that they were unable to restrict close questioning of witnesses by the board members, resulting in further protraction of business.\(^{63}\) Although the boards were supposed to expedite award hearings by the presence of members expert in the trade, this does not seem to have been the case. Lay members, pressing their own side's case, frequently disagreed about customs and work practices. Often they were ignorant of the particular section of the trade under examination. One chairman, H.R. Curlewis, later said "I do not think I ever got anything in any case from the members of the Board that I could not have got in half the time from the evidence."\(^{64}\) The Employers' Federation complained at

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\(^{60}\) Time sheets of caretaker, wages boards, Jul-Sept 1909, AGJ Letters, AO 7/5427; RCIA, Report, p. 29.

\(^{61}\) Transcripts of Metal Moulders' Board, 1910-1911, MUA uncat; Transcripts of Newcastle Collieries (Newcastle and Maitland Miners) Board, 1909-1910, AO 12/5605.1; Transcripts of Government Tramways (No. 1) Board, 1908, Premier's Dept, Special Bundles, AO 7/5930.

\(^{62}\) RCIA, Report, p. 63.

\(^{63}\) RCIA, Report, pp. 29-30.

\(^{64}\) H.R. Curlewis, RCIA, p. 551.
the "lengthy and unwieldy manner" in which boards concluded awards: the intention of the Act had been for the representatives to negotiate before the chairman,

instead of which the Board now assumes the function of a Court of Law, extremists on both sides are called upon to substantiate their claims, and the witnesses are often bullied and browbeaten by solicitors and secretaries, and the proceedings are protracted from month to month, with the result that ill feeling is greatly engendered...\(^{65}\)

A peculiar feature of the Industrial Disputes Act was that it allowed the registration of trade unions, yet gave few privileges or protections to unions so registered.\(^{66}\) The formation of a board could be requested by a registered union, an industrial union or, where there was no such union in the industry or it had not made an application, any twenty employees. Industrial agreements could only be concluded between registered unions and employers.\(^{67}\) The incorporation of industrial unions registered under the former Act was preserved, so presumably their legal position remained intact; however new unions registered under the Industrial Disputes Act were given no special legal status such as incorporation and the right to hold property, other than under the terms of the Trade Union Act. There were detailed provisions for the registration and cancellation of unions, both of which were exercised by the registrar with an appeal to the Industrial Court.\(^{68}\) Most unions remained under the Industrial Arbitration Act and also applied under the new Act. By the end of 1910, 56 new unions had registered under the Disputes Act, making 116 in all.\(^{69}\) Union secretaries were still given authority under awards to inspect employers' time and wages books, although sometimes prior authority was required from the registrar.\(^{70}\)

With the abolition of the provisions for election of board members, Heydon was given near-absolute power over appointments. As unions

\(^{65}\) E.H. Buchanan, "President's Address", Employers' Federation of NSW, Report of Annual Conference 1911, p. 11.

\(^{66}\) In this section, "registered union" means a trade union registered under IDA, "industrial union" means a trade union registered under IAA 1901, and "trade union" means a union registered only under the Trade Union Act.

\(^{67}\) IDA ss. 14, 12

\(^{68}\) IDA ss. 9-12.

\(^{69}\) Registrar's Memo, 2 Dec 1910, Department of Education, Subject Files, Department of Labour and Industry, 1909-1913, AO 20/13377.

\(^{70}\) Trolley Draymen and Carter's Award [1909] AR 233; Cutters' Award [1910] AR 58.
were the only real voice of employees, he accepted their nominations in almost all cases. However, he was concerned when the union represented only a section of employees in the industry. In the cold storage workers' application, only metropolitan employees were represented by a union so Heydon constituted a separate board for country districts. It sat for over two years without result, while its successor, appointed in 1911, had the distinction of producing by far the costliest award after 575 hours of sittings. Disputes could still arise when several unions claimed to represent the same industry, or where non-unionists were organised. Among pharmacists' assistants, the employees of the large retailing companies were covered by the shop assistants' union, while employees in the smaller shops (mainly apprentice pharmacists) belonged to an association opposed to the principles of unionism. Heydon held that the policy of the Act contemplated representation by non-unionists and that both classes of employee were fairly represented by the two organisations, so the union and association were each allowed to nominate one board member. Similarly Heydon granted representation to non-unionist wharf labourers as the union continued to restrict admission and intended to apply for preference.

Participating unions were subjected to increased expenses under the new system. Although the cost of obtaining an award under the 1901 Act had been high, it was concentrated into a few weeks of lawyers' fees. With more numerous hearings under the board system, the cost of lawyers, transcripts and witnesses' expenses increased and was incurred over a longer period. Table 9.1 shows that from 1910, when the boards began full operations, the cost of legal expenses doubled and remained at a fairly constant proportion of both union receipts and expenditure. Some unions (especially those in the food, clothing, metalworking, railways and shipping industries) incurred disproportionately high costs because their members were covered by a number of different boards.

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71 See remarks by Heydon, [1909] AR at 110-111; (1913) 3 IG 518, 741.
73 Re Waterside Workers' Board [1910] AR 433.
74 For details of membership, receipts and expenditure, and legal costs of employees' unions by industrial groups, see Appendix, tables A.3-A.5. A breakdown of expenditure is shown in table A.6. The high expenses of shipping and wharf unions were partly related to their obtaining commonwealth awards, although a number of state boards were also constituted for the industry.
Table 9.1
Trade Unions: Legal Expenses in Terms of Total Receipts and Expenditure, NSW 1907-1913

<table>
<thead>
<tr>
<th>Year</th>
<th>Receipts</th>
<th>Expenditure</th>
<th>Legal Expenses:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£</td>
<td>£</td>
<td>% of total receipts &amp; expenditure</td>
</tr>
<tr>
<td>1907</td>
<td>98 508</td>
<td>5 100</td>
<td>93 024</td>
</tr>
<tr>
<td>1908</td>
<td>105 003</td>
<td>5 045</td>
<td>102 402</td>
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<tr>
<td>1909</td>
<td>148 202</td>
<td>5 377</td>
<td>147 152</td>
</tr>
<tr>
<td>1910</td>
<td>129 754</td>
<td>9 605</td>
<td>123 794</td>
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<tr>
<td>1911</td>
<td>163 448</td>
<td>10 443</td>
<td>146 959</td>
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<tr>
<td>1912</td>
<td>199 157</td>
<td>12 423</td>
<td>173 474</td>
</tr>
<tr>
<td>1913</td>
<td>209 478</td>
<td>13 605</td>
<td>183 304</td>
</tr>
</tbody>
</table>

Source: NSW Statistical Register, 1916-17.

Notes: Information provided by trade union returns to the Registrar of Trade Unions under the Trade Union Act: includes registered unions of employers, employees and councils. Legal expenses include charges relating to wages boards. Expenditure figures were not broken down after 1913.

The Act provided that current awards of the Court of Arbitration should continue in force until their expiry or the end of June 1909 if no date was stated.\(^\text{75}\) As many of the later awards of the arbitration court had contained no expiry date, most of Heydon's work during his first year in the Industrial Court, apart from the constitution of boards, involved the enforcement of previous awards. The number of summonses for penalties and recovery of wages increased dramatically and, while most were heard by Heydon, many were remitted to the registrar for decision.\(^\text{76}\) From 1910, though, he was largely occupied in deciding on the constitution of boards, applications from employers for exemption from the coverage of a particular board, and appeals from board decisions making awards. Although theoretically only making a recommendation to the executive, Heydon insisted on maintaining his judicial independence when deciding whether to constitute a board. During the clerical workers' application, letters and statements by Wade

\(^\text{75}\) IDA s. 7.

\(^\text{76}\) The Industrial Disputes (Amendment) Act 1910, s. 3 allowed the Industrial Court to remit summonses matters to a stipendary magistrate or the registrar. In 1910 the court heard 501 summonses for breach of awards, remitting another 361 to the Industrial Registrar's Court. Of the summonses for recovery of wages (a separate head in IDA) in 1910, 102 were determined by the court and 73 by the registrar: AR Records [1910] 577. From 1911 most enforcement matters seem to have been handled by the registrar.
supporting a separate board were tendered as the main argument for the union's case. The judge became incensed at the presumption that the premier's views would decide the matter, and that Heydon was apparently expected simply to yield to his authority. The applicants' own sense should surely have told them that no greater insult could be offered to any Court than to ask it surrender its independence and judgment to the mere *ipse dixit* of anyone, however responsible his office. What are Courts for?

It emerged that the union had misrepresented Wade, who rushed to correct the mistake that he had discounted Heydon's independence.77

Most boards were constituted at the request of unions and in the order of application. With so many boards created on an *ad hoc* basis, confusion and conflict over demarcation were inevitable. The large number of awards also caused perplexity when workers in the same enterprise operated under different boards.78 Overlapping jurisdictions arose most frequently in the railways, whose operations extended across numerous industrial activities through the tradesmen employed in the workshops as well as its building, quarrying and catering operations. The chief commissioner invariably applied for separate boards or at least separate representation, citing the uniqueness of operations and the need to maintain discipline and safety. In April 1910 exemption was claimed from two boards covering building workers. Heydon laid down a general rule that the jurisdiction of boards was inclusive: a worker who could be classified under several industries "will pass under the jurisdiction of the Board first constituted for any one of them, unless he is expressly exempted. It is the exemption, and not the inclusion, which has to be specified."79 The result of this approach was that, although Heydon preferred broad industrial coverage where practicable, the earlier established boards (which were usually requested by smaller occupational unions) took pre-eminence. Inconsistencies and confusion led to numerous applications for amendments to the constitution of boards from 1911. Heydon was reluctant to completely restructure board divisions once they had been working for a time, so the process led to even further anomalies, and many employees of specialised companies remained outside the system unless

77 *Re United Clerks' Union* [1909] AR 211 at 212.
79 *Re Unskilled Labourers' (Building) Board* [1910] AR 447 at 449.
a separate enterprise board was established. Numerous exemptions and awards also made it difficult for the board chairmen to find out who would be covered by the awards they were supposed to make. For union officials, employers and workers, the situation was virtually impossible. Many claims of award breaches were brought simply to clarify the coverage of an award. Heydon recognised this as a valid use of the enforcement power since it was the only way in which an authoritative ruling could be obtained, although it was competent for the court or a board chairman to give a personal opinion on the meaning of an award.

In 1909 the giant Clyde Engineering Company requested that the railway coachmaking board be extended to cover all aspects of car and waggan making, including metalworking. Objections were lodged by the sawmillers, sheet metal workers, ironworkers' assistants and coach-makers. The application was heard together with the boilermakers' application for a board covering the iron engineering industry: in both cases, the establishment of a general industry board for the whole state without exemptions would inconvenience employers, who would have to attend several boards dealing with different aspect of their enterprises and could not be represented on each sufficiently to protect their interests. On the other hand, if each employer was granted a separate board, the unions would be disadvantaged. Heydon's solution, which he frequently adopted, was to follow the stronger unions in creating boards to cover sections of industries, while granting exemptions to those employers most likely to be inconvenienced because their business was really incidental to the central subject-matter of the board. Heydon justified this approach by interpreting the object of the Act as involving protection of the solidarity of unions. "I do not think," he announced, "that the Act was intended to weaken or break up Trade Unions, and an administration of it which would have that effect would be, to my mind, open to the weightiest objection." However, Heydon insisted that unions adapt to changing conditions, and refused to accept claims for strict craft or occupational

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80 Re Railway Workers and General Labourers' Union [1911] AR 152; Thornton v Harringtons (Ltd) [1910] AR 454.
81 (1911) AO 2/242/561.
83 Re United Society of Boilermakers and Iron Ship Builders; Re Coachmaking (Rail) Board [1909] AR 428 at 431; (1913) 3 IG 215.
demarcations: if a blacksmith worked permanently at a coal mine, he became part of the mining industry and lost his common industrial interests with ironworkers.84 Where significant overlap between different trades occurred, it was open to connect the boards by appointing the same chairman. Workers like the electricians and stationary engine drivers, who were employed throughout industry, were at a particular disadvantage because their position might be affected by any number of boards. Electricians obtained a separate board with many exemptions, while the engine drivers were governed by four boards, including one for "sundry industries". The clerical workers' application for a separate industry board in 1909 was rejected because clerks did not fit into any single occupational category listed in the schedule to the Act; they could, rather, be included under every industry, so the union would have to pursue its claims before all the boards. A special tribunal was appointed to fix a minimum wage for clerical workers under a statute introduced by the Wade government the following year.85

The Act allowed the Crown, a union or a person bound by an award to appeal to the Industrial Court on the grounds of jurisdiction, locality, law or facts. Only if the appeal was on the facts could the court re-hear the matter; but in all cases the award could be confirmed, modified, quashed or substituted by a new award.86 The court did not lay down any rules by which appeals would be entertained and awards altered, other than a general concern for fairness and justice. Allegations of procedural improprieties or failure to take adequate account of the evidence were rejected unless there were strong grounds for supposing that an injustice had been done. Heydon was reluctant to interfere with the discretion exercised by the board chairmen unless it exceeded his conception of the boards' jurisdiction or contravened his wage-fixing principles.87 An award could be amended because it failed to provide a living wage, based on the levels

84 [1909] AR 428 at 434; Amalgamated Society of Engineers v Iron Trades Employers' Association [1910] AR 309; see also Re Saddlers' Award [1911] AR 3; Re Woodworkers' Award [1911] AR 408.
85 Re United Clerks' Union [1909] AR 211; Clerical Workers Act 1910.
86 IDA ss. 38, 40(b).
87 Re Plumbers' Award [1911] AR 126; Re Printing Compositors and Operators' Award [1910] AR 557; Re Newcastle Collieries Workers' Award [1911] AR 78.
decided by Heydon and Higgins. Heydon considered it his duty to protect the interests of the public, which he tended to interpret as the maintenance of competition and the limitation of industrial regulation to matters dealing only with employment relations. The public interest thus merged with review on jurisdictional grounds. Awards were amended if they regulated other than "industrial matters" by, for example, attempting to fetter an employer's managerial rights, place limitations on the use of machinery, or restrict the employment of women and other classes of worker. Heydon stressed that boards should not regulate industry in the abstract; they were limited to examining claims based on the interests of the parties, and the public was always a party whose interests had to be protected. In taking this view, Heydon emphasised that the functions of boards were judicial rather than legislative, that they continued the arbitral functions performed by the former court. This was contrary to the views of other judges who tended to consider them, like the Victorian wages boards, as "not tribunals of arbitration but subsidiary legislative bodies deriving their authority from the State Legislatures."

Heydon continued to espouse the principles which had governed his decisions under the previous system. The managerial prerogative of employers was still sacrosanct; while workers had the right to expect fair wages and conditions, they could not demand changes in the productive process. "Our broad principle," he said, "should be 'protect the wages and conditions of the worker, protect the freedom of the employer.'" While still used for general guidance, the principles espoused in the judicial review cases were not strictly observed. Heydon, dismissing the restriction on industrial matters dictated by Clancy's case, held that a board had the right to grant paid leave after compulsory retirement. Board chairmen seemed to observe the

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88 NSW Amalgamated Railway and Tramway Service Association v Chief Commissioner for Railways and Tramways [1910] AR 71; Re Cycle and Motor Cycle Board's Award [1911] 608.
89 Re Journeymen Farriers' Union [1910] AR 264; Re Butchering (Wholesale) Award [1911] AR 245 at 247; Re Boot Trade Award [1911] 589; Re Shop Assistants' Union [1910] AR 279.
91 Australian Boot Trade Employees' Federation v Whybrow and Co (1910) 10 CLR 266 per Barton J at 289. Here Barton explicitly referred to the NSW boards in the same breath as the Victorian ones.
92 Re Butchering (Wholesale) Award [1911] AR 251 at 254.
93 Re Government Railways and Tramways Traffic Wages Staff Award [1911] AR 121 at 125.
superior court decisions more closely, and refused to stray beyond matters relating strictly to the contract of employment.94

The juridical nature of the obligations imposed by awards had never been clear. Heydon had been in some doubt whether the breach of an award was to be treated as a breach of duty or an offence. In 1912 the Supreme Court decided that an employee had the right to recover wages owed under an award before the ordinary courts. In so finding, Chief Justice Cullen held that an award did not replace the contract of employment; it simply grafted a term onto the contract. The duty to pay the award wage

is the creation of a Statute, but the obligation to pay wages existed independently of Statute. The additional requirement, though new in itself, did not transform the existing obligation from a contractual into a statutory obligation. The more correct way of describing what the Statute has done is to say that it annexed a term to contracts of hiring and service in those industries affected by awards.

Pre-existing contracts had a term incorporated into them by the statutory award, while contracts made after the award were made subject to it. Thus the remedies provided by the Act were in addition to the common law remedies.95 The attitude behind this decision reflected that held by Heydon all along: the new industrial law involved no radical departure from the old; it merely added to, rather than replaced, the individualistic common law doctrines of the contract of employment.

Strikes and Coercion

Between 1908 and 1910 a wave of strikes occurred across the state. The causes of the strikes were diverse, though most involved militant unionists influenced by the International Socialists and the Industrial Workers of the World (IWW). All were linked by their illegality under the Industrial Disputes Act. Tramways employees went on strike in July following accusations of espionage by the management. As the state's first strike of government employees, it came as a deep shock to the public, apart from causing considerable disruption (including a riot at Haymarket). Heydon granted permission for prosecution of twenty

9: System in Transition

strikers under s.42 of the Industrial Disputes Act, but the informations were withdrawn after the drivers and conductors returned to work at the end of the month. The board chaired by Justice Street delivered an award in November which, owing to his strict interpretation of the board's jurisdictional limits, failed to resolve the outstanding issues of operations and reinstatement.96 From October to November 1908 there was a strike of 500 rockchoppers employed on construction works for the Water Board. On Wade's initiative, four union leaders were charged with instigating a strike under s.42. Heydon, treating the strike as a rebellion against the law and a contempt of the court, fined the union secretary £30 and three others lesser amounts; however the strikers preferred to go to gaol rather than pay the fines. Although Holman denounced the strike as the work of socialist incendiaries (as he had done with the tram workers), the convictions enraged the union movement, which called for repeal of the anti-strike provisions. The men were released a week later when the fines were paid by the public works contractors; the strike had successfully enforced the principle of union solidarity while defying the court and Act.97

At the same time a contingent of police (dubbed "Wade's fat fifty") was despatched to Broken Hill, where a strike was imminent. The miners had been prevented from obtaining a new award in 1906 as the result of Brown's case: the arbitration court held there was no industrial dispute because they had described their application as amicable. Instead, the Amalgamated Miners' Association (AMA) had negotiated an industrial agreement with the associated mining companies in 1906, which expired in December 1908. By that time ore prices had fallen and BHP was looking to wage reductions to maintain its profit levels.98 When the company announced the withdrawal of a bonus paid under the agreement, and refused further discussion, the miners considered themselves locked out. The Proprietary mine was besieged by pickets and extra police were rushed to the Barrier. On 9 January a strike procession marching under a red banner was intercepted and 28 were

arrested for rioting, including the English socialist and union organiser Tom Mann. In an echo of the 1892 strike, the trials were removed to Albury, raising the accusation that the case was rigged. Mann was acquitted, but a number of others were convicted and sentenced to imprisonment for riot and assault. The AMA had lodged a claim with the commonwealth arbitration court at the end of December; in March Higgins delivered an award favourable to the miners. The company, which had already indicated its refusal to operate under an award granting wage increases, took the matter to the High Court. The provisions for contract miners and the Port Pirie smelters were disallowed, and the rest of the award was evaded by BHP closing its mines for two years. While the events at the Barrier did not directly involve the Disputes Act, they reinforced socialist teachings that the state, law and arbitration were invariably administered in the interests of the capitalists.

At Newcastle the coalmining struggle intensified. The royal commission resumed after a barrister and acting judge, Walter Edmunds, was appointed to replace Heydon as president. It issued a report recommending wages and conditions, but was overtaken by industrial unrest. Bowling's appointment was revoked after his involvement in the Broken Hill strike, and the local disruptions continued, despite the decision of the union executive (backed by a rank-and-file vote) to expel strikers who refused to take their grievances through the union. By the time the commission was abolished in August 1909, communications between the proprietors and union had broken down completely. The follow-


100 Barrier Branch of Amalgamated Miners' Association of Broken Hill v Broken Hill Pty Co Ltd (1909) 3 CAR 18; R v Commonwealth Court of Conciliation and Arbitration; Ex p Broken Hill Pty Co Ltd (1909) 8 CLR 419; Dale, Industrial History, p. 129; Bruce J. Pennay, "Industrial Disputes at Broken Hill up to 1909" (MA thesis, Sydney University, 1968), p. 95.

ing month a union organiser was dismissed and, with Bowling declaring that the principle of unionism was at stake, a strike spread across the northern coalfields. It was joined by the Illawarra miners, who were already engaged in separate action, while the waterside workers promised full support. A general strike, the topic of heated debate for over a year, seemed imminent. The stoppage, which began suddenly on 7 November, caught the proprietors with low stockpiles of coal. Gas supply and train services were restricted and factories began to shut. Wade attempted to mediate, but after the owners refused to attend an open conference the government announced that the anti-strike provisions of the Disputes Act would be enforced. Wade officially requested the court's intervention on 3 December; Heydon heard the matter immediately and decided to constitute a special board for Newcastle and Maitland coalminers. As the striking miners refused to participate, the Miners' Federation president, John Patterson (a moderate), was appointed as the employee member. The next day, Bowling and other leaders were arrested on charges of conspiracy; a few days later, prosecutions were commenced against strikers under the Disputes Act.

Determined to smash the strike at any cost (the government even imported coal from Japan), Wade suspended standing orders on the 16th to push through amending legislation of unprecedented harshness, which Labor quickly dubbed the Coercion Act. Section 42 was strengthened by providing that anyone instigating or aiding a strike was liable to a year's imprisonment. Special provisions relating to the supply and distribution of necessary commodities (coal, gas, water and food) were also enacted. Meetings of two or more people called to assist or manage an existing strike that largely deprived the public of these commodities were declared to be unlawful, and participants could be sentenced to a year in gaol. Police who had reason to believe that such a meeting was taking place could enter premises by force and seize any documents found there. Anyone entering into a combination intended to restrain or monopolise trade in necessary commodities was subject to a £500


fine. These offences would be heard in the Industrial Court without the benefit of a jury or a right of appeal. Wade admitted that the amendments were introduced because enforcement of the existing provisions was hampered by insufficient evidence or lack of direct application to the strike leaders. The Act seemed aimed at gaoling not only the miners' leaders but even the combined strike congress led by Hughes, which was trying to limit the effects of the dispute. The Labor party condemned the strike and accepted that for arbitration to be successful "there must be penal clauses," but baulked at the criminalisation of strikes. Wade's "panic legislation" was simply "going back to the old days of coercion" and anti-union conspiracy laws, and would only prolong the strike. The bill was rushed through all stages on the evening of its introduction, without even a copy being printed. It passed through the upper house unchanged the next day, and became law three days later. On 29 December 13 miners were convicted by Heydon under the old provisions of the Act: they went to gaol after refusing to pay their fines. A few days later Bowling and three others were prosecuted under the Coercion Act. Heydon, claiming an impending nervous breakdown, begged the government to allow him immediate leave, so the case was heard by Judge Rogers who was specially appointed deputy president of the court. Bowling was sentenced to the maximum penalty of 12 months; when later convicted of the original conspiracy charge, his total sentence cumulated to two and a half years. In accordance with prison regulations, he was transported in shackles to Goulburn gaol, which only added to the outrage. The strike, which had already shown signs of crumbling before the trials, ended in March. It had been the state's most widespread and dis-

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104 Industrial Disputes (Amendment) Act 1909, ss. 2-5. The penalty for participating in a strike remained at £1,000 or 2 months' imprisonment in default. The provisions against monopoly were directed at mine owners who agreed to co-operate with the union, thus providing valuable funds for the union.


107 *SMH* 30 Dec 1909, p. 7; Papers re conviction, imprisonment and release of Daniel Rees et al, AGJ Letters, AO 7/5437; Heydon to Garland (Acting Premier), 4 Jan 1910, AGJ Letters, AO 7/5432; *SMH* 19 Jan 1910, p. 7; *SMH* 29 Jan 1910, p. 14; *SMH* 11 Feb 1910, p. 7; papers re trial, imprisonment and petitions for release of strike leaders for illegal strike at Newcastle, AGJ Special Bundles, AO 5/7752; Ross, *History of the Miners' Federation*, p. 188.
ruptive dispute since 1890. While limited in size, in terms of its relative duration it was far larger than any other strike in the next tumultuous decade. On its conclusion, the northern miners initially participated in the board established by Heydon, which was chaired by Judge Scholes. The first award was rejected and the board eventually lapsed, being replaced by a system of private conferences under Scholes' chairmanship which lasted until August 1911.

Labor's Arbitration Act

Popular reaction to the Wade government's actions during the coal strike influenced not only the election of a federal Labor government in April 1910, but the victory of the party at the state elections in October. Both the Labor party conference in January and the Trade Union Congress in April resolved for the repeal of the penal amendments; at the latter conference a motion for the repeal of the Disputes Act was abandoned in favour of one calling for its amendment. The labour movement's hostility was confined to the Coercion Act and its criminalisation of strikes; it had come to accept the boards system. Although most of the strike prisoners were released in May and August, Bowling remained in gaol until Labor took office. Throughout the state campaign Labor candidates denounced the conviction of strikers and Bowling's placement in leg-irons, for which Wade personally was blamed. The Coercion Act was condemned as an affront to British principles of justice through its denial of the right to trial by jury. Wade and his party attempted to deny the claim that the Industrial Disputes Act had impaired unionism and argued that workers had benefited from the boards' greater speed and expertise when compared with the old court. However true, these effects were completely

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108 See Appendix, graphs 3–6.
109 Re Newcastle Collieries Board [1910] AR 509; (1913) 3 IG, p. 5.
113 Liberal Party of Australia, NSW Division, What the Workers have Gained from the Industrial Disputes Act (Sydney, 1910).
overshadowed by the memory of unionists being gaoled for exercising their popularly-accepted right to strike.

Shortly after becoming premier, McGowen announced the impending repeal of the Industrial Disputes Act and its replacement by a true system of conciliation and arbitration.\textsuperscript{114} The new government's actions on industrial reform were, however, hampered by the federal referendum in 1911, which proposed handing over such powers to the commonwealth government. But in April Holman, announcing the state government's program, promised that it would proceed with the overhaul of the state arbitration system. The arbitration court would be enhanced in power and status, while the boards would be organised into industrial groups. Only registered industrial unions would be able to pursue claims before the boards.\textsuperscript{115} With Labor's accession to power, there arose the opportunity to implement the arbitration scheme advocated by Beeby for the past five years. Beeby was appointed minister in charge of the new Department of Labour and Industry in October 1910; a few months later it took over responsibility for the Industrial Disputes Act. In anticipation of the new system, Beeby introduced new measures of administration and enforcement. An investigation officer was appointed, with the task of handling complaints of award breaches and directing prosecutions. Later he was made responsible for conciliating disputes by the exercise of "moral force" pending their reference to the boards.\textsuperscript{116}

In June 1911 Beeby introduced the Industrial Arbitration Bill. The adoption of the title of Wise's original Act was significant. Beeby described the bill's aim as being "to maintain the best features of the present Industrial Disputes Act, to re-establish the best features of the old Arbitration Act, and to adopt other provisions as the result of experience".\textsuperscript{117} The boards would act as petty industrial courts responsible for the minutiae of awards and completely subject to the supervision of the Court of Industrial Arbitration. Although the boards would be divided into industrial groups, Beeby's intention was to have the system based on trade or occupational divisions. Thus there would be a separate board covering each of the major trades, which would

\textsuperscript{114} SMH 13 Dec 1910, p. 6.
\textsuperscript{115} SMH 21 Apr 1911, p. 6.
\textsuperscript{116} Department of Education Subject Files, Department of Labour and Industry 1909-1913, AO 20/13377; (1912) 1 IG, p. 3; (1913) 2 IG, p. 808; (1914) 4 IG, p. 1146.
\textsuperscript{117} Beeby, NSWPD vol. 40 (14 Jun 1911), p. 786.
make special provision for workers employed in different industries. The establishment of boards under different industrial groups would simplify matters and reduce the number of boards. Beeby also intended that when the arbitration court was dealing with appeals on matters of fact, the judge would be supplemented by representatives from the industry. Conciliation would be a key component of the new scheme: special non-compulsory conciliation boards would be established for mining districts and other industries where needed, while the department's investigations officer would become the Industrial Commissioner, a statutory officer able to call compulsory conferences whenever a dispute threatened to erupt. \[118\]

Beeby took particular pride in the new methods of deterring and punishing strikes. Workers taking part in a strike would not be liable to imprisonment, but they could be fined and the amount charged against future earnings. Registered unions participating in strikes could have their registration cancelled. However, not all strikes would be unlawful; unions that chose to remain outside the arbitration system would not be subject to penalties under the Act. By this means Beeby intended to provide that direct action and arbitration were two alternative but mutually exclusive strategies. Compliance with awards would be reinforced by making the privileges which the arbitration system provided to unions conditional on their submission to the authority of the Act's machinery, including conciliation. To his surprise, this idea was not well received by unions: by now incorporated status and state recognition were regarded as a right. \[119\]

Employers had few disagreements with the bill's fundamentals, but specific innovations were strongly opposed. The Master Builders' Association considered the new scheme as "practically a second edition of the old one with emendations and additions and but few improvements." Objections were, however, voiced over "the exaltation of the third or administrative party" to disputes by giving extensive powers to the minister. \[120\]

The bill's progress was halted by the prorogation of parliament after the government barely survived defeat on the floor of

\[118\] G.S. Beeby, (1912) 1 IG, p. 3.
the house over crown leases legislation, but it was reintroduced in late November and passed onto the upper house. There, under the influence of lobbying by employer groups, the bill was ruthlessly dissected. Several areas introduced in the definition of "industrial matters" (such as domestic servants, rural workers, and all proposed employment) were deleted, and the Council also attempted to remove the power to award preference. Restrictions on appearances by advocates and agents were reduced, leaving it to the chairman or court to grant permission to appear. The power to initiate prosecutions for strikes, constitute or dissolve boards, and appoint chairmen and members to them, were taken out of the hands of the minister and placed in the court's safekeeping. The Council also removed the clauses providing a defence to a charge of striking if the strike took place in a non-unionised industry or was authorised by a secret ballot of union members and notice was then given to the minister. The Employers' Federation claimed credit for these changes. Most were rejected by the government, and a free conference of both houses was held to resolve the deadlock. Many of the alterations remained, but a compromise was reached on preference: its award by a board could be cancelled by the court if the union participated in a strike.

In spite of the high hopes for Labor's Arbitration Act, the system continued much as before. Heydon remained as president of the court, and continued to apply the principles which he had established on his elevation to the post seven years before. Emphasis remained on the judicial adjudication of claims. One foreign observer noted that "instead of conciliation being the dominant feature in the board meeting, the boards have spent most of their time in taking evidence and reaching conclusions based on this evidence. They are in reality, therefore, petty courts." While superficially resembling a wages board system, he concluded, the New South Wales system should be examined under the heading of compulsory arbitration.

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121 Industrial Arbitration Bill 1912 (LC black letter), cl. 5, 16-17, 24, 38, 43-48; Employers' Federation of NSW, Annual Report 1912, p. 3.


Chapter 10

Conclusion

The system devised by Beeby did not last long. The grouped boards failed to reduce the time taken to deliver awards, and conflicts between craft and industrial unionism remained. In 1913, prompted by a strike at the Darling Harbour railway goods yard directly attributable to the deregistration of the all-grades railways industry union and the delay in obtaining an award, the government appointed A.B. Piddington as sole royal commissioner to inquire into the state's industrial arbitration system. He was particularly directed to examine the methods of organising boards and the option of restricting evidence given before them, but the commission's hearings resolved into a debate over the merits of arbitration courts consisting of a single judge, as against the board system. Unionists opted for a system of trade-based boards with strong representation by unions; but Piddington concluded that

the experience of this State, as shown by the evidence in this Inquiry, points unmistakably in my opinion to the wisdom of confiding issues of such magnitude and complexity only to Judges of Supreme Court standing. A tribunal so constituted should be both the Court of first instance, and, except in a very restricted class of cases, the final Court.\(^1\)

He calculated that three judges sitting continuously would be able to dispose of the caseload that could not be handled by 197 boards in 27 groups. He also recommended that representation on the boards should be curtailed; the proper place for experts was in the witness-box rather than on the bench or jury. These views were supported by Heydon, who regarded the attempt to mix the wage board and judicial systems as a mistake.\(^2\)

Piddington's recommendations were in large part adopted by the Holman Nationalist government in 1916: the number of industrial judges was increased from two to four, and the Court of Industrial Arbitration was given all the powers exercisable by the boards, while boards could

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\(^1\) RCIA, Report, p. 33.

\(^2\) Heydon to Piddington, 18 Sept 1913, RCIA, Report, pp. 45-46.
only hear applications if so directed by the court. Furthermore, amendments designed by George Beeby in 1918 adopted the Whitley council scheme devised in Britain to promote conciliation, while a separate Board of Trade was established to fix general wage rates and regulate apprenticeships. The criminality of strikes was relaxed: only government employees were forbidden from striking, while employees subject to an award more than one year old could legally strike after a secret ballot of union members repudiating the award. Workers were given a positive right to membership of the union covering their industry, while the internal affairs of unions as well as their contractual arrangements with members or other bodies were brought under legal regulation by the arbitration court. The government had attempted to amend the law of trade unions in 1916 following judicial decisions restricting their legal capacities, but decided to drop its bill altogether rather than agree to drastic changes by the Legislative Council. The 1918 Act achieved these reforms by providing, for example, that unions could engage in any lawful objects, including political ones, provided that the political activities were kept separate from the union's industrial functions: the court became the arbiter of any complaints by members. Beeby's aim was to gradually transfer the regulation of industrial conditions from the court to industrial councils and shop committees, but unions still preferred a judicial determination and award, or else were opposed altogether to conciliation. The great experiment in achieving industrial justice seemed to have become stuck in a judicial form marked by the ever-expanding scope and complexity.

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3 Industrial Arbitration (Amendment) Act 1916, ss. 3-4.
4 SMH 6 Dec 1916, p. 9. In O'Sullivan v Finch [1914] AR 279 the Arbitration Court held, following Amalgamated Society of Railway Servants v Osborne [1910] AC 87, that donations to political campaigns were ultra vires the powers of a trade union. In Railway Workers and General Labourers' Association v United Labourers' Protective Society (1914) 14 SR 1 the Supreme Court held that a trade union could not itself enforce contractual agreements in the ordinary courts.
5 Industrial Arbitration (Amendment) Act 1918. The need to specify the legality of political involvement by trade unions and their power to recover levies was heightened by decisions resulting from the conscription referendum and general strike in 1917: see Allen v Gorton (1918) SR 202; Wills v Ponsford [1917] AR 360.
of its juridification, both of industrial relations and of the conduct of union affairs. These changes continued the process begun with Wise's Act as, partly at their own insistence, unions moved from a status of illegality to one of regulated legality. By this time, those who bothered to reflect on the development of industrial law described it as an adjunct rather than an alternative to the common law system of criminal and civil law.7

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It is intriguing that of all the English-speaking countries, only Australia and New Zealand should have developed such a strongly juridical form for the regulation of industrial relations. In many countries in the 1890s, discussion of the "labour question" included suggestions for state-established boards or tribunals of conciliation and arbitration. The problems associated with the non-legal status of collective agreements and voluntary awards were examined, and proposals advanced for legal recognition and enforcement. Such proposals were, however, abandoned in favour of continued legal abstention. In parts of the United States and Canada, the solution contained in the New South Wales Trade Disputes Act of 1892, enforcement following submission to a state arbitration board, was paralleled or copied. As in New South Wales, though, such schemes were of little effect. In Britain, the tradition of voluntary conciliation and arbitration continued and state involvement stopped at the encouragement of arbitration boards. Proposals for compulsory hearings and legal enforcement of awards were abandoned after strong opposition from the union movement. In New South Wales the labour movement moved from similar opposition to widespread support for state intervention and adjudication by a judicial body. This difference in attitude on behalf of unions, much remarked upon at the time, has much to do with the basis of the conflict during the great strikes and the form taken by compulsory arbitration.

Before the 1890s there had been few examples of the English method of voluntary collective agreements establishing machinery for conciliation and arbitration. Most unions, largely craft-based, supported

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direct regulation through unilaterally established working rules rather than organised conciliation and collective bargaining, and there was little scope for their development in the polarised industrial climate following the maritime strike. Conciliation and arbitration were rarely differentiated as separate processes in public discourse before the first concrete statutory scheme was developed in 1892. Organised arbitration was regarded by most unionists as an abrogation of their independence and the right to strike. Involvement by the state was treated with suspicion because power would reside in the government of the day, which was assumed to favour the protection of employers' interests.

The great strikes of the 1890s confirmed these suspicions of state intervention. Yet arbitration by a participatory body independent of the government offered at least some recognition of workers' collective rights of organisation and representation. Among unionists, Law had come to be equated with suppression of these rights through the use of the criminal law, notably the Masters and Servants Act and criminal conspiracy. Arbitration was non-Law, a departure from the inherent hostility to unionism displayed by the ordinary courts. At the same time, though, mass unionism was deeply imbued with a sense of right and justice. The workers' claim to a decent living standard and a fair share of the product of their labour, it was felt, only had to be heard by an impartial tribunal to be accepted. The problem lay in obtaining that hearing. In the 1890s it was employers who persistently broke agreements and awards, considering them as only contingently binding. Otherwise employers refused altogether to engage in conciliation because it meant recognition of the union as an equal party; negotiation with unions meant supplanting the direct relationship between the employer and employee. Adjudication of their claims by a judicial body offered unions public recognition of their right to representation.

Despite the continuing enthusiasm of some Labor members of parliament, the labour movement's lack of confidence in the state's enforcement of arbitrated decisions remained until Reeves' solution involving a permanent judicial system based on the recognition and encouragement of unions and their collective rights. This at last offered unionists a new kind of law, one capable of forcing employers to accept the representation of employees by unions and of enforcing both negotiated agreements and arbitrated awards. Wise, with his strong faith in the benevolent intervention of the state to promote
collective self-determination, was able to satisfy the unions' demand for recognition and justice through the establishment of a specialised legal system. Unions would become legalised yet immune from the anti-union bias of the ordinary law. Wise simultaneously used the image of a court of justice to disarm the hostility of employers to incursions on their power by stressing the normality of the judicial tribunal. Criticisms were disarmed by an appeal to the conservatism and rationality of the judge who would preside over the new system. The exercise of radical new powers, such as the setting of a minimum wage and the award of preference to unionists, would be left to the discretion of the judge to decide according to abstract notions of justice. Both capital and labour were reassured by the appointment of no less than a Supreme Court judge.

Judiciality

A prominent feature of the debates over arbitration in the 1890s was the labour movement's peculiarly high regard for judges of the Supreme Court. This cannot be solely attributed to particular individuals like Victoria's Chief Justice Higginbotham, who publicly supported conciliation during the Maritime strike. This respect for the judiciary reflected a fundamental faith not so much in law as in legality. The constitutional position of the Supreme Court as guardian of justice was reinforced by the judges' own isolation from conflict. While magistrates and District Court judges, who administered the criminal law against unions, had occasion to display both their personal bias and the ideological suppositions of the law, the distance of the Supreme Court bench from such conflicts amplified its image of inherent independence and justice. Holman and others claimed that no one else could be found who was completely disinterested, that as public officials the judges were at least free of direct links with employers. Having a "judicial mind" and habits, they were qualified to deliver impartial decisions on claims of right, based on the careful evaluation of masses of evidence. In addition, the judges were already there and on the public payroll, a significant consideration at a time of economic stringency when treasury payments for public "billets" were invariably treated with suspicion. The appointment of a Supreme Court judge also reflected the importance of the task he would perform. Cohen's replacement by a District Court judge in 1905 was only accep-
ted out of necessity. The Labor party insisted on Heydon's elevation in status to that of the Supreme Court in 1908.

Both Wise and Cohen assumed that presiding over the arbitration court would be a part-time occupation, leaving time for normal judicial duties. The transformation of the court into a continuous tribunal under the weight of applications for awards and their enforcement left the system in the charge of judges used to the determination of civil claims according to rigid legal processes. It is surprising, therefore, that the system did not become even more legalistic. Of course there were no industrial specialists available at the time of the court's establishment, but the arbitration system became the breeding ground for the next generation of industrial judges as several of the advocates who gained their expertise in the court were later appointed to preside over it. Curlewis and Edmunds, both barristers practising regularly in the arbitration court and afterwards chairmen of several boards, were appointed as the additional judges of the court in 1916. Beeby became a judge of the New South Wales Industrial Court in 1920, judge of the Commonwealth Arbitration Court in 1926 and ultimately its Chief Judge in 1939. The development of a clique of lawyers indoctrinated into the practices of the specialist industrial jurisdiction assisted in the reproduction of arbitration as a distinct system.

Although the presence of lawyers was constantly criticised by the labour movement, the appropriateness of a judge as president of the arbitration court was simply assumed. Disagreement with the adoption of an adjudicative form for dispute resolution was, however, a major reason for employers' support for a wages board system. In award hearings, the method by which the court and parties proceeded served to facilitate an adjudicative solution. While the underlying issues were often complex, the dispute was reformulated as an itemised list of claims by unions and corresponding answers by employers. This reduced the difficulties associated with the adjudication of polycentric problems as the issues were frequently considered in isolation. In some respects the court's own self-limitation ruled out treatment of the underlying cause of a dispute. Thus the introduction of new machinery and work processes were considered management matters and beyond the court's legitimate sphere of operations.
Legalism

Despite Wise's expectations that the court would be only an adjunct to collective bargaining, it was immediately sought as the principal avenue for regulation. Demands were placed on the court's services which the nature of its constitution as a judicial body made it structurally unable to fulfil. The arbitration court had the power to determine its own procedure and was not required to observe strict legal formalities, but it was still a court and the judges felt bound to conduct it as such. Wise was surprised at the court's initial adoption of a strongly judicial mode of adjudication:

When I introduced the measure I certainly did not anticipate that the Court would concern itself so much with details as it did... Mr Justice Cohen, however, came to the conclusion that in a new Act of this nature the utmost publicity should be given to every detail of its working, and he allowed the parties in a dispute to discuss every detail of the proposed settlement at length in Court.8

It was in the adoption of the trappings, formalities and procedures of the ordinary courts that legalism was most obviously displayed by the arbitration court, and for which it was most strongly criticised. The parties' participating in the system contributed to the image of extreme legalism. Their reliance on lawyers, especially employers' use of barristers with little experience of the court, reproduced court-room procedures such as extensive cross-examination of witnesses. This behaviour was adopted by lay representatives as appropriate to the venue. However the tendency towards procedural formalism was to some extent countered by the emergence of a group of specialist advocates and their development of more appropriate procedures. To the outside observer, though, these developments were not immediately apparent.

Legalism in the court's decision-making processes was manifested not in Shklar's sense of inflexible rule-following, but by observance of general principles gleaned from the imputed purposes of the Act. These were interpreted, especially by Heydon, as subject to ordinary legal concepts and doctrines. As the court was supposed to act according to equity and good conscience, deciding the merits of claims according to unspecified notions of fairness, the development of strict precedents for the determination of substantive issues would have been out of keeping with the court's functions. Procedural matters were subject to greater limitations, through the court's rules and judicial statements on

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their interpretation. Occasionally Cohen or Heydon would refer to previous decisions, largely for the maintenance of consistency. When first appointed, Heydon paid particular attention to his predecessor's judgments and refused to overturn specific decisions when parties attempted to re-argue them. However, his own judgments he generally regarded as providing guidelines rather than rules. The sawmillers' case, in which he first stated the principles to be adopted for settling the terms of awards, was treated as a precedent by both the judge and the parties, but its content was sufficiently flexible to allow Heydon a high degree of discretion. The judicial review cases were stringently observed at first: not only were they authoritative declarations of the limits of the court's powers, they also reinforced Heydon's own beliefs. But the superior courts' prescriptions were accorded less respect after their effects led to the near collapse of the system in 1906.

The registrar and boards showed a greater tendency to follow the court's decisions closely, since their decisions were subject to appeal to the court. Heydon also followed his previous decisions on the constitution of boards, but this was the result of a need to maintain systematism rather than an appreciation of the binding effect of his decisions. With a single arbitration court dominated by the judge and exercising discretion that was largely self-limiting, especially with the decline of judicial review after 1906, there was little impetus towards the development of strict rules. This changed when the number of judges increased and subsidiary tribunals were established.

Corporatism

Socialist critics frequently argued that by participating in the arbitration system, unions had become incorporated into the institutions and processes of the state. Initially it was thought that the subjugation of unions would result from registered unions surrendering the right to strike and domination of the court by the "lawyer class": in 1900 Harry Holland had warned the working class against "being tied up by a capitalistic lawyer-made law that will paralyse their hands for freedom of action". After seeing the system in action, Holland broadened his attack, arguing that the Industrial Arbitration Act

9 People and Collectivist 14 Jul 1900.
involved the conversion of the unions into mere machines for the making of conflicting awards and industrial agreements terminating at varying periods, and the reduction of the union officials to mere dues collectors and private policemen to see that the Court's awards were observed.\textsuperscript{10}

The English union leader Tom Mann later recalled that his visit to Australia and his encounter with the New South Wales system in 1907 converted him away from compulsory arbitration. While the unions had grown in size, they had "lost fighting efficiency". The whole arbitration process was in the hands of the lawyers, and "[i]t was clear that a continuation on such lines would result in the unions becoming virtually a part of the Civil Service. They would be dominated by the plutocratic forces of the State."\textsuperscript{11}

Certainly there was increased control over unions associated with their new-found legal status. However, direct control over unions by the arbitration court during the first decade of the system was limited in extent. Intervention and supervision of union operations were not introduced until Beeby's amendments of 1918. Before then, the court could exercise indirect control through the conditional granting of privileges such as registration and preference. The participation of unions in the processes of obtaining and enforcing awards, and adherence to the formalities imposed by both the superior courts and the Act itself, increased bureaucratisation of unions: few could avoid having a full-time secretary, while the activities of unions were centralised in the hands of the executive. The power to recover subscriptions and fines meant that the court itself assisted in the increased regulation of members by the union. It was these processes, rather than the direct penal sanctions for strikes, which affected unions most deeply. The prohibition of strikes under the 1901 Act was limited to the period before an award was obtained which, as the Newcastle wheelers' strike showed, made the provision inoperable. Penalties were extended to all strikes with the Industrial Disputes Act in 1908, and especially the 1909 amendments; despite Beeby's intention to limit it to registered unions, the 1912 Act as altered by the upper house continued the general prohibition. Whether the anti-strike provisions affected the militancy and independence of unions is open to


question; before 1901, most unions had been reluctant to strike, while Wade's repressive measures (which were both a cause of and a response to increased militancy) served only to inflame opposition. Defiance of the law by unionists asserting their right to strike resulted in challenges to the legitimacy of the court, while more effective methods of coercion brought the system itself into question.

The involvement of employers and their associations in the regulative process was another aspect of the corporatist tendency. This involvement was not entirely involuntary. Employers often had sound business reasons to desire the regulation of employment conditions. A compulsory award and common rule reduced undercutting by competitors and provided a degree of certainty and stability. The common rule could also be used to hamper competitors, perhaps even to drive them out of business. With the recognition of unions by the state, employers were relieved of the need to either accept or reject representation of their workers' interests by unions. Industrial relations were frequently left to negotiations between the union and the employers' association. Contrary to appearances, the arbitration system may have actually increased collective bargaining. This was made possible by the growth of unionisation and the organisation of employers in response. To the registration of 88 industrial agreements between 1901 and 1908, and the increasing number thereafter (see table A.8), must be added a large number of consent awards, both before and after the abolition of the court's power to award a common rule based on an agreement. In 1901 total antipathy had been reduced to acquiescence, while judicial review was used to limit the extent of the court's powers. By 1906 employers were not generally opposed to the regulation of wages and conditions, particularly as Heydon's approach had allayed fears at intrusion into the management of their enterprises.

While the manner in which unions and employer associations participated in the arbitration system indicates strong elements of corporatist intermediation, it is difficult to describe the overall system as corporatist in character. Because of its judicial form and adjudicative functions, the court was not specifically directed towards the formulation and implementation of state policy. Even in 1913 Heydon could say that the principal task of the court was to do justice between the parties; considerations of industrial peace and efficiency
took second place.\textsuperscript{12} This concentration on the adjudication of interests \textit{inter partes} was strongest during the operation of the single court. With the restructuring of the system in 1908, Heydon took the view that the function of the boards included the protection of the public interest. However, the public were conceived as an absent party to proceedings whose interests should be taken into consideration by the chairmen when framing awards. While conceived as legislative in function, in practice the boards operated in an adversarial manner, adjudicating competing claims between unions and employers. The coordination of the arbitration system towards the achievement of national goals would have to wait until the First World War, when Heydon attempted to limit wage increases in the interests of the war effort. Later, in 1916 and 1917, he would go so far as to cancel the registration of unions that engaged in strikes which hampered national efficiency. Until the arbitration system was specifically directed towards the achievement of such ends, its potential as an organ of corporatist state policy would remain unfulfilled.

\textsuperscript{12} \textit{Re Government Tramways No 1 Board} [1913] AR 186 at 189.
Appendix

Table A.1
Prosecutions under the Masters and Servants Acts:
NSW, 1901-1920

<table>
<thead>
<tr>
<th>Year</th>
<th>Charged arrest</th>
<th>summed</th>
<th>total</th>
<th>Convicted</th>
<th>Conviction Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>..</td>
<td>..</td>
<td>225</td>
<td>125</td>
<td>56</td>
</tr>
<tr>
<td>1902</td>
<td>..</td>
<td>..</td>
<td>197</td>
<td>101</td>
<td>51</td>
</tr>
<tr>
<td>1903</td>
<td>..</td>
<td>..</td>
<td>105</td>
<td>41</td>
<td>39</td>
</tr>
<tr>
<td>1904</td>
<td>..</td>
<td>..</td>
<td>96</td>
<td>59</td>
<td>61</td>
</tr>
<tr>
<td>1905</td>
<td>..</td>
<td>..</td>
<td>197</td>
<td>63</td>
<td>32</td>
</tr>
<tr>
<td>1906</td>
<td>20</td>
<td>355</td>
<td>375</td>
<td>136</td>
<td>36</td>
</tr>
<tr>
<td>1907</td>
<td>9</td>
<td>299</td>
<td>308</td>
<td>195</td>
<td>63</td>
</tr>
<tr>
<td>1908</td>
<td>25</td>
<td>536</td>
<td>561</td>
<td>338</td>
<td>60</td>
</tr>
<tr>
<td>1909</td>
<td>24</td>
<td>544</td>
<td>568</td>
<td>253</td>
<td>45</td>
</tr>
<tr>
<td>1910</td>
<td>27</td>
<td>377</td>
<td>404</td>
<td>243</td>
<td>60</td>
</tr>
<tr>
<td>1911</td>
<td>35</td>
<td>686</td>
<td>721</td>
<td>529</td>
<td>73</td>
</tr>
<tr>
<td>1912</td>
<td>22</td>
<td>453</td>
<td>475</td>
<td>269</td>
<td>57</td>
</tr>
<tr>
<td>1913</td>
<td>13</td>
<td>245</td>
<td>258</td>
<td>151</td>
<td>59</td>
</tr>
<tr>
<td>1914</td>
<td>15</td>
<td>922</td>
<td>937</td>
<td>622</td>
<td>66</td>
</tr>
<tr>
<td>1915</td>
<td>13</td>
<td>1076</td>
<td>1089</td>
<td>912</td>
<td>84</td>
</tr>
<tr>
<td>1916</td>
<td>6</td>
<td>1005</td>
<td>1011</td>
<td>668</td>
<td>66</td>
</tr>
<tr>
<td>1917</td>
<td>15</td>
<td>126</td>
<td>141</td>
<td>61</td>
<td>43</td>
</tr>
<tr>
<td>1918</td>
<td>11</td>
<td>202</td>
<td>213</td>
<td>102</td>
<td>48</td>
</tr>
<tr>
<td>1919</td>
<td>7</td>
<td>126</td>
<td>133</td>
<td>75</td>
<td>56</td>
</tr>
<tr>
<td>1920</td>
<td>7</td>
<td>188</td>
<td>195</td>
<td>150</td>
<td>77</td>
</tr>
</tbody>
</table>

Source: Total offences charged tables, NSW Statistical Register, 1901-1926.

Notes:  
1 Tables for 1901-1905 do not separate arrests and summonses.  
2 The Masters and Servants Act 1902 commenced on 4 Sept 1902 (consolidation only).  
3 Before 1910 the offences tables recorded only the most serious offence if more than one offence was charged at the same time. From 1910 the tables included all offences charged.
### Table A.2
Wage Earners by Industry
NSW 1891-1911

<table>
<thead>
<tr>
<th>Industry</th>
<th>1891</th>
<th>1901</th>
<th>1911</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Professional</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>21,906</td>
<td>26,897</td>
<td>37,085</td>
</tr>
<tr>
<td><strong>Domestic</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Board &amp; lodging</td>
<td>9,617</td>
<td>13,507</td>
<td>16,203</td>
</tr>
<tr>
<td>Domestic service</td>
<td>33,681</td>
<td>43,743</td>
<td>44,187</td>
</tr>
<tr>
<td>TOTAL</td>
<td>43,298</td>
<td>57,250</td>
<td>60,390</td>
</tr>
<tr>
<td><strong>Commercial</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property &amp; finance</td>
<td>3,741</td>
<td>4,787</td>
<td>8,349</td>
</tr>
<tr>
<td>Food</td>
<td>7,255</td>
<td>11,603</td>
<td>17,144</td>
</tr>
<tr>
<td>Animal &amp; veg</td>
<td>1,331</td>
<td>3,753</td>
<td>6,384</td>
</tr>
<tr>
<td>Textile &amp; fabrics</td>
<td>4,249</td>
<td>7,427</td>
<td>11,863</td>
</tr>
<tr>
<td>Gen merchants ns</td>
<td></td>
<td>11,191</td>
<td>15,603</td>
</tr>
<tr>
<td>Other</td>
<td>14,116</td>
<td>6,096</td>
<td>10,526</td>
</tr>
<tr>
<td>TOTAL</td>
<td>30,692</td>
<td>44,857</td>
<td>69,869</td>
</tr>
<tr>
<td><strong>Transport &amp; Communication</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Railway traffic</td>
<td>7,876</td>
<td>9,720</td>
<td>16,908</td>
</tr>
<tr>
<td>Road traffic</td>
<td>9,223</td>
<td>8,011</td>
<td>12,613</td>
</tr>
<tr>
<td>Seas &amp; rivers</td>
<td>8,799</td>
<td>13,552</td>
<td>15,534</td>
</tr>
<tr>
<td>Communication</td>
<td>4,367</td>
<td>5,209</td>
<td>7,673</td>
</tr>
<tr>
<td>TOTAL</td>
<td>30,265</td>
<td>36,492</td>
<td>52,728</td>
</tr>
<tr>
<td><strong>Industrial</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mechanical &amp; artistic</td>
<td>18,475</td>
<td>21,457</td>
<td>34,911</td>
</tr>
<tr>
<td>Textiles &amp; clothing</td>
<td>16,149</td>
<td>20,449</td>
<td>30,773</td>
</tr>
<tr>
<td>Food, drink, narcotics</td>
<td>5,922</td>
<td>10,037</td>
<td>16,609</td>
</tr>
<tr>
<td>Other animal &amp; veg prod</td>
<td>3,585</td>
<td>4,227</td>
<td>4,121</td>
</tr>
<tr>
<td>Metals</td>
<td>10,702</td>
<td>11,730</td>
<td>16,411</td>
</tr>
<tr>
<td>Energy</td>
<td></td>
<td>1,865</td>
<td>4,419</td>
</tr>
<tr>
<td>Construction</td>
<td>28,998</td>
<td>27,457</td>
<td>34,438</td>
</tr>
<tr>
<td>Other</td>
<td>18,597</td>
<td>12,199</td>
<td>22,389</td>
</tr>
<tr>
<td>TOTAL</td>
<td>102,428</td>
<td>109,421</td>
<td>164,071</td>
</tr>
<tr>
<td><strong>Primary</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agricultural</td>
<td>30,468</td>
<td>31,554</td>
<td>30,012</td>
</tr>
<tr>
<td>Pastoral</td>
<td>18,460</td>
<td>25,401</td>
<td>39,394</td>
</tr>
<tr>
<td>Forestry</td>
<td>1,045</td>
<td>1,142</td>
<td>4,940</td>
</tr>
<tr>
<td>Water</td>
<td>1,587</td>
<td>1,832</td>
<td>2,229</td>
</tr>
<tr>
<td>Mines &amp; quarries</td>
<td>21,996</td>
<td>26,670</td>
<td>32,767</td>
</tr>
<tr>
<td>Other</td>
<td>819</td>
<td>749</td>
<td>1,265</td>
</tr>
<tr>
<td>TOTAL</td>
<td>74,375</td>
<td>87,348</td>
<td>110,607</td>
</tr>
<tr>
<td><strong>TOTAL - ALL CLASSES</strong></td>
<td>302,964</td>
<td>362,265</td>
<td>494,750</td>
</tr>
</tbody>
</table>

**Source:** NSW Census 1891, table 7; NSW Census 1901, table 8; Commonwealth Census 1911, tables 22-23.

**Notes:** Classification based on 1901 and 1911 censuses; where categories in 1891 census cannot be separated or reallocated they have been included in "Other". The 1891 census contained many unspecific returns in the industrial class; 16,158 men were undefined labourers in 1891, while 8,660 were so classed in 1901. 3,071 unspecified carters and horse-drivers in 1891 have been re-allocated to road transport.
Table A.3
Trade Unions: Membership by Industrial Groups, 1907-1913

<table>
<thead>
<tr>
<th>Group</th>
<th>1907</th>
<th>1908</th>
<th>1909</th>
<th>1910</th>
<th>1911</th>
<th>1912</th>
<th>1913</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Building</td>
<td>4734</td>
<td>5366</td>
<td>5383</td>
<td>6718</td>
<td>11581</td>
<td>16935</td>
<td>19922</td>
</tr>
<tr>
<td>B. Pastoral agric farming</td>
<td>25675</td>
<td>28052</td>
<td>35395</td>
<td>29666</td>
<td>23605</td>
<td>21496</td>
<td>21694</td>
</tr>
<tr>
<td>C. Mines quarries smelting</td>
<td>19197</td>
<td>22936</td>
<td>20548</td>
<td>20126</td>
<td>19735</td>
<td>25761</td>
<td>28241</td>
</tr>
<tr>
<td>D. Engineering metalworking</td>
<td>5246</td>
<td>7050</td>
<td>7553</td>
<td>6798</td>
<td>10861</td>
<td>13255</td>
<td>15724</td>
</tr>
<tr>
<td>E. Clothing boots hats</td>
<td>5265</td>
<td>6521</td>
<td>3072</td>
<td>3700</td>
<td>5202</td>
<td>3591</td>
<td>6286</td>
</tr>
<tr>
<td>F. Printing bookbinding etc</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>G. Food and drink</td>
<td>6665</td>
<td>7616</td>
<td>10044</td>
<td>9975</td>
<td>8227</td>
<td>10613</td>
<td>15541</td>
</tr>
<tr>
<td>H. Manufacturing nei</td>
<td>3150</td>
<td>5379</td>
<td>7082</td>
<td>8753</td>
<td>9082</td>
<td>12099</td>
<td>13708</td>
</tr>
<tr>
<td>I. Railways and tramways(^1)</td>
<td>9019</td>
<td>11056</td>
<td>15008</td>
<td>17775</td>
<td>23663</td>
<td>36239</td>
<td>35406</td>
</tr>
<tr>
<td>J. Other land transport</td>
<td>2227</td>
<td>2834</td>
<td>2374</td>
<td>2961</td>
<td>3106</td>
<td>5544</td>
<td>6089</td>
</tr>
<tr>
<td>K. Shipping and wharves</td>
<td>9692</td>
<td>11513</td>
<td>12677</td>
<td>13315</td>
<td>15628</td>
<td>17960</td>
<td>19750</td>
</tr>
<tr>
<td>L. Clerical art teaching</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1430</td>
<td>1858</td>
<td></td>
</tr>
<tr>
<td>M. Domestic hotel</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3251</td>
<td>3821</td>
<td></td>
</tr>
<tr>
<td>P. Miscellaneous</td>
<td>4831</td>
<td>5595</td>
<td>6728</td>
<td>8774</td>
<td>12521</td>
<td>19081</td>
<td>27500</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>95701</td>
<td>113918</td>
<td>127402</td>
<td>130346</td>
<td>150527</td>
<td>190671</td>
<td>213708</td>
</tr>
</tbody>
</table>

Source: Official Year Book of NSW, 1908-1913.

Notes: Membership figures shown in returns to Registrar of Trade Unions as at December of each year. From 1911 includes only employees' unions. nei = not elsewhere included.

\(^1\) Before 1909 this category may not have included tramways.
Table A.4
Employees' Trade Unions: Total Receipts and Expenditure
by Industrial Groups, 1910-1913

<table>
<thead>
<tr>
<th>Group</th>
<th>1910</th>
<th>1911</th>
<th>1912</th>
<th>1913</th>
<th>1910</th>
<th>1911</th>
<th>1912</th>
<th>1913</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Building</td>
<td>6966</td>
<td>9071</td>
<td>15380</td>
<td>17067</td>
<td>5709</td>
<td>6639</td>
<td>10512</td>
<td>12164</td>
</tr>
<tr>
<td>B. Pastoral agric farming</td>
<td>19676</td>
<td>28721</td>
<td>14968</td>
<td>14714</td>
<td>19617</td>
<td>27304</td>
<td>16441</td>
<td>15079</td>
</tr>
<tr>
<td>C. Mines quarries smelting</td>
<td>34536</td>
<td>40911</td>
<td>52626</td>
<td>49852</td>
<td>34813</td>
<td>37565</td>
<td>48845</td>
<td>44482</td>
</tr>
<tr>
<td>D. Engineering metalworking</td>
<td>13723</td>
<td>17678</td>
<td>21900</td>
<td>24125</td>
<td>13885</td>
<td>16537</td>
<td>19899</td>
<td>12526</td>
</tr>
<tr>
<td>E. Clothing boots hats</td>
<td>2950</td>
<td>3251</td>
<td>3546</td>
<td>3614</td>
<td>2684</td>
<td>2767</td>
<td>2611</td>
<td>3223</td>
</tr>
<tr>
<td>F. Printing bookbinding etc</td>
<td>3347</td>
<td>4578</td>
<td>5251</td>
<td>5716</td>
<td>3176</td>
<td>4492</td>
<td>4191</td>
<td>4870</td>
</tr>
<tr>
<td>G. Food and drink</td>
<td>10789</td>
<td>8012</td>
<td>10318</td>
<td>13399</td>
<td>10554</td>
<td>7012</td>
<td>9841</td>
<td>12432</td>
</tr>
<tr>
<td>H. Manufacturing nei</td>
<td>9253</td>
<td>7330</td>
<td>11792</td>
<td>11717</td>
<td>8227</td>
<td>6241</td>
<td>8600</td>
<td>9431</td>
</tr>
<tr>
<td>I. Railways and tramways</td>
<td>8661</td>
<td>11326</td>
<td>19979</td>
<td>19340</td>
<td>7239</td>
<td>9560</td>
<td>14768</td>
<td>18044</td>
</tr>
<tr>
<td>J. Other land transport</td>
<td>2020</td>
<td>2241</td>
<td>2960</td>
<td>3340</td>
<td>1756</td>
<td>1836</td>
<td>2519</td>
<td>2502</td>
</tr>
<tr>
<td>K. Shipping and wharves</td>
<td>9080</td>
<td>12289</td>
<td>16356</td>
<td>17936</td>
<td>7901</td>
<td>11065</td>
<td>14662</td>
<td>15529</td>
</tr>
<tr>
<td>L. Clerical art teaching</td>
<td>560</td>
<td>874</td>
<td></td>
<td></td>
<td></td>
<td>433</td>
<td>694</td>
<td></td>
</tr>
<tr>
<td>M. Domestic hotel</td>
<td>2507</td>
<td>3228</td>
<td></td>
<td></td>
<td></td>
<td>2246</td>
<td>2788</td>
<td></td>
</tr>
<tr>
<td>N. Councils Federations</td>
<td></td>
<td></td>
<td></td>
<td>2231</td>
<td></td>
<td></td>
<td></td>
<td>2056</td>
</tr>
<tr>
<td>O. Eight-hour Committees</td>
<td></td>
<td></td>
<td></td>
<td>3230</td>
<td></td>
<td></td>
<td></td>
<td>3037</td>
</tr>
<tr>
<td>P. Miscellaneous</td>
<td>8753</td>
<td>5073</td>
<td>8292</td>
<td>15444</td>
<td>8233</td>
<td>4223</td>
<td>7203</td>
<td>14082</td>
</tr>
</tbody>
</table>

TOTAL                                      | 129754| 153548| 187470| 201725| 123794| 137920| 163574| 175457|

Source: Official Year Book of NSW, 1911-1914.
Notes: Funds shown in returns to Registrar of Trade Unions as at December of each year. nei = not elsewhere included.
Table A.5
Employees' Trade Unions: Legal Expenses by Industrial Groups, 1910-1913

<table>
<thead>
<tr>
<th>Group</th>
<th>Legal Expenses £</th>
<th>% of Expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1910 1911 1912 1913</td>
<td>1910 1911 1912 1913</td>
</tr>
<tr>
<td>A. Building</td>
<td>590 448 287 819</td>
<td>10.3 6.8 2.7 6.7</td>
</tr>
<tr>
<td>B. Pastoral agric farming</td>
<td>513 406 281 447</td>
<td>2.6 1.5 1.7 3.0</td>
</tr>
<tr>
<td>C. Mines quarries smelting</td>
<td>2 641 1 848 1 770 1 701</td>
<td>7.6 4.9 3.6 3.8</td>
</tr>
<tr>
<td>D. Engineering metalworking</td>
<td>929 1 820 1 979 1 544</td>
<td>6.7 11.0 9.6 8.3</td>
</tr>
<tr>
<td>E. Clothing boots hats</td>
<td>97 346 316 91</td>
<td>3.6 12.5 12.1 28.2</td>
</tr>
<tr>
<td>F. Printing bookbinding etc</td>
<td>185 3 809 192 185</td>
<td>5.8 6.2 4.6 3.8</td>
</tr>
<tr>
<td>G. Food and drink</td>
<td>496 1 107 1 301 1 318</td>
<td>4.7 15.8 13.2 10.6</td>
</tr>
<tr>
<td>H. Manufacturing nei</td>
<td>497 457 808 880</td>
<td>6.0 7.3 9.4 9.3</td>
</tr>
<tr>
<td>I. Railways and tramways</td>
<td>490 602 1 513 1 748</td>
<td>6.8 6.3 10.2 9.7</td>
</tr>
<tr>
<td>J. Other land transport</td>
<td>138 174 241 472</td>
<td>7.9 9.5 9.6 18.9</td>
</tr>
<tr>
<td>K. Shipping and wharves</td>
<td>2 622 2 195 2 769 2 157</td>
<td>33.2 19.8 18.9 13.9</td>
</tr>
<tr>
<td>L. Clerical art teaching</td>
<td>13 38 ... ...</td>
<td>... 3.0 5.5 ...</td>
</tr>
<tr>
<td>M. Domestic hotel</td>
<td>20 102 ... ...</td>
<td>... 0.9 3.7 ...</td>
</tr>
<tr>
<td>N. Councils Federations</td>
<td>... ... 43 ...</td>
<td>... ... 2.1</td>
</tr>
<tr>
<td>O. Eight-hour Committees</td>
<td>... 2 ... ...</td>
<td>... ... 0.1</td>
</tr>
<tr>
<td>P. Miscellaneous</td>
<td>407 339 550 1 120</td>
<td>5.0 8.0 7.6 8.0</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>9 605 10 055 12 147 12 527</td>
<td>7.8 7.3 7.4 7.1</td>
</tr>
</tbody>
</table>

Source: Official Year Book of NSW, 1911-1914.

Notes: Funds shown in returns to Registrar of Trade Unions as at December of each year. Percentages are rounded to one decimal point.

nei = not elsewhere included.
## Table A.6
**Trade Unions: Expenditure (including legal charges), 1907-1913**

<table>
<thead>
<tr>
<th>Year</th>
<th>Receipts</th>
<th>Benefits</th>
<th>Expenditure</th>
<th>Legal</th>
<th>Total</th>
<th>Legal: % of total expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£</td>
<td>£</td>
<td>£</td>
<td>£</td>
<td>£</td>
<td></td>
</tr>
<tr>
<td>1907</td>
<td>98 508</td>
<td>8 477</td>
<td>79 447</td>
<td>5 100</td>
<td>93 024</td>
<td>5.5</td>
</tr>
<tr>
<td>1908</td>
<td>10 5003</td>
<td>21 279</td>
<td>76 078</td>
<td>5 045</td>
<td>102 402</td>
<td>4.9</td>
</tr>
<tr>
<td>1909</td>
<td>148 202</td>
<td>31 859</td>
<td>109 916</td>
<td>5 377</td>
<td>147 152</td>
<td>3.6</td>
</tr>
<tr>
<td>1910</td>
<td>129 754</td>
<td>23 849</td>
<td>90 340</td>
<td>9 605</td>
<td>123 794</td>
<td>7.8</td>
</tr>
<tr>
<td>1911</td>
<td>163 448</td>
<td>28 743</td>
<td>107 773</td>
<td>10 443</td>
<td>146 959</td>
<td>7.1</td>
</tr>
<tr>
<td>1912</td>
<td>199 157</td>
<td>24 610</td>
<td>136 438</td>
<td>12 423</td>
<td>173 474</td>
<td>7.2</td>
</tr>
<tr>
<td>1913</td>
<td>209 478</td>
<td>35 740</td>
<td>134 511</td>
<td>13 605</td>
<td>183 304</td>
<td>7.4</td>
</tr>
</tbody>
</table>

*Source: NSW Statistical Register, 1916-17.*

*Notes:* Information provided by trade union returns to the Registrar of Trade Unions under the Trade Union Act: includes registered unions of employers, employees and councils. Legal expenses include charges relating to wages boards. Expenditure figures were not broken down after 1913.

## Table A.7
**Proceedings Before Arbitration Court: Convictions for Strikes and Lockouts, 1909-1917**

<table>
<thead>
<tr>
<th>Year</th>
<th>Strikes</th>
<th>Lockouts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1910</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1911</td>
<td>132</td>
<td>0</td>
</tr>
<tr>
<td>1912</td>
<td>108</td>
<td>0</td>
</tr>
<tr>
<td>1913</td>
<td>362</td>
<td>0</td>
</tr>
<tr>
<td>1914</td>
<td>407</td>
<td>0</td>
</tr>
<tr>
<td>1915</td>
<td>628</td>
<td>0</td>
</tr>
<tr>
<td>1916</td>
<td>48</td>
<td>0</td>
</tr>
<tr>
<td>1917</td>
<td>188</td>
<td>0</td>
</tr>
</tbody>
</table>

*Source: Official Year Books of NSW.*
<table>
<thead>
<tr>
<th>Year</th>
<th>Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1902/03</td>
<td>28</td>
</tr>
<tr>
<td>1904</td>
<td>18</td>
</tr>
<tr>
<td>1905</td>
<td>6</td>
</tr>
<tr>
<td>1906</td>
<td>13</td>
</tr>
<tr>
<td>1907</td>
<td>11</td>
</tr>
<tr>
<td>1908</td>
<td>12</td>
</tr>
<tr>
<td>1909</td>
<td>28</td>
</tr>
<tr>
<td>1910</td>
<td>21</td>
</tr>
<tr>
<td>1911</td>
<td>27</td>
</tr>
<tr>
<td>1912</td>
<td>45</td>
</tr>
<tr>
<td>1913</td>
<td>36</td>
</tr>
<tr>
<td>1914</td>
<td>50</td>
</tr>
<tr>
<td>1915</td>
<td>33</td>
</tr>
<tr>
<td>1916</td>
<td>51</td>
</tr>
<tr>
<td>1917</td>
<td>43</td>
</tr>
<tr>
<td>1918</td>
<td>39</td>
</tr>
<tr>
<td>1919</td>
<td>49</td>
</tr>
<tr>
<td>1920</td>
<td>76</td>
</tr>
<tr>
<td>1921</td>
<td>56</td>
</tr>
</tbody>
</table>

Source: Official Year Books of NSW.
Appendix

Graph 1
Employee Population:
Selected Sectors, NSW 1901-1912

- Pastoral
- Mining
- Manufacturing
**Graph 2**

*Union Membership: NSW, 1901-1920*

**Key**

IAA = membership of unions registered under Industrial Arbitration Act 1901; TU Act = membership of unions registered under Trade Union Act; e'e all = membership of all employee unions in NSW.

Source: NSW Official Year Books; NSW Statistical Registers; Labour Reports 1912-20.
Graph 3
Industrial Disputes:
Workers Involved, NSW 1908-1920

Workers Involved

- mining
- non-min
Appendix

Graph 4
Industrial Disputes:
Working Days Lost, NSW 1908-1920

Days Lost, 000

1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920

mining
non-min
Graph 5
Industrial Disputes:
Strike Size, NSW 1908-1920

Workers involved/strike

non-min
mining
Graph 6
Industrial Disputes:
Strike Duration, NSW 1908-1920

Days lost/worker involved

1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920

non-min
mining
Bibliography

A. PRIMARY SOURCES


Arbitration Reports, 1901-1918 [NSW. Later titled Industrial Arbitration Reports].

  Sydney 1891.
  Adelaide 1897.
  Second Session, Sydney 1897.
  Third Session, Melbourne 1898.

  Labour Bulletin, 1913-1917.
  Labour Report, 1912-1918.


Commonwealth Arbitration Reports, 1904-1926.

Commonwealth Law Reports, 1903-1926.

Commonwealth Parliamentary Debates, 1903-1913.

Great Britain.


Royal Commission on Labour.

Fifth Report. C.7421. BPP 1894 XXXV.

Foreign Reports. Vol II: The Colonies and the Indian Empire. C.6795-XI. BPP 1892 XXXVI Pt V.

New South Wales.
Bibliography


Correspondence Relative to the Recognition by Commissioners for Railways of Industrial Unions under the Industrial Arbitration Act, and the Attorney-General’s Opinion Thereon. NSWPP (LA) (1902) vol. 5, 329-331.


Legislative Assembly. *Votes and Proceedings*.

Legislative Council. *Journals*.


Public Service Lists [Blue Books].


Royal Commission on Strikes. Report, Minutes of Evidence and Appendices. 1891.

Select Committee on Trade Conciliation Bill. Minutes of Evidence. VPLANSW (1890) vol. 8.

New South Wales Government Gazette.

New South Wales Industrial Gazette, 1912-1918.

New South Wales Law Almanac, 1875-1919.

New South Wales Parliamentary Debates, 1881-1918.

New South Wales Law Reports, 1880-1900.

New South Wales Statistical Register, 1890-1920.

New Zealand Parliamentary Debates, 1890-1894.

Official Year Book of New South Wales, 1900-1920.

South Australian Parliamentary Debates, 1890-1894.

State Reports (NSW), 1901-1926.

A2. Manuscripts


Amalgamated Railway and Tramway Service Association. Minutes of Executive and Council, 1908-1912. ABL E89/1.

Armstrong, Andrew. Letters to. ML Doc 2372.

Australasian Association for the Advancement of Science.

Minute Book, 1886-1907. ML MSS 988/1.

Minutes of Section G. ML MSS 988/13.

Australasian Institute of Marine Engineers.

Annual Reports, 1881-1894. ABL E202/1001.

Minutes. ABL T19/3.

Australasian Steam Ship Owners' Federation.

Minutes, 1893-1894. ABL E217/1.

Reports, 1904-1906. ABL E217/89.


Beauchamp, W.L. (Lord Beauchamp).

Diary, 1899-1900. ML A3295.

Letters to. ML A3012.
Black, George,

Arbitration's Chequered Career. Typescript with manuscript notes [1928]. ML Q331.12/B.

Papers. ML A1054.

Unbound Papers. ML Uncat MSS Set 256.

Broken Hill South Silver Mining Co. Ltd.

Directors' Minute Book No. 1, 1889-1894. MUA uncat.


Carruthers, Sir J.H. Papers. ML MSS 1638.

Catts, J.H. Papers. NLA MS 658.


Coal Miners Mutual Protection Association of the Hunter River District.

Agreements and Letters, 1873-1888. ABL E207.

Minutes, 1874-1890. ABL E165/28.

Cohen J. Notebooks.


Industrial Arbitration Court - Chambers, 1902-1903. AO 2/2686.


Creer, Joseph. A Manx Australian's Reminiscences [1902]. ML A923.29/C.


Deakin, Alfred. Papers, 1907-13. NLA MS 1540 ser. 15.


McMillan, Sir William.

Correspondence, 1889-1901. ML MSS 2958.

Papers. ML MSS 1885/1.

New South Wales. Colonial Secretary's Office. Special Bundles.

Bill to amend Arbitration Act, 1892. AO 4/906.3.

Reports and Papers re Broken Hill Strike, 1892. AO 4/904.
New South Wales. Court of Arbitration, Industrial Court and Court of Industrial Arbitration.


Register of Applications to Court, 1905-1912. AO 7/5366-7/5371.

Transcripts of Metal Moulders Board, 1910-1911. MUA.

New South Wales. Department of Attorney General and Justice.

Indexes to Letters Received, 1901-1911. AO X2064-X2074.

Letters Received, 1901-1911. AO 7/5388-7/5453.

Special Bundles.

Prosecution of Broken Hill strike leaders, 1892. AO 5/4701 pt.


Royal Commission on coal mining disputes, northern districts, 1907-1909. AO 5/7752.

Trial, imprisonment and petitions for release of strike leaders for illegal strike at Newcastle, 1908-1910. AO 5/7763.

Petitions and applications for release of Lithgow strike prisoners, 1909-1913. AO 5/7765.

New South Wales. Department of Labour and Industry.

Files of Industrial Unions of Employees, 1912-1959. AO 10/42150-10/42184.

Files of Industrial Unions of Employers, 1912-1959. AO 10/42185.

Miscellaneous Files. Blacksmiths, Toolsmiths and Strikers Association, Broken Hill, 1907. AO 2/5808.1

Notebooks of Chairman of Food Supply and Distribution (No. 1) Board No. 3, 1912-1913. AO 2/5723-2/5725.
Royal Commission into Coal Mining Disputes in Newcastle and Gunnedah Districts, 1907-1908. Transcript of Proceedings. AO 2/5811-2/5813.

Trade Union Files, 1884-1959. AO 10/42118-10/42149.


Legislative Assembly. Tabled Papers. NSW Parliamentary Archives.

Legislative Council. Proceedings in Committee of the Whole (Committee Bills). NSW Parliamentary Archives PRS 203.LC.

New South Wales. Premier's Department. Special Bundles. Transcript of proceedings before Government Tramways (No. 1) Board, 1908. AO 7/5930.


O'Sullivan, E.W. Letters to, 1900-1908. ML A029.

Parkes, Sir Henry. Correspondence. ML A912.


Executive Committee, 1880-1910. ML A3823-3825.

General Meetings, 1880-1912. ML A3829-3846.

Miscellaneous Papers. ML A3845-2.

Press Cuttings, 1902-1914, ML A3854-3858.


Wise, B.R.

Album of newspaper cuttings and leaflets on Australian federation and political affairs in NSW, 1900-1904. ML F320.9901/1.

Correspondence. ML A2646.

Newspaper cuttings, typographical notes, speeches, etc, 1892-1904. ML QA923.2/W.

Papers. ML MSS 1327.

Reverie and Reminiscence [Memoir of B.R. Wise to his son, c.1912] Transcribed manuscript in possession of J.A. Ryan.
A3. Newspapers and Periodicals

Australasian Insurance and Banking Record, 1888–1901.
Australasian Pastoralists' Review, 1891–1912.
Australian Economist, 1888–1898.
Australian Workman, Sydney, 1890–1897.
Barrier Miner, Broken Hill, 1892, 1905–1909.
Daily Telegraph, Sydney.
Evening News, Sydney.
Evening Penny Post, Goulburn, 1900.
Magistrate, Sydney.
Newcastle Morning Herald.
Railway and Tramway Co-Operator, later Co-Operator, 1908–1917.
Sydney Morning Herald.
Weekly Notes (NSW).
Weekly Notes Covers, 1891–1920.
Worker, later Australian Worker, Sydney, 1892–1914.

A4. Books, Pamphlets and Articles

Amalgamated Miners' Association Wrightville, Annual Reports and Balance Sheets, 1902–1907.
Anderson, [Francis], "A Modern Philosopher - Green of Balliol" (1890) in The Union Book of 1902; Being the Contribution of the Sydney University Union to the Celebration of the Jubilee of the University. Sydney: William Brooks, 1902.


"Australis Ignotus" [pseud], The Affiliation of Capital and Labor. np, nd [1890].


--------, Three Years of Industrial Arbitration in New South Wales. Sydney: Worker Printery, 1905.


Black, George, Arbitration's Chequered Career, from 1901 to 1927. Sydney, [1929].

--------, A History of the New South Wales Political Labor Party from Its Conception until 1917, 7 parts. Sydney, [1927-29].

--------, The Labor Party in New South Wales: A History from its Formation in 1891 until 1904. Sydney, [1904].


British Broken Hill Proprietary Co Ltd, Directors' Reports, 1892.
Bibliography


------, *Directors' Reports*, 1890-1894.


------, "Industrial Arbitration Courts (With Special Reference to the Ambit of their Awards)", *Law Quarterly Review* 34 (1918) 186-195.

------, "Industrial Courts in Australia", *Journal of the Society of Comparative Legislation* 3rd ser 2 (1920) 169-188.


Cohen, Herman; and Howell, George, Trade Union Law and Cases. London: Sweet & Maxwell, 1901.


Employers' Federation of NSW, Annual Reports, 1904-1912.


Liberal and Reform Association, *Manifesto* [August 1903].
Bibliography

Liberal Party of Australia, NSW Division, What the Workers have Gained from the Industrial Disputes Act. Sydney, 1910.


-----, "Sweating and Wages Boards", Nineteenth Century 64 (1908) 748–762.


Master Builders' Association of NSW, Annual Reports, 1901-1910.


-----, Ten Years of Labour Rule in New South Wales. Sydney: 1902.


Peoples' Reform League, The First Step in Politics. [Sydney: 1905].


-----, *History of the AWU*. Sydney: Worker Trustees, 1911.


------, *Free Trade and Wages*. Sydney: Stewart & Clarke, 1884.


------, "Industrial Grievances in Australia", *Sydney Quarterly Magazine* 2 (1886) 377-384.

------, *The Labour Question, or Social Revolt and its Causes*. Sydney: 1890.


------, "Plain Speaking on Great Questions", *Centennial Magazine* 2 (1889) 81-88.

---, "Reminiscences of the Oxford Union" (1896) in *The Union Book of 1902; Being the Contribution of the Sydney University Union to the Celebration of the Jubilee of the University*. Sydney: William Brooks, 1902.

---, "Some Political Reminiscences", *Lone Hand* 1 (NS) (1914) 104-105, 186, 224, 269-270.


**A5. Collections of Documents**


**A6. Chronological Table of Statutes**

a) United Kingdom

Arbitration Act 1698, 9 & 10 Wm III, c. 15.

Masters and Servants Act 1823, 4 Geo IC, c. 34.

Arbitrations between Masters and Workmen Act 1824, 5 Geo. IV, c. 96.

Combinations Amendment Act 1825, 6 Geo IV, c. 129.

Common Law Procedure Act 1854, 17 & 18 Vict, c. 125.

Molestation of Workmen Act 1859, 22 Vict, c. 34.

Councils of Conciliation Act 1867, 30 & 31 Vict, c. 105.

Trade Union Act 1871, 34 & 35 Vict, c. 31.

Criminal Law Amendment Act 1871, 34 & 35 Vict, c. 32.

Arbitration (Masters and Workmen) Act 1872, 35 & 36 Vict, c. 46.
Conspiracy and Protection of Property Act 1875, 38 & 39 Vict, c. 86.
Employers and Workmen Act 1875, 38 & 39 Vict, c. 90.
Trade Union Act Amendment Act 1876, 39 & 40 Vict, c. 22.
Conciliation Act 1896, 59 & 60 Vict, c. 30.
Trade Disputes Act 1906.

b) Commonwealth


c) New South Wales

Masters and Servants Act 1828, 9 Geo IV, No. 9.
Masters and Servants Act 1857, 20 Vic, No. 28.
Arbitrations Facilitation Act 1867, 31 Vic, No. 15.
Friendly Societies Act 1873, 37 Vic, No. 4.
Trade Union Act 1881, 45 Vic No. 12.
Trade Disputes Conciliation and Arbitration Act 1892, No. 29.
Arbitration Act 1892, No. 32.
Factories and Shops Act 1896, No. 37.
Conciliation and Arbitration Act 1899, No. 3.
Friendly Societies Act 1899, No. 31.
Early Closing Act 1899, No. 38.
Industrial Arbitration Act 1901, No. 59.
Shearers Accommodation Act 1901, No. 74.
Arbitration Act 1902, No. 29.
Masters and Servants Act 1902, No. 59.
Industrial Arbitration (Temporary Court) Act 1905, No. 1.
Industrial Disputes Act 1908, No. 3.
Industrial Disputes Amendment Act 1908, No. 24.
Industrial Disputes (Amendment) Act 1910, No. 5.
Clerical Workers Act 1910, No. 19.
Industrial Arbitration Act 1912, No. 17.
Commonwealth Powers (War) Act 1915, No. 65.
Industrial Arbitration (Amendment) Act 1916, No. 81.
Industrial Arbitration (Amendment) Act 1918, No. 16.
Industrial Arbitration (Further Amendment) Act 1918, No. 39.

d) Victoria
Employers and Employes Act 1890, No. 1087.
Employers and Employes Act 1891, No. 1219.
Councils of Conciliation Act 1891, No. 1226.
Factories and Shops Act 1896, No. 1445.
Factories and Shops Amendment Act 1896, No. 1476.
Factories and Shops Act 1897, No. 1518.
Factories and Shops Act 1900, No. 1654.
Factories and Shops Act 1903, No. 1857.
Factories and Shops Act 1904, No. 1955.
Factories and Shops Act (No. 2) 1905, No. 2008.

e) South Australia
Conciliation Act 1894, No. 598.

f) Western Australia
Industrial Conciliation and Arbitration Act 1900, No. 20.

g) New Zealand
Industrial Conciliation and Arbitration Act Amendment Act 1895, No.30.
Industrial Conciliation and Arbitration Act Amendment Act 1896, No. 57.
Industrial Conciliation and Arbitration Act Amendment Act 1898, No. 40.
Industrial Conciliation and Arbitration Act 1900, No. 51.
Industrial Conciliation and Arbitration Amendment Act 1901, No. 37.
B. SECONDARY WORKS

B1. Bibliographies


B2. Books and Articles


Bavin, Thomas (ed), *Jubilee Book of the Law School of the University of Sydney, 1890–1940*. Sydney: np, 1940.


Cameron, R.J., "The Role of the Arbitration Court", *Historical Studies* 22 (1954) 204-214.


-----, *Industrial Relations and Politics - The Western Australian Arbitration Act, 1912-1920*. Perth: Dept of Industrial Relations, University of Western Australia, 1986. (Discussion Paper, 8).

Bi b l io g r a p h y 355


Gemmell, Warwick, 'And So We Graft from Six to Six': The Brickmakers of New South Wales. Sydney: Angus & Robertson, 1986.


Gollan, R.A.; and Mansfield, F.E., "Bede Nairn's 'Civilising Capitalism'"*, *Labour History* 25 (1973) 68–78.


[Hargreaves, W.J.], *History of the Federated Moulders' (Metals) Union of Australia, 1858-1958*. Worker Print, [1958].


-----, "Wage Determination in New South Wales, 1890–1921", *Journal of Industrial Relations* 10 (1968) 189–205.


--------, New South Wales Trade Unions and the 'Co-operative Principle' in the 1890s", *Labour History* 49 (1985) 51-60.


--------, The Employers and Compulsory Arbitration: the Case of the NSW Employers' Federation, 1903-1940. Sydney: Department of Industrial Relations, University of NSW, n.d. (Working Papers, 51).


--------, The Realm of the "New Province for Law and Order": the Role of the High Court, 1903-1920. Sydney: Department of Industrial Relations, University of NSW, 1983 (Working Papers).


Scates, Bruce, "'Millenium or Pandemonium?': Radicalism in the Labour Movement, Sydney, 1889-1899", *Labour History* 50 (1986) 72-94.


--------, "Violence in Industrial Conflicts in New South Wales in the Late Nineteenth Century", *Historical Studies* 86 (1986) 54–70.


Bibliography


Wurth, Wallace C., "History of the Living or Basic Wage", *New South Wales Industrial Gazette* 109 (1953) 763-775.

B3. Related Works


Bibliography


Hawke, R.J., "The Commonwealth Arbitration Court - Legal Tribunal or Economic Legislature?", University of Western Australia Annual Law Review 3 (1956) 422-478.


Bibliography


Lange, C.L., "Histoire de la Doctrine Pacifique et ... Développement du Droit International", Hague Recueil des Cours 13 (1926).


Bibliography


B4. Theses and Other Unpublished Works


Healy, James, "Brief History of the Australian Waterfront and the Waterside Workers' Unions." Typescript [1947].


