WALTZING MATILDA

AND THE SUNSHINE HARVESTER FACTORY

The early history of the Arbitration Court, the Australian minimum wage, working hours and paid leave

Australia's national workplace relations tribunal was first established as the Commonwealth Court of Conciliation and Arbitration with the passage of the *Commonwealth Conciliation and Arbitration Act 1904*.

Since that time the institution has evolved in line with substantial legislative, social and economic changes, the most recent development being the passage of the *Fair Work Act 2009* and the subsequent establishment of Fair Work Australia.

WALTZING MATILDA

AND THE SUNSHINE HARVESTER FACTORY

The early history of the Arbitration Court, the Australian minimum wage, working hours and paid leave

A history resource for educational institutions

Fair Work Australia

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Jack Howe, a 15 year old apprentice in Victoria in 1944. He is pictured carrying tools to the tradesmen working on the construction of a 10 000 ton merchant navy ship at the Naval Dockyard, Williamstown, Victoria.

How this book was prepared

This book was written and prepared by the Honourable Reg Hamilton, Deputy President of Fair Work Australia.

Professor Joe Isaac and Professor Stuart Macintyre, both of the University of Melbourne, provided the author with comment and advice on research areas and content.

The Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry and the Australian Industry Group were consulted on an earlier draft. They supported the publication and provided a number of useful comments that improved the document. We wish to thank Jeff Lawrence, Grant Belchamber, Peter Anderson and Stephen Smith.

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Please note

This book may show images of Aboriginal people who have died, which may cause distress to their relatives. Care and discretion should be used if viewing such an image.

Text and illustrations from earlier eras may reflect the attitudes of the time.

FOREWORD

This book is about the establishment and development of Australia's unique industrial relations system. It starts with the story of the Arbitration Court—the Commonwealth Court of Conciliation and Arbitration—why it was established, what it did and the influence it had on Australia's social, economic and political history.

By the 1930s the Australian minimum wage system had been established and covered most of the Australian workforce. Then various types of leave were introduced, giving workers paid leave during sickness, or for holidays.

There were other important changes. Ordinary working hours were reduced from 48 to 44 per week after 1927, from 44 to 40 per week after 1947, and after 1983 from 40 to 38 per week. There were decisions in equal pay cases of 1966 and 1972 which removed differences in award rates for Aboriginal and female employees respectively. Female employees were given the right to take unpaid maternity leave, and this was later complemented by a right for men to take paternity leave.

Through the decades the Arbitration Court and its successors have provided a means for employers, employer associations, trade unions, and employees, to settle disputes, taking into account economic and social developments. These and other issues were the subject of vigorous debate during the hearing of cases.

This is an important and interesting story. I hope that the book will be read and enjoyed not only in schools and other educational institutions but also by all those with an interest in the history of our nation.

Geoffrey Giudice AO
President
Fair Work Australia

Aboriginal family early 1900s.

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INTRODUCTION

Every young man or woman who leaves school and goes to work, goes to work with the entitlement to a minimum wage, annual leave, sick leave, and other conditions.[1]

These entitlements were gradually introduced over the last century in awards made by the Commonwealth Court of Conciliation and Arbitration (Arbitration Court) and its successors.

Their gradual introduction was part of the process of modernising Australia. Australia before Federation in 1901 was sometimes called a 'worker's paradise'[2] because of the high level of production and high wages earned by workers compared to other countries. Australia was a leader in developing these new entitlements, which are now common in advanced industrialised nations, the countries of Western democracy.

The Arbitration Court was established by the *Commonwealth Conciliation and Arbitration Act 1904*. This was one of the most important early Acts of parliament after Australia became a nation in 1901.[3]

Part 1 of this resource deals with the origins of the Arbitration Court. Why did Australia introduce this court? What reasons for it were given at the time?

Part 2 deals with the origins of the minimum wage introduced by the Court. This minimum wage covered most of the workforce of Australia by 1921. How was this minimum wage fixed? How was it adjusted? What other approaches could have been adopted?

Part 3 deals with the special minimum wages set for young people, and the introduction of equal pay for women and for Aboriginal stockmen. Why were lower minimum wages set for these groups? Did attitudes later change?

Part 4 deals with ordinary hours of work and a number of important leave entitlements gradually introduced into awards. What hours did workers have to work each week, and what was the origin of the Australian weekend? How were sick leave, annual leave, and parental leave introduced in Australia?

The Court was to become one of the oldest national Australian institutions after the Commonwealth Parliament, Commonwealth

Mrs Theresia Pless, 23, newly arrived from Germany at work in the Cadbury Chocolate Factory, Claremont, Tasmania, 1958.

Government and High Court. The Court became a commission in 1956, and is now called Fair Work Australia. The different names of the Court and Commission in the last 100 years were:

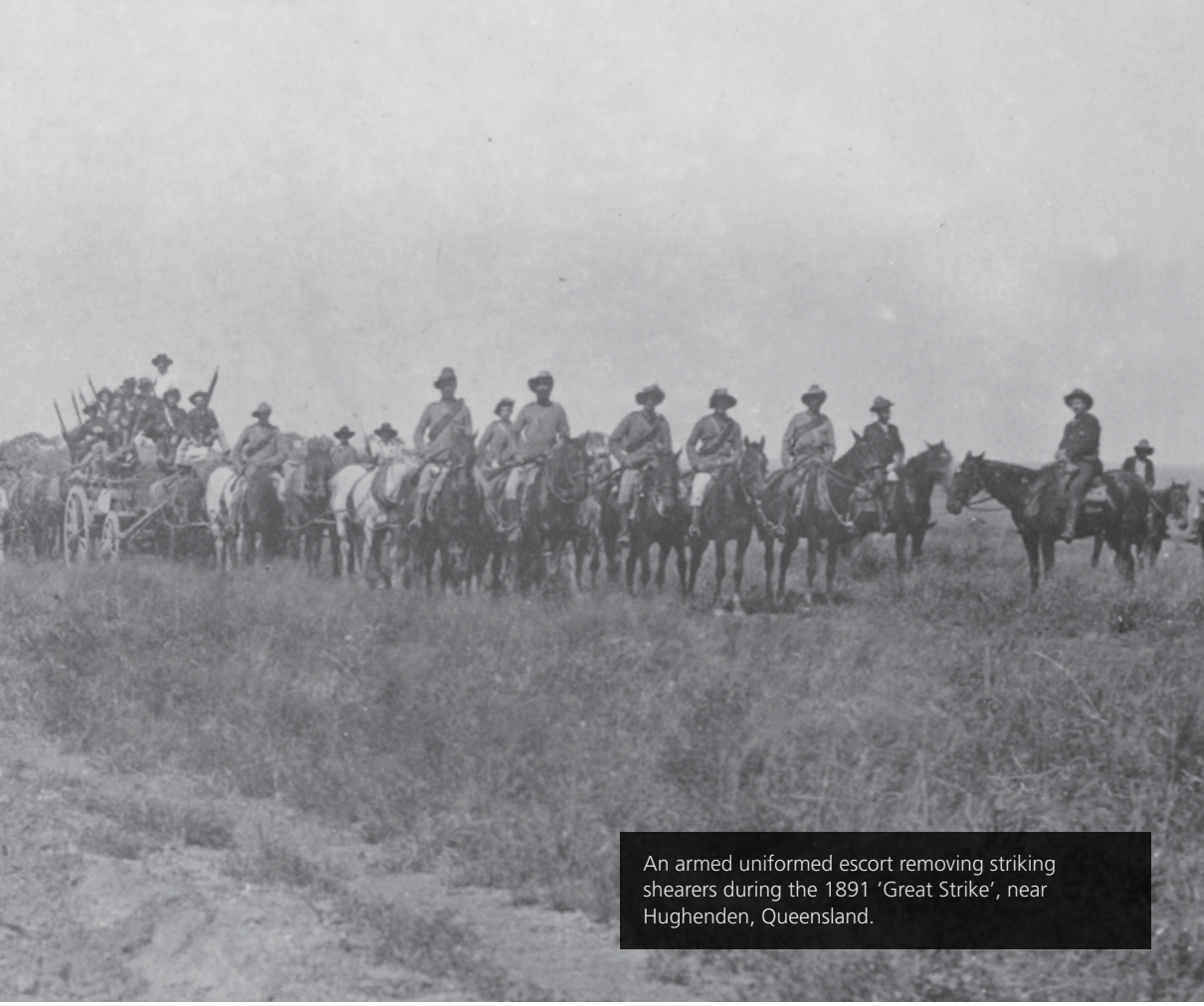
1904–1956	Commonwealth Court of Conciliation and Arbitration
1956–1973	Commonwealth Conciliation and Arbitration Commission
1973–1988	Australian Conciliation and Arbitration Commission
1988–2009	Australian Industrial Relations Commission
2009–present	Fair Work Australia

The book title explained

The title of the book is 'Waltzing Matilda and the Sunshine Harvester Factory'. Waltzing Matilda is a song loosely based on some local events in Queensland during the terrible shearers' strike of 1894. The Great Strikes of the 1890s were key events that led to the establishment of the Arbitration Court. The Sunshine Harvester factory is the place where the Australian minimum wage system began. Justice Higgins of the Arbitration Court found that 7 shillings a day for an unskilled labourer was fair and reasonable wages for the factory to pay. That 7 shillings was the basis of the minimum wage system which applied to most of the Australian workforce by the 1920s.

More information

The full *Harvester Decision*, relevant Court decisions and other materials, can be found in the History section of the Fair Work Australia website.



An armed uniformed escort removing striking shearers during the 1891 'Great Strike', near Hughenden, Queensland.

PART 1

'WALTZING MATILDA' AND THE GREAT STRIKES: THE ORIGINS OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION

Time line

1788	Colony of New South Wales begins. Regulations on the work of convicts.
1828	*Masters and Servants Act 1828*—master–servant relationship.
1855–60	Democratic self-government in New South Wales, Victoria, South Australia, Queensland and Tasmania. Western Australia remains under Colonial Office rule.
1873	Victorian *Shops and Factories Act 1873* regulates safety, etc. in factories.
1881	New South Wales *Trade Union Act 1881* recognises trade unions, other states follow. Trade union members can still be convicted of criminal conspiracy, and are in the 1891 shearers' strike.
1890s	The great strikes—1890 maritime strike, 1891 shearers' strike, 1894 shearers' strike, 1892 Broken Hill strike. Trade unions defeated. The memory of the bitter disputes would haunt the colonies, and be remembered in 'Waltzing Matilda'.
1890	Charles Kingston introduces compulsory Conciliation and Arbitration Bill—the later model for Australia.
1891	New South Wales Royal Commission on Strikes—strikes 'the great social problem of the age'. Henry Lawson writes 'Freedom on the Wallaby'.
1892	New South Wales Parliament establishes a system of 'voluntary conciliation and arbitration' with the *Trade Disputes Conciliation and Arbitration Act 1892*—defunct in 1894.
1895	'Waltzing Matilda' written by Banjo Paterson.
1895	George Reid's New South Wales compulsory conciliation Bill defeated.
1896	Arbitrated awards and minimum wages begin in Victoria.
1898	The Constitutional Convention resolves to include a conciliation and arbitration power in the proposed Australian Constitution.
1901	New South Wales compulsory *Industrial Arbitration Act 1901*.
1901	Australian Constitution gives the Australian Parliament the power to legislate on conciliation and arbitration (s.51(35) of the Constitution).
1901	First federal election—compulsory arbitration generally supported by most political groups and candidates.
1902	26 March 1902 Prime Minister Edmund Barton decides not to introduce the Conciliation and Arbitration Bill due to lack of parliamentary time.
1903	7 July 1903 Charles Kingston obtains leave to introduce the Conciliation and Arbitration Bill into Parliament. The Bill is not introduced but is printed in *The Age* newspaper.

1903	28 July 1903 Alfred Deakin, Attorney-General, introduces the Conciliation and Arbitration Bill into the Australian Parliament for the first time. The Bill is withdrawn by the government on 8 September after the Labor Party amends it to cover state railway employees.
1903	Second federal election—compulsory arbitration generally supported by most political groups and candidates.
1904	22 March 1904 Prime Minister Alfred Deakin introduces the second Conciliation and Arbitration Bill.
1904	The Conciliation and Arbitration Bill is approved by the Australian Parliament on 9 December 1904 during the George Reid/Allan McLean Government. The Bill is proclaimed and becomes law on 15 December 1904.
1905	10 February 1905 Richard O'Connor appointed first president of the Commonwealth Court of Conciliation and Arbitration.
1906–07	The Court makes its first two awards. They cover the industries of the great strikes—maritime and shearing.

1.1 THE GREAT STRIKES OF THE 1890S

A song about a strike

In 1894 shearers became aware that pastoralists throughout Australia would probably cut the rate they paid shearers from 20 shillings per 100 sheep shorn to 18 shillings in some areas. The rates were a contentious matter, and there had been disputes, particularly a brutal dispute in 1891. Shearers were unable to get a guarantee of the existing rate. They went on strike.

The strikers set up camps supported by the union, and the government responded by sending troopers. Some of the strikers had rifles, but there was little actual violence, although there was some violent talk and arson. In July 1894 the Ayshire Downs woolshed near Winton was burnt, and shots were fired at two station employees trying to save the shed. At Kallaa Station near Bourke, police were sleeping in a hut guarding a woolshed when 50 or 60 strikers stoned the shelter. The police emerged and fired several shots to disperse the shearers. In September, the *Rodney* was steaming along the Darling River carrying non-unionists to Bourke district woolsheds. Union shearers boarded the vessel while it was moored in a swamp for the night, ordered everybody off, and threw the non-union swags into the river. They then burnt the ship to the waterline. The lawlessness and bitterness of the dispute alarmed and astonished the small colonial communities in Queensland, New South Wales, Victoria and South Australia.

The governments of New South Wales and Queensland intervened to help the pastoralists by passing special laws, prosecuting shearers and sending police and troopers. After three months the Queensland shearers had lost the dispute. They were broke, as was their union. The union could not maintain the £500 a week necessary to maintain strike camps, and called off the strike on 10 September. The strikers also lost in Victoria and South Australia, although in New South Wales many pastoralists did not cut shearing rates.[4]

'Waltzing Matilda' is probably loosely based on some local events in Queensland during the 1894 strike. A shearer is alone in the bush and is caught by troopers while he is stealing a sheep. He defiantly kills himself rather than give himself up to lawful authority. It is a song of bitterness and defiance, and may tell us something about how shearers felt about their defeat in the 1894 shearers' strike:

Up rode the squatter, mounted on his thoroughbred,
Down came the troopers, one, two, three,
'Where's that jolly jumbuck you've got in your tucker bag?'
'You'll come a-Waltzing Matilda, with me'.

Waltzing Matilda, Waltzing Matilda
'You'll come a-Waltzing Matilda, with me'
'Where's that jolly jumbuck you've got in your tucker bag?'
'You'll come a-Waltzing Matilda, with me'.

Up jumped the swagman and sprang into the billabong,
'You'll never take me alive', said he,
And his ghost may be heard as you pass by that billabong,
'You'll come a-Waltzing Matilda, with me'.

Waltzing Matilda, Waltzing Matilda
'You'll come a-Waltzing Matilda, with me'
And his ghost may be heard as you pass by that billabong,
'You'll come a-Waltzing Matilda, with me.'
'Oh, You'll come a-Waltzing Matilda, with me.'

[Note: 'Waltzing matilda' refers to carrying the 'matilda' or 'swag', a swag or bag being a travelling shearer's sleeping partner; a 'swagman' was a travelling shearer or farm labourer; a 'jumbuck' is a sheep; 'troopers' refers to mounted police and the army; 'coolibah tree' is a type of gum tree; a 'billy' is a tin can in which water was boiled on the fire; 'tucker bag' is a bag in which tucker or food was carried; a 'billabong' is a pond or body of water; a 'squatter' is a grazier or pastoralist, running sheep or cattle on a property. This version includes the 'You'll never catch me alive said he' variation introduced by the Billy Tea company and written by Marie Cowan. Banjo Paterson's original lyrics referred directly to 'drowning', which the tea company felt was too negative.]

What were the local events that led to 'Waltzing Matilda'? During the strike eight shearing sheds were burnt in one district of Queensland, including the woolshed at Dagworth. On 2 September about a dozen armed men crept up to Dagworth woolshed, which was defended by station hands. They opened fire and the station hands shot back. Over 100 shots were fired but no-one was hit.

A postcard from the early 1900s.

During the fighting one of the shearers crept up and threw a bottle of kerosene at the shed, and it burnt to the ground. Later that month a swagman and shearer who had taken part in the dispute was found dead at a camp by the Four Mile Billabong near Kynuna. This was Samuel 'Frenchy' Hoffmeister, whose body was recovered from the billabong. He had been shot.

Hoffmeister was suspected of lighting the match that burnt down the Dagworth woolshed, owned by the Macpherson family. Some believe that he was murdered because of it, others that he shot himself. Banjo Paterson enjoyed riding around Dagworth station with friends Christina and Bob Macpherson, and knew the story.[5]

'Waltzing Matilda' is a local story of Queensland, but it also reminds us of the lawlessness of the great strikes in the shearing industry in 1891 and 1894, and the maritime industry. The way that the strikes ended in the 1890s divided the colonies in a way not seen since the 1840s divisions between convicts and free people in New South Wales (South Australia did not have convicts). Would Australia become a nation of more or less permanent class warfare between a large group of working-class union members and the rest of the community?

Middle-class reformers such as Charles Kingston of South Australia and Alfred Deakin of Victoria were horrified by the bitterness and social and economic damage. They spent an important part of their political careers in the new Australian Parliament after Federation in 1901 arguing for the establishment of a court to deal with such conflict. Most important political groupings supported them in the first two federal elections held in 1901 and 1903.

The strikes left the Australian colonies with a great social problem, which was to be answered in the early days of the new nation.

The six colonies federated and became a nation in 1901.

One of the first things that the new Australian Parliament did was to debate the problem of how collective industrial conflict should be resolved. It was a long and difficult debate, but the Arbitration Court was established by the *Commonwealth Conciliation and Arbitration Act 1904*.

The first two awards made by the new court covered the industries of the great strikes. In 1906 the first award made covered

the maritime industry[6], and the second award made in 1907 covered the shearing industry.[7] Under the award shearers were required to be paid 24 shillings per 100 sheep shorn in most cases, and most claims apart from rates had been agreed between the pastoralists and the union. In 1907 the Court handed down the *Harvester Decision*.[8] In *Harvester* the Court decided that 7 shillings a day for an unskilled labourer was fair and reasonable wages. The 7 shillings became the basis of the Australian minimum wage system.

How the great strikes came about

In the early Australian colonies the main relationship in workplaces was between an individual master and servant. Businesses became larger and more complex as the economy developed, and collective relations between organised groups of employees and employers also developed.

Trade unions had existed in Australia since the 1820s, but in the last part of the nineteenth century a number of new and more powerful unions were formed representing agricultural, shipping and other workers. These unions combined into metropolitan councils, and even developed inter-colonial links, forcing employers to respond in the same way.

Industrial conflict was not a matter of particular importance to the small colonial towns and settlements of Australia until the 1890s, when economic conditions deteriorated, and trade unions became assertive. As businesses found it difficult to make a profit, they responded by seeking to cut the wages and conditions of workers in order to continue in business:

> The long economic boom which began with the gold rushes of the 1850s and which had greatly increased local manufacturing and fed speculation in the 1880s, began to collapse, beginning with Victorian property collapses and a British banking crisis. Overseas investment dried up; prices for wool and wheat fell dramatically. Most local banks collapsed costing many depositors their funds. Unemployment and poverty soared, government tax revenues collapsed and public works projects were abandoned. To

Norman Lindsay painting depicting a dispute on a ship.

make matters even worse a long drought began, further damaging the rural industries on which most colonies depended.[9]

Trade union activities were not always regarded as legitimate, and many employers resisted trade unionism. Trade unions resisted the reductions by going on strike. The strikes of the 1890s were remarkable for their size and for their social and economic damage.

What is a strike?

A strike involves one or more employees stopping work as a means of placing pressure on their employer to agree to a demand, such as improved pay and conditions.

What is a lock-out?

A lock-out involves an employer refusing to allow employees to enter their workplace. The tactic is used to place pressure on employees to modify their demands or to accept a demand by the employer.

What were the strikes about?

As in many industrial disputes today, the employees involved in the strikes in the 1890s were concerned about their pay and conditions. It was also a time when there was great disagreement and conflict about the rights of unions and union members and over what employers saw as their right to manage and to employ non-unionists.

The main disputes during this period included the 1890 maritime strike, the pastoral disputes of 1890, 1891 and 1894 and the 1892 Broken Hill strike.

Since the strikes occurred in a time of great economic difficulty and high unemployment, the employers had little trouble replacing those on strike and the unions were generally defeated. This caused great bitterness and suffering amongst the defeated workers. The arson and armed groups of strike-breakers, and strikers' camps, quite naturally alarmed many. There was something approaching

general lawlessness. The *Brisbane Courier* said on 19 June 1891 that the people of Queensland did not know 'how narrow an escape they have had from what might have been a most disastrous civil war'.[10]

Case study 1: The 1890 maritime strike

Who were the main players?

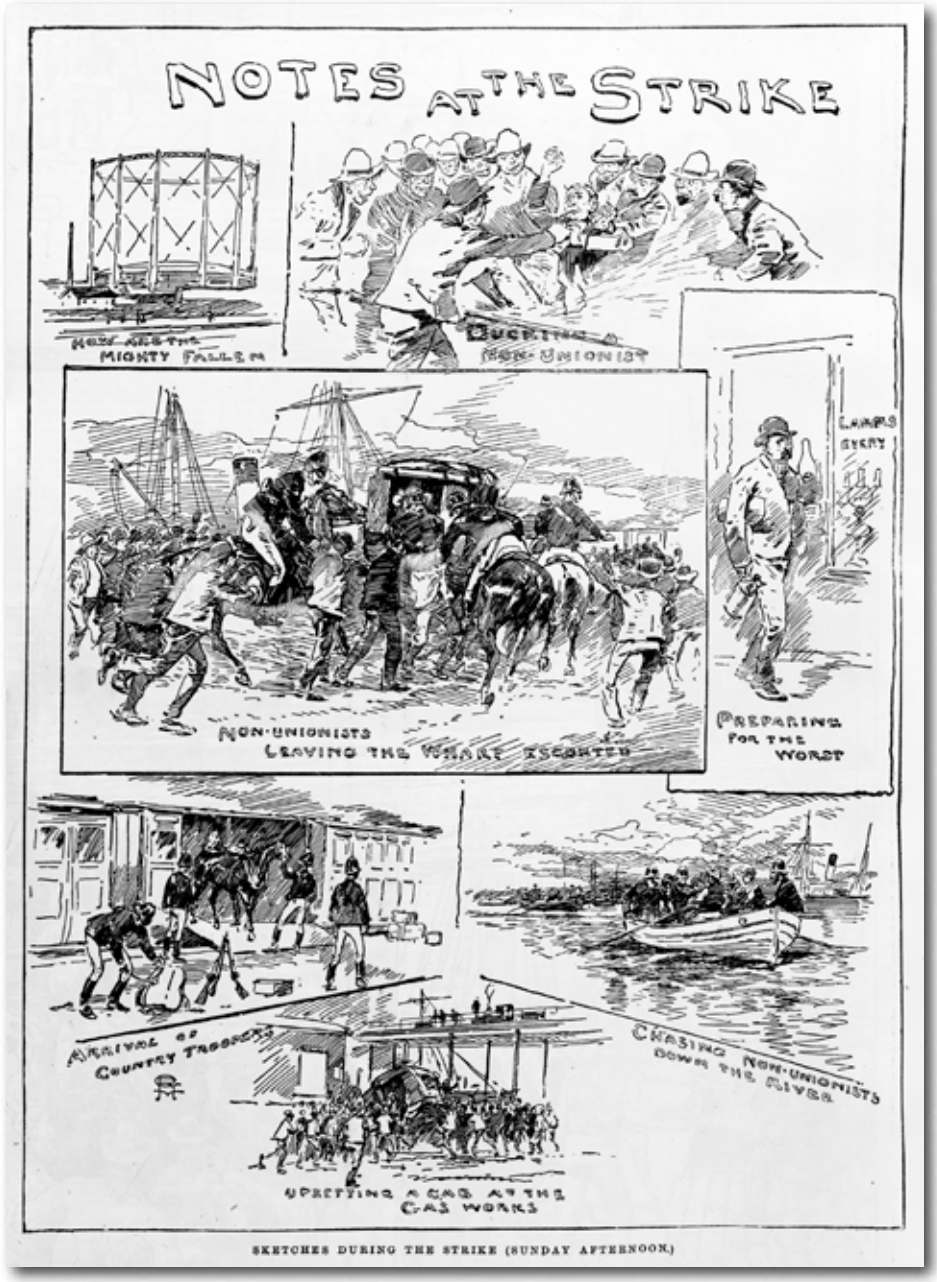
The dispute involved the Mercantile Marine Officers' Association (the union) and the Steamship Owners' Association of Victoria (the employers). It was not confined to marine officers, but also waterside workers, shearers, gas stokers and coal miners. Coal miners from Newcastle, Broken Hill and New Zealand refused to dig coal for non-union-operated vessels and consequently by September 1890 50 000 workers were on strike.[11]

What was it about?

The marine officers were seeking improved pay and working conditions and also defending union rights. In August 1890 the shipowners told the Mercantile Marine Officers' Association that before its wage claims could be discussed the association's Victorian members had to end their affiliation with the Melbourne Trades Hall Council. The marine officers walked off their ships, the waterside workers refused to load them and the coal miners refused to supply coal for the ships. The dispute spread across industries and the colonies.[12]

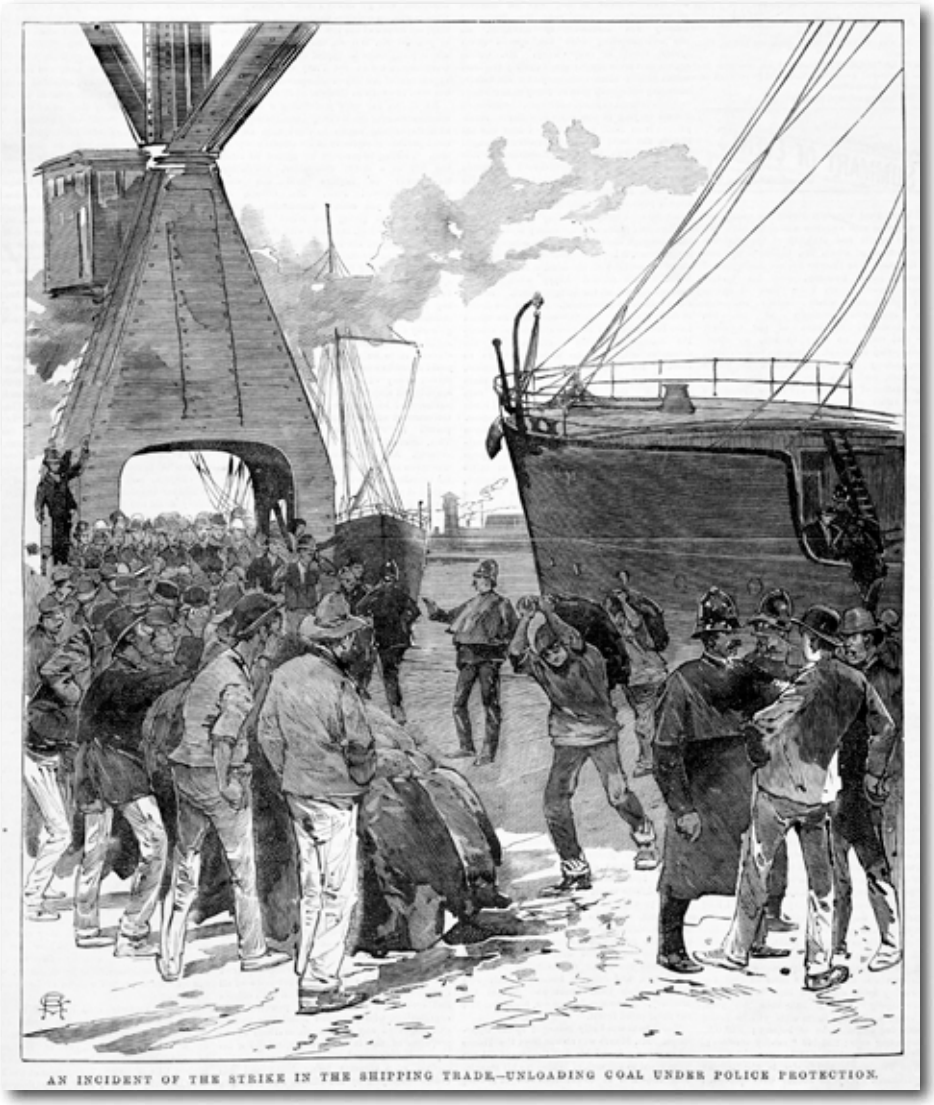
What was the outcome?

The strike came to an end when the marine officers could no longer sustain strike action. They returned to work on the conditions set by employers from November 1890, which included wage cuts of up to 30 per cent for everyone in the industry. They also had to acknowledge their error and beg for their jobs back.



The Illustrated Newspaper collection, 1 September 1890.

The drawings are titled: '*How are the mighty fallen; Ducking a non-unionist; Non-unionists leaving the wharf escorted; Preparing for the worst; Arrival of country troopers; Chasing non-unionists down the river; Upsetting a cab at the gas works*'.



AN INCIDENT OF THE STRIKE IN THE SHIPPING TRADE.—UNLOADING COAL UNDER POLICE PROTECTION.

The Illustrated Newspaper collection, 1 September 1890.

The drawing is titled: *'An incident of the strike in the shipping trade—unloading coal under police protection'*.

Volunteers are working at the docks under police protection because the striking dock workers believed the volunteers were stealing their jobs.

Why was it significant?

The impact of the strike was far-reaching and the industrial action was met with a harsh response from the colonial governments. Alfred Deakin (chief secretary in Victoria at the time) called out part-time soldiers of the local defence force, who confronted union pickets at the port of Melbourne. In New South Wales, Premier Henry Parkes sent special police with firearms to Circular Quay and in Queensland Premier Samuel Griffith mobilised the defence forces.[13]

Case study 2: The 1891 shearers' strike

Who were the main players?

The dispute involved the Australian Shearers' Union and the Pastoralists' Federal Council (the employers).

What was it about?

The shearers were concerned their rates of pay would be reduced as employers began to employ non-union labour at lower cost. Their demands included the continuation of their existing rates of pay, protection of their rights and privileges, fair agreements and the exclusion of Chinese labour.

What was the outcome?

After striking for many months, it was clear that shearers were unable to maintain strike action. In August 1891, the Pastoralists' Federal Council and the Australian Shearers' Union reached agreement, albeit in favour of the pastoralists. It was agreed that employers could choose and employ union or non-union labour as they pleased.

Why was it significant?

There was little actual violence except for arson, but striking shearers formed camps, and were armed. In Queensland over 2000 soldiers and police were deployed, and 1099 special constables had been sworn in.[14] As the strike ended some of the union leaders were

arrested and charged with conspiracy and some were sent to jail. A view formed amongst labour leaders that industrial action of this sort had its limitations and that a political party that represented the needs and interests of the workers might be more effective. The 1891 shearers' strike is now considered one of the factors that led to the formation of what we now refer to as the Australian Labor Party (ALP).

Colonial legislation on strikes

The colony of New South Wales had special regulations regarding the employment of convicts. Later the laws regarding the relationship of master and servant known in Britain came to apply in the Australian colonies. The most influential early Act was the New South Wales *Masters and Servants Act 1828*. This Act was based on disciplining employees. In one case a shoemaker disobeyed a farm superintendent's order to cut grass on a Sunday. The shoemaker was prosecuted under the Act and was sentenced to six months imprisonment.[15]

However, this legislation was developed before democracy. What sort of legislation would apply when democracy came to the Australian colonies, and ordinary people could vote and influence legislation? After 1860 the Australian colonies (except Western Australia) had democratic self-government, with a premier answerable to an elected parliament.[16]

In 1873 Victoria passed the *Shops and Factories Act 1873*, which gave some protection to workers. In 1881 the New South Wales Parliament passed the *Trade Union Act 1881*, which recognised the right of workers to combine into trade unions, and other states followed. Trade unions and claims for improved wages or conditions had sometimes led, and sometimes would still lead to criminal conviction. The Tolpuddle Martyrs were transported as convicts to Australia in 1834 for making secret oaths together at the cross roads near a small village in England, when what they sought was improved wages and conditions. More than 129 shearers were sentenced to one or more months hard labour after being convicted of various forms of crimes, such as criminal conspiracy, following

the 1891 shearers' strike. Two were sentenced to seven years, and several others to three years or more jail.[17]

In 1882 the Victorian Parliament set up a Factories and Shops Commission to inquire into 'the alleged evil arising from the protracted hours of labour of employees in connection with retail shops and trading establishments'.

However, laws in the Australian colonies did not attempt to provide for settling disputes, or claims made by trade unions, until the 1890 strikes. Disputes were largely unregulated, except for the criminal law.

After the 1890s strikes began, a special royal commission was set up in New South Wales. Its 1891 report claimed that the problem of strikes was 'undeniably the great social problem of the age'.[18]

The royal commission said that industrial conflict was no longer simply a matter of workers seeking to increase their wages and conditions, or to resist employer reduction of wages and conditions. The employment of non-unionists was becoming 'the chief ground of contention'. It was the cause of the maritime strike, and elsewhere there were allegations of union officials being dismissed because of their union activities. Trade unions argued for 'recognition of unionism', while employers argued for 'freedom of contract'.[19] In some industries 'recognition of unionism' meant that unions insisted that only trade union members be employed, and 'freedom of contract' meant that employers would not employ union members or allow union activities. Both approaches are now unlawful.

Mr WC Willis, Chairman of the Steamship Owners' Association during the 1890 maritime strike, told the 1891 Royal Commission on Strikes:

> If the Unions would only be reasonable we would be willing to employ Union men, but the time has come when we must insist on the freedom of contract clause.[20]

Mr Beaton, the president of the Trades and Labour Council, told the royal commission that the maritime strike began when the master of the *Corinna* sacked Peter Morgan, the Seamen's Union delegate. He said:

> It is the place of only one man to be the mouthpiece of the whole crew. The Seamen's Union puts a man in the position, and then that man is generally the person who, in fighting the cause of his fellow-men, is victimised. It generally happens that the man who has advocated the cause of his fellow-men in any ship has to suffer.[21]

After the royal commission reported, the New South Wales Parliament established a system of 'voluntary conciliation and arbitration' with the *Trade Disputes Conciliation and Arbitration Act 1892*. Under this Act strikes or disputes were not dealt with unless both the employees and employers agreed. In its first year of operation eight applications by employees to take matters to arbitration were rejected by employers, one was settled by conciliation and one was settled by arbitration. The 1890s depression and competition for jobs meant that employers, in the view of Thomas Clegg, the New South Wales clerk of awards, had vastly increased power. The system did not last long, and it was effectively defunct after December 1894 when the New South Wales Legislative Assembly voted to reduce the funds of the tribunals.[22] The Victorian Parliament introduced a voluntary conciliation and arbitration system, the *Councils of Conciliation Act 1891*, which was also unsuccessful.

George Reid introduced a Bill into the New South Wales Parliament providing for compulsory conferences in 1895, but it was defeated by 30 votes to one. The only compulsion in the Bill was that of compulsory investigation of industrial disputes, with no power to make binding awards unless both sides, employer and union, agreed. Nevertheless, it was called by the *Sydney Morning Herald* 'extreme and one-sided legislation calling new and highly unfair powers into existence'. However, opinion in New South Wales began to change with growing industrial trouble in the Newcastle coal fields.[23]

The Kingston Bill (1890)

What was apparently considered by some to be a failure of the existing laws led to greater interest in compulsory procedures for settling disputes, and to forcing employers and trade unions into arbitration even if they did not agree.

Charles Kingston of South Australia developed a Bill for compulsory conciliation and arbitration. The key elements of Kingston's 1890 Bill were:

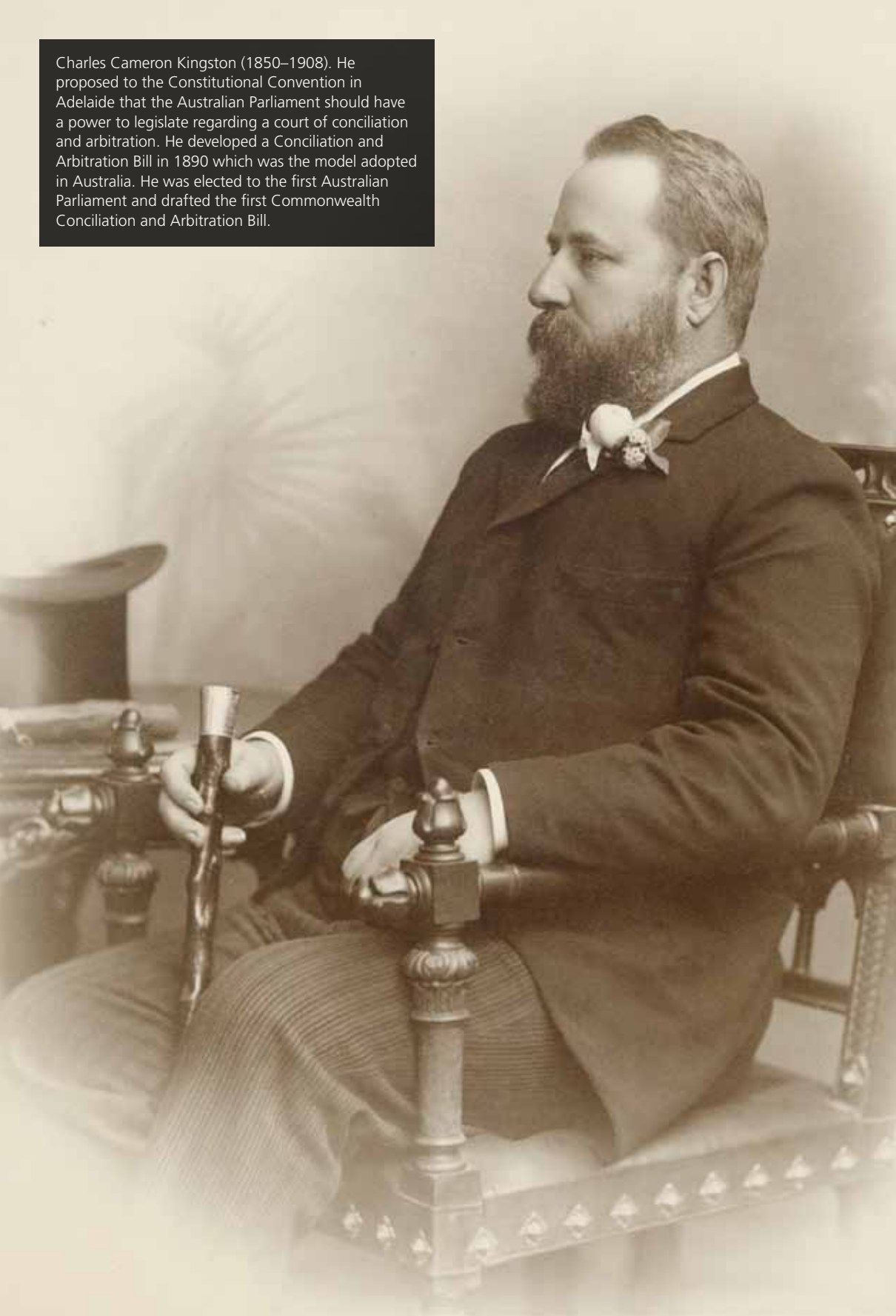
1. The establishment of permanent state bodies for the settlement of disputes.
2. The existence of compulsion at both phases of the dispute settlement process (that is, submission of the dispute to the process, and the enforcement of the outcomes of that process).
3. The registration and regulation of trade unions for the purposes of implementing and enforcing the arbitration process.
4. The abolition or restriction of strikes and lock-outs.[24]

What is conciliation?

Conciliation is a process where an independent third party assists two sides in a dispute to reach an agreed resolution.[25]

What is arbitration?

Arbitration is a formal process where an independent third party hears both sides in a dispute and then makes a binding decision.



Charles Cameron Kingston (1850–1908). He proposed to the Constitutional Convention in Adelaide that the Australian Parliament should have a power to legislate regarding a court of conciliation and arbitration. He developed a Conciliation and Arbitration Bill in 1890 which was the model adopted in Australia. He was elected to the first Australian Parliament and drafted the first Commonwealth Conciliation and Arbitration Bill.

Kingston explained to the 1890 Royal Commission on Strikes that he had looked at a Canadian statute, and at an incomplete Victorian Bill[26], but it appears that he essentially drafted the Bill himself. South Australia had been a main 'democratic laboratory' for the Australian colonies in developing the democratic self-governing colonial parliaments of the 1850s[27], and was also something of a leader in developing the Australian model of labour laws.

His Bill was the model that became the standard Australian compulsory conciliation and arbitration system. The Kingston model was adopted in New Zealand in 1894, in New South Wales in 1901, South Australia in 1920, Western Australia in 1906, and by the Australian Parliament in 1904. The Victorian system of 1896 was based not on the Kingston model but on measures to avoid what was called 'sweating', or exploitation of workers by failing to pay wages or fair wages. The Victorian *Factories and Shops Act 1896* provided for the formation of special boards empowered to fix a minimum rate of remuneration in certain specified industries: men's and boys' clothing, shirts, underclothing, boots, furniture and bread. These rates when fixed were enforced by the minister for labour through the chief inspector of factories. However, there continued to be real problems with ensuring that minimum wages were actually paid.[28]

In New South Wales, opinion was much influenced by the leading employer, the chairman of the Union Steamship Company, James Mills. He told the *Sydney Daily Telegraph* of 3 July 1899 that the Kingston and New Zealand models should be adopted:

> I think this method of settling disputes is, on the whole, satisfactory. Under the operation of the Act the parties can meet together and after a little discussion the strength of each case can be pretty well judged.[29]

Other arbitration systems

There were some variations on the Kingston model. The colonies of Victoria in 1896 and South Australia in 1900 and Tasmania introduced 'wages board' systems. Under 'wages board' systems disputes were settled by many separate wages boards set up for

various industries. These wages boards consisted of representatives of labour, of employers, and an independent chairman who had the casting vote. Under the Kingston Bill, and federally, and in New South Wales, one permanent tribunal operated like a court, with judges who made the decisions.

Kingston's evidence

Kingston's evidence to the 1890 royal commission is of some interest, given his influence. He did not justify his model on the basis of general theories or radical statements, but more on a pragmatic assessment of the problems as he saw them, rightly or wrongly. This was typical of the colonial liberals of the day. He was for example only 'hopeful' that his system would prevent 'quarrels' between employers and trade unions. He saw strikes and lock-outs as 'barbarous expedients' and said that it was worth sacrificing something to avoid them. On the issue of the refusal of union members to work with non-union workers (which had become a common thing), he said that the arbitration body would be able to make an order on that and he would not tie its hands in any way. He thought that most workers obeyed the law and would end strikes if ordered, but accepted that this would not always be the case.

He was willing to take sides over the terrible maritime strike of 1890. He said that the strike was 'provoked by the masters [employers], and continued by the masters', and that employees took strike action to avoid a lock-out.[30]

How would the Kingston model operate?

Kingston's model provided that, in order to avoid strikes and lock-outs, industrial tribunals could impose awards on the employers and trade unions engaged in a dispute if they did not reach agreement during conciliation. Kingston, Alfred Deakin and all the other supporters of this model never tried to predict what these awards would contain. They simply referred to just and equitable wages, hours and conditions, or outcomes not obtained by brute force.

What would be the level of the wages, or other conditions in awards imposed on employers and unions? What types of matters would be dealt with in these awards? How would these award provisions be varied later on? These were not issues determined by the Acts that established the tribunals, but were left to the tribunals to determine themselves. As we will see in subsequent chapters, they would be the subject of major controversy for decades. They are still the subject of major controversy.

The Australian experiment and other countries

The United States of America, Canada and Britain did not adopt compulsory conciliation and arbitration systems. They adopted collective bargaining systems, which despite varying in many respects also provided for various types of compulsion. Like collective bargaining systems, arbitration relied on collective representation of groups of employees by trade unions. However, Foenander says that Britain and the US also drew substantially from the Australian experiments, for example in the British Trade Boards Acts of 1909 and 1918, the *Wages Councils Act 1945* and the Kansas *Industrial Court Act 1920*, and the general theory underlying the New Deal legislation of the United States. The British legislation was founded on a 1908 report prepared by Ernest Aves, an English public servant, who visited Australia and New Zealand and was particularly impressed by the wages boards in Victoria. British legislation followed the Victorian model, and some US states, for example Kansas, followed the British model for the fixation of minimum wages.[31] However, in the United States of America minimum wage laws passed by state parliaments were until 1938 sometimes overridden as an unconstitutional violation of liberty of contract.[32]

The Federal Constitutional Convention held in Adelaide in 1897, decided that the new Australian Constitution should include a power of the Australian Parliament to legislate with respect to conciliation and arbitration.

1.2 THE AUSTRALIAN CONSTITUTION AND ARBITRATION

The great strikes were important events of the 1890s. It was not surprising that the need for a federal role in industrial relations was debated extensively in the constitutional conventions held over the course of the 1890s. These conventions were organised by the governments of each of the British colonies of New South Wales, Victoria, South Australia, Queensland, Western Australia, and Tasmania. New Zealand and Fiji also attended the first of them. The purpose of the conventions was to discuss the development of an Australian constitution, which would combine the British colonies on the Australian continent into one nation.

South Australian politician Charles Kingston proposed to the first convention, held in Sydney in 1891, that the federal parliament should be given legislative power for:

> the establishment of courts of conciliation and arbitration, having jurisdiction throughout the commonwealth, for the settlement of industrial disputes.

Debate on the issue was postponed to a later time.[33]

A second convention was held in 1897–98 in Adelaide, Sydney and Melbourne and the delegates were directly elected.

In 1897 Henry Bournes Higgins, a Victorian delegate, said that a new Australian constitution should include a power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. This was rejected in 1897, but was eventually accepted in 1898. The final wording of the clause—requiring that disputes involve more than one state—was a compromise. Those seeking a broader power accepted less than they initially sought.

In moving for the inclusion of what is now known as the conciliation and arbitration power, Higgins said:

> What I wish is that the Federal Parliament shall have power to make such regulations as it thinks fit for the termination and prevention of widespread industrial disputes. I do not ask the committee to say that courts of

> conciliation and arbitration shall or shall not be created. I simply desire that the Federal Parliament shall be empowered to create such courts if it thinks fit.[34]

Kingston, then premier of South Australia and a delegate to the 1898 convention, agreed:

> The leading feature of this Constitution is that the Federal Parliament should have power to legislate for the peace, order, and good government of the Commonwealth. By what means are the peace and order of the various colonies most disturbed, and their good government threatened, at the present time? By strikes and lock-outs. Shall we not then be wanting in our duty if we do not give to the Federal Parliament power to legislate in such a way as will prevent strikes and lockouts, and enable industrial questions of the greatest difficulty to be amicably settled between the parties, upon considerations of right and wrong rather than because of the relative strength of the disputants.[35]

In opposition, New South Wales premier George Reid argued that the introduction of a federal conciliation and arbitration system, in addition to those already present in a number of states, could lead to increased disputation:

> Just consider the temptation under those circumstances to shift the venue of a particular trade dispute from a particular state. If the employers in the trade dispute in a particular state think that the federal law and its administration are more likely to suit them, look at the incentive there is to extend the mischief and evil into another state, or more than one other state, in order to shift the venue of the tribunal which will try the dispute.[36]

South Australian delegate Josiah Symons believed the responsibility for resolving industrial disputes was properly held by the states and the prospect of any federal intervention would be hotly contested:

> I think that the insertion of this power in our Constitution is unnecessary, and will be absolutely mischievous. In fact, if this is to be carried out, it will create the greatest possible difficulty and complication, notwithstanding which all it does is simply to embody an expression of the sentiment of kindliness and good-will ... supposing a firm has branches in different cities, and there is a strike in the branch in South Australia, and an air of discontent in the branch in Victoria, would that be sufficient to call down

> the interference of the federal authorities? What I say is that it will not be in your Bill; it will not be in this Constitution; it will not be for the Executive; but it will be for the Federal Parliament to decide that, and you will hand over to the Federal Parliament one of the most pregnant sources of heat and passion that ever was invented.[37]

Higgins persuaded the convention to include the conciliation and arbitration power (s.51(35)) in the Australian Constitution, but it was agreed to by a narrow margin of just three votes: 22 to 19. Section 51(35) of the Constitution provides that Parliament can legislate with respect to:

> Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

The power was subsequently used by the Australian Parliament to pass the *Commonwealth Conciliation and Arbitration Act 1904*.

The power of the Australian Parliament was to make laws of a certain kind. If the parliament was to make any laws at all regarding collective conflict or labour relations, it would make a law similar to the Kingston Bill of 1890. This is not surprising, because it was Charles Kingston who first proposed to the constitutional conventions that the Australian Parliament have such a power.

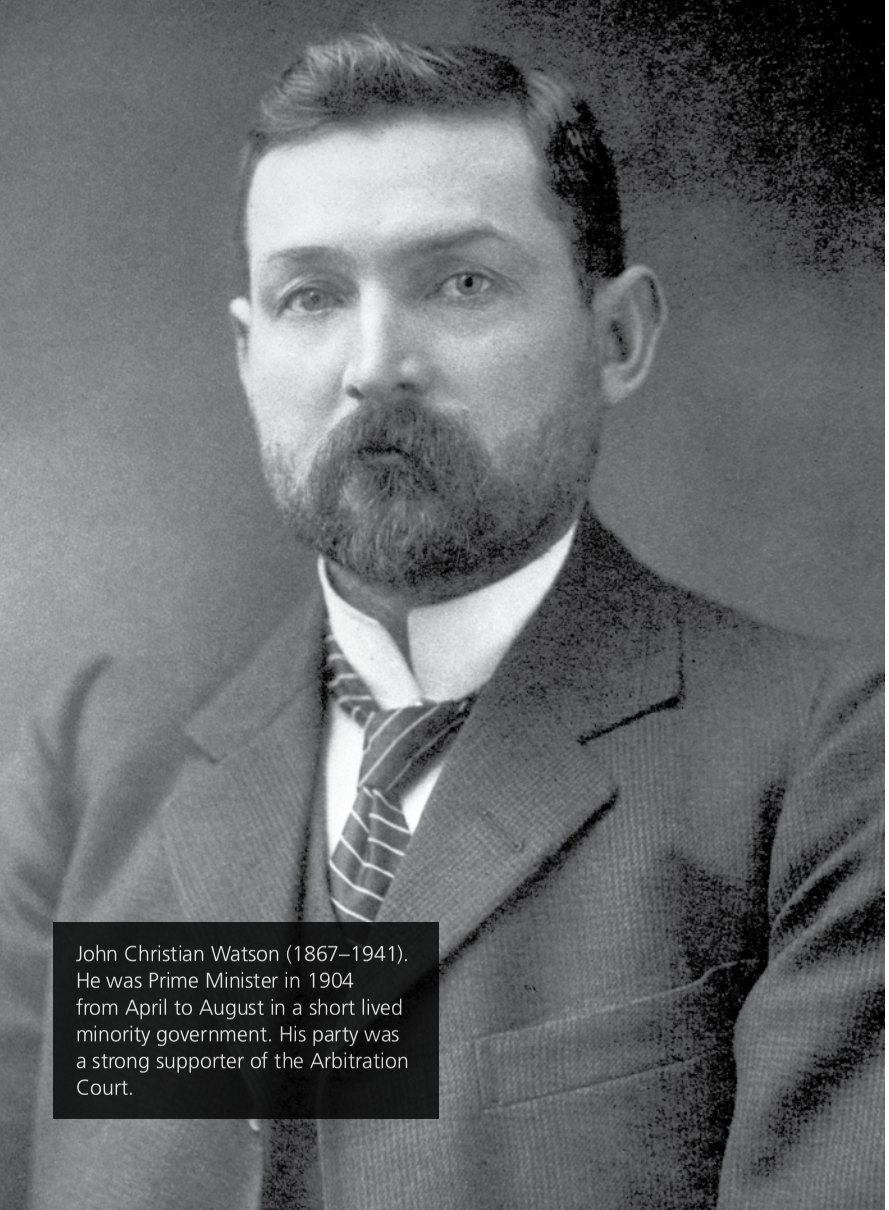
It was not, for example, a power to make laws with respect to 'collective bargaining', a term which was invented in 1891.[38] Collective bargaining is the term often used to describe the labour systems in the United States of America, Canada, the United Kingdom and other industrialised nations. Collective bargaining systems leave the determination of wages and conditions to be determined by agreement between employers and employees.

The conciliation and arbitration systems were different. Those systems provided for a court or wages board to impose an arbitrated set of wages and conditions if employers and employees, or employers and trade unions, did not agree.

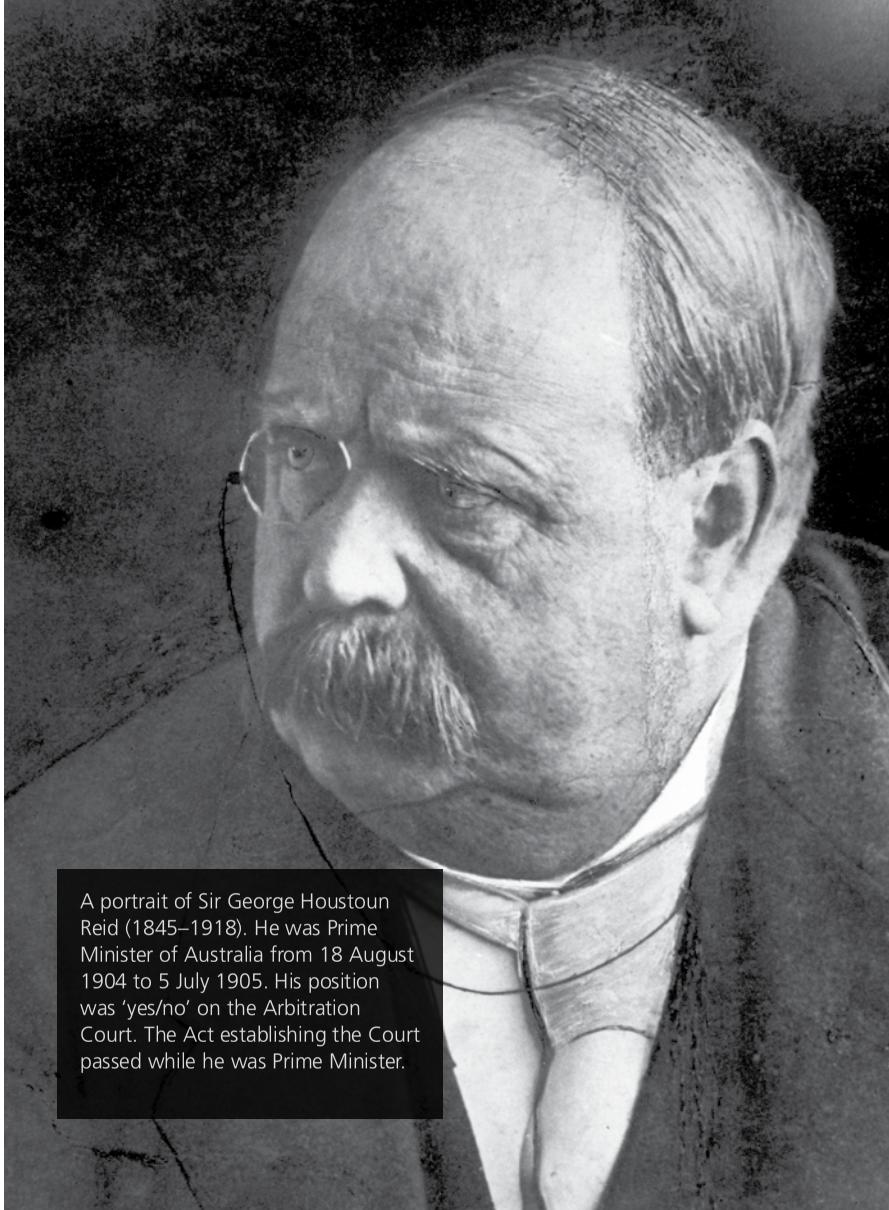
Summary

1. The great strikes of the 1890s led to a widespread view that industrial disputes were a serious problem in the Australian colonies, and that existing laws were not sufficient to deal with them.
2. Issues of the time included whether or not employers should have freedom of contract, and be able to employ only non-unionists, or whether they should only be allowed to employ members of trade unions.
3. There was discussion about various types of labour system that might address the serious problem of industrial disputes. Charles Kingston's Bill, which provided for compulsory conciliation and arbitration, became the model applied nationally in Australia and New Zealand. A second model was the Victorian wages board system of 1896, which was also influential.
4. There was a long and difficult debate during the constitutional conventions about whether or not the parliament of the new Australian nation should have the power to make laws about industrial disputes. It was eventually agreed that the Australian Constitution should contain the conciliation and arbitration power. This decision also had the effect of largely determining that if the Australian Parliament made laws they would be based on the 1890 Kingston model, because the power only authorised that sort of law.

The Hon Alfred Deakin (1856–1919). He was Prime Minister of Australia three times, for a brief period in 1903 and then from July 1905 to November 1908 and from June 1909 to April 1910. He was the most influential political supporter of the establishment of the Arbitration Court.



John Christian Watson (1867–1941). He was Prime Minister in 1904 from April to August in a short lived minority government. His party was a strong supporter of the Arbitration Court.



A portrait of Sir George Houstoun Reid (1845–1918). He was Prime Minister of Australia from 18 August 1904 to 5 July 1905. His position was 'yes/no' on the Arbitration Court. The Act establishing the Court passed while he was Prime Minister.

1.3 AUSTRALIA'S OWN EXPERIMENT: THE CONCILIATION AND ARBITRATION ACT

The Conciliation and Arbitration Bill

A Conciliation and Arbitration Bill was supported by the most important political leaders in the Australian Parliament in the period 1901–04.

During the debates on the Bill there were four governments, and four Prime Ministers. They were the first four Prime Ministers of Australia: Edmund Barton (1901–03), Alfred Deakin (1903–04), John Christian Watson (1904), and George Reid (1904–05).

Each of the first four Prime Ministers of Australia supported the Bill, although they disagreed on many details of the Bill. These disagreements included whether or not it should cover seamen and state government employees such as railway workers, and whether or not the Bill should provide preference to union members. Because of these disagreements the passage of the Bill into law took several years and involved many difficult debates. During this time, the government changed four times and twice because of the Bill.

The Act was not copied from the United States of America or from Britain as many others were at the time. It was a uniquely Australian Act based on a Bill developed by Charles Kingston of South Australia. Alfred Deakin, the second Prime Minister of Australia, was perhaps its most influential political supporter, although the Bill eventually passed parliament in 1904 while George Reid was Prime Minister.

Henry Bournes Higgins, an important contributor to the debates at the constitutional conventions that gave the Australian Parliament power to legislate over industrial relations, was one of the Bill's key supporters in the parliament.

Higgins was to become the second president of the Commonwealth Court of Conciliation and Arbitration, and the main influence on the Court in its first 20 years of operation. He

handed down the *Harvester Decision*, which established a 'living' or 'family' wage of 7 shillings a day for an unskilled labourer. The 7 shillings became the basis of the Australian minimum wage, which has lasted until today. It became known as the 'basic wage'. Additional amounts were paid to more skilled employees. These amounts became known as 'margins'.

The first parliament after the election of 1901

After Australia's first federal election in 1901, it became apparent that three groups dominated parliament. The Liberal Protectionists, led by Edmund Barton and Alfred Deakin, had supported a compulsory Conciliation and Arbitration Bill during the 1901 election[39], and after. There was no fixed policy amongst George Reid's Free Traders, and Reid could only speak confidently on behalf of his followers on the free trade issue.[40] His supporters were sometimes equivocal about the Bill but generally in support of arbitration, while the federal Labor Party, led by John Christian Watson, supported it. The ALP caucus adopted compulsory arbitration as a binding decision after the 1901 election.[41]

Deakin, Watson and others wanted a court to be established that would deal with any industrial disputes that occurred and were not confined to one state. The court would attempt to settle the dispute by agreement, and if that failed would impose a settlement by arbitration. Thus, using this system, it was hoped that some of the terrible dislocation resulting from the 1890s strikes would be avoided.

The Labor Party enforced compliance with caucus decisions. However, the Liberal Protectionists and Free Traders were different. Members of these two groups decided what approach to take on each issue for themselves, while influenced by the general direction of their leaders. This led to unpredictable decision making and unstable governments. A Prime Minister could not guarantee that members of his government would support his government's policies.

The first Conciliation and Arbitration Bill

Charles Kingston prepared the first federal Conciliation and Arbitration Bill. It was, however, never introduced into parliament. Australia's first Prime Minister, Edmund Barton (leader of the Liberal Protectionists), decided on 26 March 1902 not to proceed with its introduction after running out of parliamentary time. He was not a fierce supporter, as Kingston and Deakin were.

The following year Kingston gave a copy of his Bill to *The Age* newspaper before introducing it into parliament. He then sought and gained leave on 7 July 1903 to introduce the Bill into parliament, but not before a considerable amount of criticism and mirth at his expense from leading figures from other parties including Billy Hughes from the federal Labor Party, and George Reid from the Free Traders. George Reid joked that perhaps the government should take newspaper editors into the Cabinet before giving them confidential Bills.[42] The Bill was never actually introduced—only *The Age* and its readers ever saw it. Again the government decided that it did not have enough time to debate it.

Kingston later resigned after differences emerged between him and the government. He wanted to extend the scope of the Bill to include all shipping along the Australian coast, while his colleagues did not. As Kingston later explained with some emotion, he had given his word to the seamen that they would be protected against a reduction of their wages to 'an equality with those paid to the cheapest competitors in the Australian seas'.[43]

Most of the government considered that the Bill would probably have a very limited application, and that the inter-state disputes that the Bill would apply to would not occur very often. Despite the Barton government's disagreement with Kingston, the Bill when passed in 1904 by the Reid/McLean government, did include coastal shipping. Shipping unions and employers registered some of the first unions of employees and employers, and the first award made covered the officers on steamships.

The second Conciliation and Arbitration Bill

On 28 July 1903 Alfred Deakin (then Attorney-General and later Prime Minister), introduced a Conciliation and Arbitration Bill into parliament for the first time. In his second reading speech on 30 July he said:

> We now substitute a new regime for the reign of violence by endowing the State—which in itself possesses a strength greater than that of either or both of the contestants—with power to impose within the limits of reason, justice and constitutional government, its deliberate will upon the parties to industrial disputes. At the present time we have unions of employers upon the one side and of employe[e]s upon the other ... It marks the beginning of a new era in industrial matters, not only because of its main object, the prohibition of strikes and lock-outs, but because it brings into play a new force—the force of an impartial tribunal with the State behind it ...[44]

> This Bill marks ... the beginning of a new phase of civilisation. It begins the establishment of the People's Peace, under which the conduct of industrial affairs in the future may be guided ... The object of this measure is to prevent strikes ... Lock-outs and strikes equally involve destruction—destruction of labour, of machinery, of capital, of social relations and of social peace. The Bill makes a gallant effort to cope with these great evils of modern industrialism.[45]

The legislation was designed to promote the making of enforceable collective agreements. In the event that the parties involved in a dispute failed to reach agreement or settle their differences, the state (by way of an independent tribunal) could act as the independent third party to encourage agreement by conciliation. Should this not be possible, an equitable and enforceable award could be made:

> The main purpose of the Bill is to adopt methods of conciliation as far as possible ... [The] tribunal intervenes simply for the purpose of bringing the parties together, pronouncing no judgement, but, by clarifying the issue, and enabling it to be considered in a temperate fashion, it facilitates the coming together of the opposing forces and assists them to make, as between themselves, an amicable agreement, which is then registered by the court ... Then those who cannot by conciliation settle their disputes between themselves are required ... to allow the terms of a settlement to be

> laid down by an impartial tribunal, which hears both parties to a matter in dispute and delivers a decision which is binding.[46]

Deakin had hoped to make clear that the role of the Court was to consider each case and dispute according to its merits and to deal with it according to equity and good conscience. However, in order to protect the public interest, strikes and lock-outs would be prohibited. He argued:

> Under the new system—and here is the revolution—a different aim will operate. Might is not to make right. But, as soon as it can be discerned and determined, right is to make might. The thought which has hitherto been set aside is now to be made the determining factor of the situation. It will not be asked which side commands the greatest capital, the greatest number of hands, or the greatest number of sympathizers, or can strike the community the most deadly blow to force its opponent into surrender.[47]

What would the awards provide?

The new Court was to make awards that contained some of the most important labour standards ever introduced into Australia.

Deakin partly predicted this and even spoke of 'social justice':

> The measure aims at a gradual, slow, but sure achievement of fair hours, fair wages, and fair conditions of labour. It seeks to accomplish this by steps taken in consonance with the circumstances of the country, and with its industrial advance. Its object is to place employers on the same footing one with another so that the most scrupulous and the most generous—as many of them are—shall not be hampered by such qualities in the struggle to maintain themselves against the competition of less worthy men. It aims at placing employees under obligations and control that will prevent the rebellious breaking away of unruly unionists, in consequence of their dislike of any award. It seeks to bring both employer and employees into line, and to connect them by amicable agreements or equitable awards ...
>
> Social justice is a lofty aim. It has not been sought to enforce it in any special form upon any special class, or in the interests of any one class. The Bill has been drawn from first to last, looking upon the employer and employee with perfectly equal eyes, with a view to bringing them before the Bar of a tribunal where in consonance with the principles clear to all British people, they shall have meted out to them even-handed justice ...[48]

Then federal opposition leader George Reid supported the Bill. He said: 'I am quite hopeful that the result of this experiment will show that even in the field of social economics, Australia can win victories and set examples which will teach the rest of the world'.[49]

Even as he said that he admired Deakin's speech, Reid could not resist the opportunity to make jokes at his expense. He marvelled that Deakin had so easily settled matters that had 'profoundly agitated the most acute intellects of Great Britain and the United States'.[50] Neither country had a system of compulsory conciliation and arbitration. Reid jokingly expressed '... infinite regret that there are not other editions of my honourable friend [Alfred Deakin] available, and also that we could not possibly spare him even for the benefit of mankind at large'.[51]

Leaving the jokes aside, and despite his seeming support for the Bill, most of his speech detailed a list of objections and alleged problems. He never proposed a different scheme. These alleged problems included:

- the expense[52]
- whether another justice of the High Court would be appointed[53]
- the possibility of the standing of judges being undermined by the work[54]
- difficulties in interpreting the Constitution[55]
- state tribunals[56]
- Abraham Lincoln's statement in support of the right to strike, as opposed to the prohibition on strikes in the Bill[57]
- the lack of compulsory arbitration bodies in the United States[58]
- the alleged success of voluntary arbitration in the United Kingdom[59]
- the injustice of common rule awards, which applied to all employers in an industry[60]
- the right of employees to join registered trade unions[61]
- other matters.

Despite these concerns, Reid supported the Bill but expressed his disappointment that it was necessary. He said:

> In no sense is this a triumph for humanity. It is a confession that the ordinary rules have failed, and that we have to grope about for some method which is clumsy, and perhaps, inequitable ... trusting that the time will come when, under a more rational and voluntary arrangement of intelligent men representing these great interests, a method will be found of settling their disputes without any recourse to legal machinery.[62]

Reid too had been shocked by the terrible suffering of the 1890s strikes. He saw the imposition of a settlement on parties across an industry as an affront to ordinary rights, but also saw it as a necessary evil:

> But, just as in martial law, all the sanctions and usages of civilized life disappear, is it not better that, in this case, they should disappear for a time in order to prevent the destruction, bloodshed, and hatred which these quarrels engender?[63]

Despite George Reid's apparent concerns with 'common rule' awards, the Act introduced by his government in 1904 in fact provided for them. Such 'common rule' awards were later held to be invalid. Awards would only be forced on the parties that were parties to an industrial dispute, not an industry as a whole. 'Common rule' awards were awards that applied across an industry or other stated group, not to particular named employers.

Kingston was the person most responsible for developing the Bill. He had drafted the first Bill in 1890, and had drafted most of the second Bill before parliament. He addressed many of the questions that Reid had asked. On the question of the almost unprecedented nature of the Bill, namely that it was not based on any model from the United States of America or Britain, he said:

> Any legislation of this kind is of an experimental character. I have yet to learn that Australia fears to embark upon a course of legislation for which

> there is no established precedent. She is content to make her own laws for cases as they arise.[64]

He discussed the operations of similar legislation in New Zealand and New South Wales. In New Zealand the conciliation function was done by a separate body, conciliation boards, which delayed finalising matters. In New South Wales there was no mention of conciliation. Both were problems that were rectified in the Bill before parliament. In relation to the cost and expense of the measure, he said that the avoidance of the disaster of the shearers' strike, or the maritime strike, would more than pay for any cost of the measure.[65] He said that state arbitration courts could not deal with strikes that covered many states:

> We feel that they [major strikes] are less likely to occur if we provide for tribunals which will satisfactorily deal with them when they arise, and will endeavour to nip in the bud troubles which may, if they are allowed to develop, cause the utmost difficulty.[66]

Kingston quoted from the evidence he gave to the 1891 New South Wales Royal Commission on Strikes on a number of key issues, including the conciliation function. He said that he had consulted with such persons as the leader of the opposition George Reid had suggested.[67] Finally, he explained at length why he had resigned from his position as a minister with the government. He said:

> I believe in protecting our local industries against cruel and unfair competition. I believe in the importance of the ship-owning industry. I believe in the preservation for Australia of the Australian coastal trade. I do not propose anything to the extent of preventing competitors who subscribe to the same conditions and pay the same wages from sharing in that trade. But I know the competition to which the Australian ship-owners are at the present moment subjected ... They have to pay their seamen £6 10s. per month, and to compete with others who pay only from £3 to £4 per month.[68]

John Christian Watson (federal Labor Party) pointed out that no speaker had yet opposed the Bill, but said that Mr FT Derham of the Victorian Chamber of Manufactures, and Mr Walpole of the

Employers' Federation in Melbourne, were campaigning against the Bill. He rejected their views, firstly, because most members of parliament had been elected on the basis of support for the Bill, and secondly because the system of voluntary conciliation and arbitration they supported had 'universally failed'. He said that Australia was not free of terrible strikes:

> What about the coal strike at Outtrim, which has been in progress for the past six months. That was not brought about by the initiative of the men? In that case an attempt was made by the employers to reduce the wages of the men by nearly one-third. They were engaged upon piece-work at so much per ton. Naturally the men objected to such a sweeping reduction. They offered to submit their case to arbitration, but the employers—as is too frequently the case—refused to be conciliatory, and declined to accept anything short of absolute submission to their terms. The men have repeatedly offered to submit their case to arbitration. That strike has now continued for six months, and has undoubtedly inflicted a great injury upon the people who are chiefly concerned, as well as upon the State of Victoria. It cannot be a good thing for Victoria that these mines should remain idle all the time ... The men who were originally locked out are still insisting upon their right to work at reasonable wages.[69]

Watson considered that there was currently real industrial conflict in Australia and overseas, and workers were experiencing 'sweating' and harsh conditions such as to justify a new Act of this kind.[70]

The shipping magnate Sir Malcolm McEacharn supported the Bill, although he said:

> There was a time when I was utterly opposed, not only to unionism, but to conciliation and arbitration in any form ... The unionism to which I had been accustomed during the great strikes of 1890 to 1894 was of a more arrogant and 'stand and deliver' type than the unionism of today. I hope that the newer unionism ... which has enabled those of us who are employers to meet our men with pleasure and discuss matters in a conciliatory spirit, may continue.[71]

One commentator says that this was typical of the attitude of employers of the time. He also comments that unions took a similar view. They were willing to give arbitration a trial to see what the results would be.[72]

The Bill was abandoned on 8 September when the Labor Party successfully amended it to cover state railway employees. The Labor Party insisted that the Bill cover state railway employees because the Irvine government in Victoria had insisted that its railway workers should disaffiliate from the Trades Hall. Workers protested and went on strike and the government then introduced legislation banning such strikes. Deakin, however, saw the amendment as violating the federal balance by overriding the states' powers of self–government.[73]

Another federal election was then held. In the 1903 election campaign again all parties supported a Conciliation and Arbitration Bill in some form. Again the parliament was made up of three groupings: Alfred Deakin's Liberal Protectionists, George Reid's Free Traders, and the Labor Party. Alfred Deakin retained office, and remained Prime Minister.[74]

The third Conciliation and Arbitration Bill

A new Bill was introduced on 22 March 1904 by Alfred Deakin, Prime Minister (Liberal Protectionist). Again, Alfred Deakin spoke at length about the contents of the Bill.

The Bill was opposed by some. This was a parliament of individuals, not of disciplined political parties who enforced party policy, which is the position today. The debate was wide-ranging, and many different issues were raised.

For example, Mr Glynn (a Free Trader) reviewed developments in Great Britain, including the Midland Iron and Steel Wages Board and the Durham Miners' Association, both of which showed he said '... that, by being temperate and bringing common sense and honesty to bear, all disputes may be settled on the voluntary principle'.[75]

Mr Robinson (a Free Trader) said that a wages board system should apply, not a court:

> If a dispute is to be settled by force of law, I think it far better that those who settle it shall be men elected, as under the Victorian Factories Act,

> by the employers and employees concerned, and shall choose their own chairman, than that it shall be dealt with by a Court.[76]

Neither of these two approaches had much support in parliament or in the electorate. The Act was to provide for a court.

Deakin was unable to secure the Bill's passage and resigned. The government of John Christian Watson (Labor Party) pursued the Bill. It was defeated in an attempt to amend the Bill to provide for preference for trade union members, and accordingly Watson also resigned on 17 August 1904, thus ending the first national labour government in the world.

The Bill finally passed the Senate on 9 December 1904, during the period of the George Reid/Allan McLean (Free Trade, Protectionist) government. This was perhaps surprising, because although Reid supported the Bill, of the first four Prime Ministers he was the least enthusiastic. It was Alfred Deakin's Bill, and there was some degree of personal enmity between Deakin and 'Yes/No Reid', given that name by his enemies because he seemed to both support and oppose Federation. Deakin was willing to describe Reid as untrustworthy, lazy, a brilliant tactician and platform orator, physically repulsive, and with no consistent principles other than free trade.[77] Reid's views on Deakin are perhaps best recorded in the way in which he systematically undermined most of Deakin's endeavours.

Reid's position was also partly 'yes/no' on the Conciliation and Arbitration Bill, although more yes than no, perhaps because of political calculation.

The Bill was popular, and Reid's government depended on Labor and Deakin's support. Alfred Deakin and John Christian Watson, the other main leaders, supported the Bill because they were convinced it was in the interests of Australia.

Tariffs and arbitration

It is sometimes said that there was a link between the introduction of tariffs, taxes on imports of goods into Australia, and the introduction of conciliation and arbitration. However, tariffs were introduced in 1902, and conciliation and arbitration in 1904. There was no

direct link between the two Bills, although tariff legislation was amended and later debates had regard to arbitration. Tariffs divided the parliament. The largest group in parliament, the Barton/Deakin protectionists were elected on a platform of introducing tariffs, while the second largest, George Reid's free traders were elected on a platform of opposing tariffs. The smallest group, the Labor Party, contained both free traders and protectionists.

Conciliation and arbitration, on the other hand, was supported in principle by the Barton/Deakin group, the Labor Party, and some of Reid's Free Traders. Despite this general support, parliament was divided over particular details of the Bill (e.g. whether the Act should cover state railways, or allow the Court to order preference to union members).

There was no link between tariffs and conciliation and arbitration until the introduction of Deakin's policy of New Protection[78] in 1906 with the *Excise Tariffs Act 1906*. This Act made tariff protection conditional on wages and conditions being paid, which were declared by the president of the Commonwealth Conciliation and Arbitration Court to be 'fair and reasonable'. This Act led to the *Harvester Decision*, which set the first Australian minimum wage. The Excise Tariffs Act was almost immediately found by the High Court to be invalid, and this removed the direct link between protection for industry, and protection of workers' wages through a minimum wage.

George Reid, Prime Minister when the *Commonwealth Conciliation and Arbitration Act 1904* passed parliament, was also parliament's most influential opponent of tariffs.

It is true, however, that the tariff system established in 1902 and amended by later parliaments, coexisted with the arbitration systems as they developed, just as it coexisted with other policies. It might be argued, for example, that the continued existence of a high award wage would have been threatened at times if employers had been able to use cheaper labour overseas rather than Australian labour, and to import goods rather than making them in Australia. Tariffs prevented this occurring to some extent. By 1928 the Tariff Board claimed that the level of tariffs in the iron and steel sector was largely determined by the gap between Australian wages and that paid by competing overseas employers.[79] The removal of tariffs late

in the twentieth century was justified on the basis of the benefits of free trade, which included cheaper goods for Australians.

The *Commonwealth Conciliation and Arbitration Act 1904*

The Bill was assented to and became law on 15 December 1904. The 'chief objects' of the Act provide a convenient summary of the Act's provisions:

i. To prevent lock-outs and strikes in relation to industrial disputes;

ii. To constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes;

iii. To provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties;

iv. In default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award;

v. To enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other;

vi. To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act;

vii. To provide for the making and enforcement of industrial agreements between employers and employees in relation to industrial disputes.

The record of the Act in achieving these objects, particularly object (i) relating to preventing strikes and lock-outs, object (iv) relating to awards, and object (vi) relating to encouragement of registered organisations is discussed later. However, in summary strikes continued to occur, while the Court was slow to make

awards. Six unions were registered in 1905, including one employer union, the Commonwealth Steamship Owners' Association, and there were many more registered in the coming decades.

Table 1: First six organisations registered under the Act

	Registered	State	Name
1	15 May 1905	NSW	The Merchant Service Guild of Australasia (current name: The Australian Maritime Officers' Union)
2	16 May 1905	NSW	The Australian Workers' Union
3	15 June 1905	Vic	The Federated Saw Mill, Timber Yard, and General Wood Workers Employees Association, Victorian Branch
4	6 July 1905	Vic	Bakery Employees' and Salesmen's Federation of Australia
5	11 July 1905	Vic	Commonwealth Steamship Owners' Association
6	7 Aug 1905	NSW	The Federated Stewards and Cooks Union of Australasia

The *Commonwealth Conciliation and Arbitration Act 1904* was not repealed until 1988.[80]

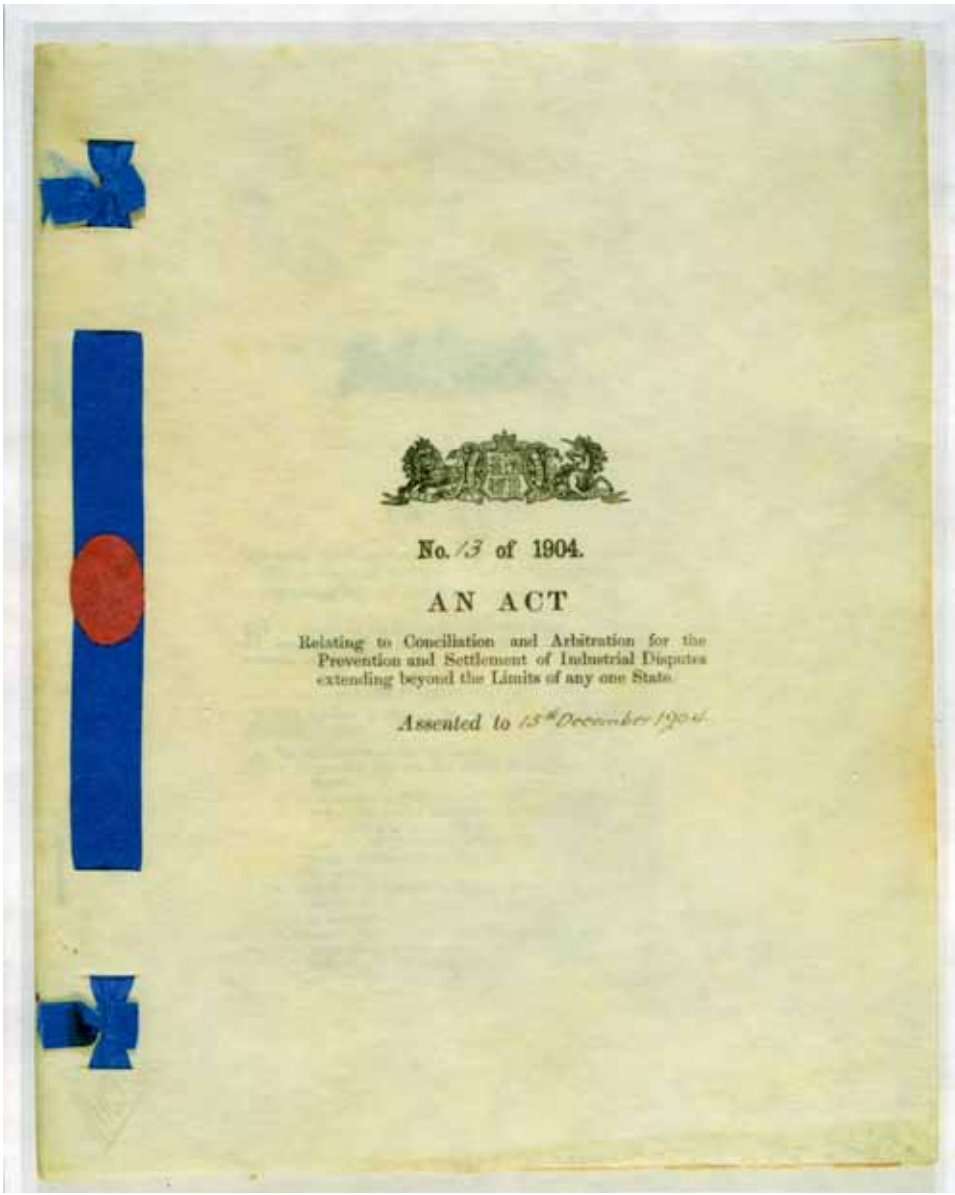
1.4 ESTABLISHMENT OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION

The Commonwealth Court of Conciliation and Arbitration consisted initially of just a president, a judge of the High Court, who worked part-time as president of the Court. Richard O'Connor was the first president, appointed on 10 February 1905, and the second president was Henry Bournes Higgins, who was appointed in 1907.[81] In 1913 another member of the Court was appointed, a deputy president, Mr Charles Powers.

Justice Henry Higgins was the most important influence on the early Court. His decisions, and unusual personality and intellect, set the pattern for the Court during its first 20 years of operation.

The Court was set up with the following administrative procedures being implemented:

> Commonwealth of Australia
> Attorney-General's Department,
> Melbourne, 26th January, 1905.
>
> APPOINTMENT OF INDUSTRIAL REGISTRAR, UNDER THE COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1904.
>
> His Excellency the Governor-General, with the advice of the Federal Executive Council, has been pleased to approve of the appointment of GORDON HARWOOD CASTLE, Chief Clerk and Assistant Parliamentary Draftsman in the Attorney-General's Department of the Commonwealth, as Industrial Registrar under the *Commonwealth Conciliation and Arbitration Act 1904*, during pleasure and without salary.
>
> J. H. SYMON,
> Attorney-General.



No. 13 of 1904.

AN ACT

Relating to Conciliation and Arbitration for the Prevention and Settlement of Industrial Disputes extending beyond the Limits of any one State.

Assented to 15th December 1904.

The front cover of the Conciliation and Arbitration Act of 1904. This Act was Australia's own experiment. It was not based on models in the United States nor Great Britain.

While the need for a Commonwealth Court of Conciliation and Arbitration was accepted by the Australian Parliament with the passage of the *Commonwealth Conciliation and Arbitration Act 1904*, few politicians expected that the Court's workload would be anything but modest.

In a minute paper dated 19 January 1905 the secretary of the Attorney-General's Department, Robert Garran, proposed administrative arrangements for the new court, including:

- the appointment of High Court Justice Richard Edward O'Connor as the first president of the Court
- Melbourne to be the principal registry with a district registry in the capital of each state
- the then registrar of the High Court, Mr Gordon Harwood Castle, to be the industrial registrar of the Court.

Both Justice O'Connor and Mr Castle were expected to take on the duties of the Commonwealth Conciliation and Arbitration Court in addition to their High Court duties. As the work was expected to be nominal, they received no additional salary. Similarly, the Commonwealth asked the states to provide an appropriate officer to act in a part-time and unsalaried capacity in each of the district registries.

In March 1907 Gordon Castle asked to be relieved of the position of industrial registrar, quoting the heavy workload as the reason:

> When the Act was passed into law, it was considered that for some time the work of the Industrial Registrar under it would be little more than nominal and, in order to save expense, I was asked to accept the office without salary. I did so, and have held the office since 1905.
>
> The work under the Act has grown considerably, and I now find that it is impossible for me to satisfactorily carry on the work in addition to my work as Chief Clerk and Assistant Parliamentary Draftsman in the Attorney-General's Department.[82]

Six months later, Justice O'Connor also stepped down from his position on the Court to spend more time on his High Court commitments.

The successors of these two men were to play formative roles in the development of the Court. Justice Henry Higgins led the Court as president from 1907 to 1921 and Alexander Murdoch Stewart served as industrial registrar from 1907 to 1929 when he was appointed a conciliation commissioner.

Early work of the Court

In its first five years the Court made only six awards. A lack of official forms delayed the first registration of an industrial organisation and the first hearing did not take place until November 1905 in Sydney.

First registration of an industrial association

The registration of an industrial association was one of the first items of business for the Court's registrar Gordon Castle.

On 27 January 1905 the Merchant Service Guild, an organisation representing maritime officers, notified the registrar of its desire for registration under the *Commonwealth Conciliation and Arbitration Act 1904*.

The registration was delayed due to the unavailability of associated regulations and forms, but the process was completed on 15 May 1905 when a certificate of registration was issued. The guild was required to pay a £2 registration fee.

Summary

1. Despite the general support for a compulsory Conciliation and Arbitration Bill the progress of the Bill through parliament was difficult, and took several years. It led to the resignation of two governments, and long debates.
2. The Bill passed with the support of the three groupings in the parliament: Alfred Deakin's Liberal Protectionists, George Reid's Free Traders, and the federal Labor Party.
3. The speeches in parliament show that a range of arguments were considered. These included avoiding a repetition of the bitter labour disputes of the 1890s, replacing the crude mechanism of strikes and lock-outs with reason and argument, and amelioration of the position of workers and protection of their wages and conditions.