

BOOK REVIEW

Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004)

The year 2004 marked the centenary of Australia's federal conciliation and arbitration system. The low-key tenor of celebrations held for the centenary was understandable, given that 2004 was also the year that a federal election delivered the Howard Coalition Government a Senate majority likely to threaten the last remnants of a system that has been progressively dismantled since the early 1990s.

As is obvious from its title, this is a book of commissioned chapters intended to recognise the centenary of conciliation and arbitration. The book was instigated by the Australian Industrial Relations Commission (the 'Commission'), the tribunal which, under various guises, has presided over the conciliation and arbitration system for the last one hundred years. The book project was overseen by an Editorial Board consisting of members of the Commission, representatives of employers, the Australian Council of Trade Unions, and the Commonwealth Department of Employment and Workplace Relations. Joe Isaac, an economist and former Deputy President of the AIRC, now a Professorial Fellow in the Department of Management at the University of Melbourne, and Stuart Macintyre, Professor of History at the same university, were asked to edit the book.

The result is an extremely readable thematic history of the federal conciliation and arbitration system, and it is an important history. The themes explored are: the political history of the establishment of the conciliation and arbitration system (Tim Rowse); 'arbitration in action' (Stuart Macintyre), the legal aspects of conciliation and arbitration (Justice Michael Kirby and Breen Creighton); the wider economic and social impact of the system (Keith Hancock and Sue Richardson); justice and equity issues (Gillian Whitehouse); the role of employer associations in the system (David Plowman); the relationship between trade unions and arbitration (Malcolm Rimmer); and the role of the system in regulating and mediating industrial action (Bill Harley). The various authors are all outstanding scholars or practitioners, and eminently qualified for the task presented to them.

The chapters are punctuated with historical 'sidebars', and illustrated by an impressive selection of photographs and cartoons depicting aspects of the system's history and particularly controversial moments. These sidebars and the associated illustrations are presumably included to address the Commission's interest in having a centenary history of its work. My only criticism of this is that at times, the sidebars appear without warning (and sometimes with no significant relevance to that particular point in the book), interrupting the flow of the

discussion. Perhaps they could have been presented between chapters. There are also some useful appendices to the book, with information concerning major changes to the tribunal, and a list of members of the tribunal.

The chapter of most immediate interest to lawyers is Kirby J and Creighton's contribution, 'The Law of Arbitration'. This chapter eloquently and comprehensively charts the key legal developments in the history of the arbitration system. The discussion focuses primarily on the various stages in the High Court's interpretation of the constitutional context within which arbitration has developed. We are reminded of the High Court's rejection of common rule awards in the *Whybrow* case¹ and later developments, the court's construction of the term 'industry' used in s 51(xxxv) of the *Australian Constitution*, and the implications of the separation of powers doctrine for the formal status of the tribunal. In concluding, the authors briefly contemplate the future of arbitration. Written before the Coalition Government's election victory delivered it control of the Senate from July 2005, this discussion is optimistic. Justice Kirby and Creighton suggest that the history of the Commission over its first century reveals its 'remarkable resilience, persistence and adaptability'. Nevertheless, they acknowledge the difficulty of predicting the tribunal's future 'in a rapidly changing world of economic, social and technological innovation'. Add 'extreme political adversity' to this future, and perhaps their conclusion may have been cast in more bleak terms.

Bill Harley's chapter, 'Managing Industrial Conflict', traces the role of conciliation and arbitration in regulating strike action. It covers familiar territory concerning the use then demise of the penal powers in the legislation, the practice of inserting 'bans clauses' in awards, and so on. Given the present Commonwealth Government's propensity for strongly policing the boundaries between lawful and unlawful industrial action, there could have been a more extensive discussion of recent developments in this chapter. For example, there is no discussion of the government's continuing attempts to pass the *Building and Construction Industry Improvement Bill 2003* (Cth) and subsequent variations. This legislation would establish a prescriptive legal model of regulation for industrial relations in the construction industry, backed by extensive penal powers, to sit alongside the existing industrial relations system.²

Interestingly, in my view, there is very little consideration given to the 'nuts and bolts' of award-making and conflict resolution in the book. In terms of the law of conciliation and arbitration, little of no attention is given to either the process of award-making, or the content of awards made by the Commission and its predecessors. Perhaps this reflects the nature of this book as an historical

¹ *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311.

² For a more extensive discussion of the regulatory nature of this legislation, see Anthony Forsyth, 'Outside Intervention or Necessary Evil: the Howard Government's Approach to Industrial Relations Regulation', *CCH Industrial Law News*, Issue 1, 29 January 2004; and John Howe, "Deregulation" of Labour Relations in Australia: Toward Command and Control' (Working Paper No 34, Centre for Employment and Labour Relations Law, University of Melbourne, 2005).

overview of a century of developments, with only limited space available for consideration of such detail. It may also reflect the lack of historical, empirical research into the content of awards. The latter deficiency in labour law scholarship is curious, given the importance of awards as regulators of terms and conditions of employment for at least the first eighty years of the system's operation.

Even Stuart Macintyre's chapter, 'Arbitration in Action' is, surprisingly, a quite detached perspective on its topic. Macintyre's focus is largely the tribunal and its membership, especially those appointed to head the tribunal (as Chief Judge when the Commission was a court, and as Presidents when it became the Commission). As such, it is a description of changes in the structure and composition of the Commission itself. Although some insights are given into the personal approaches of different office-holders, it lacks any discussion of the day-to-day business of conciliation and arbitration. Some explanation of the significance of the 'paper dispute' in the award-making process, and its strategic use by trade unions and employers over the years, would have made interesting reading.

Moving beyond the aspects of the book most concerned with the formal legal structure of conciliation and arbitration, Gillian Whitehouse's chapter 'Justice and Equity: Women and Indigenous Workers', and Keith Hancock and Sue Richardson's chapter 'Economic and Social Effects' appear to be the contributions which entail the most significant original research concerning the operation of the conciliation and arbitration system. Whitehouse argues that while social equality was a key expectation flowing from the establishment of a conciliation and arbitration system, in practice, justice for all has been an elusive target. The author documents the difficulties faced by the system in endeavouring to accommodate the varied working arrangements and geographical locations of indigenous workers, causing their working conditions to frequently fall outside the tribunal's wage determination process. Whitehouse concludes that although explicit discrimination against women and indigenous workers has largely been eliminated, the system has functioned to facilitate the pursuit of particular types of wage justice at different historical junctures in a way that frequently excluded other forms of wage justice. She refers to the example of the erosion of the 'family wage' for men, which although essential for the promotion of gender pay equity, at the same time undermined the notion of a universal 'fair' wage as a consequence of industrial citizenship.

Hancock and Richardson, on the other hand, address the broader policy-making role of the tribunal. There is extensive discussion of the extent to which the tribunal in making its determinations took into account the impact of its decisions on the wider economy. The authors are circumspect in their discussion of the impact of wages policy on macroeconomic conditions, including unemployment and productivity. They are more conclusive about the impact of 'wage breakouts' under enterprise bargaining on income equality more generally.

In summary, there is much to recommend about this book. From a legal perspective, it will be an essential purchase for those with more than a passing interest in labour law. It provides a comprehensive overview of the history of the arbitration, the role of its various institutions, and its political context in a single volume facilitating ease of reference. It will be especially useful for students and practitioners investigating labour law for the first time. The book outlines the historical and other contexts of the system which are so important to an understanding of the current regulatory framework.

However, the book also represents an opportunity missed. Although the chapters were all written before the 2004 federal election, this cannot excuse a failure to give more extensive consideration to the threats faced by conciliation and arbitration. The system has been under constant challenge for the best part of the last decade. The centenary of arbitration provided an opportunity to interrogate the characteristics and significance of the conciliation and arbitration system with an eye to the future. This shortcoming is presumably, in part, a result of the book essentially being 'commissioned' to commemorate the Commission's centenary. The result could have been different if it had been produced from a themed conference involving a general 'call for papers'. It was disappointing that the conference held by the Australian Industrial Relations Society celebrating the centenary of arbitration was not used for such a purpose, with much of the conference program taken up by commissioned papers. Moreover, the price of attending the conference was set at a level beyond the reach of many researchers.

Many of the chapters present broad, chronologically organised historical overviews concerning their respective themes. A more rigorously analytical approach might have produced some alternative, more challenging themes, and some novel insights. For example, I would have liked to have seen the chapters do more to address some of the criticisms made of the system since the 1970s under the banner of 'labour market deregulation'. One example is the largely unsubstantiated criticism that the Commission has not taken into account the needs of the economy, and of unemployment, in making its decisions. Although Hancock and Richardson's chapter goes some way toward the debunking of this myth, it does not engage with the political or academic debate over the issue.

It would also have been useful if the book introduced or drew upon some different theoretical perspectives to shed new light on otherwise familiar territory. For example, various writers have sought to draw upon perspectives from regulatory studies to re-examine the nature of labour law and its associated institutions.³ Chris Arup has suggested that viewed from such a perspective, '[t]he attack on arbitration is both a symptom of the problematics of regulation, and an opportunity to think, creatively and pluralistically, about suitable strategies'.⁴

³ See, eg, Chris Arup, 'Labour Law as Regulation: Promises and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229; Peter Gahan, 'Work, Status and Contract: Another Challenge for Labour Law' (2003) 16 *Australian Journal of Labour Law* 249.

⁴ *Ibid* 236.

Some of the material presented in the book was already covered (in some cases, by the same authors) in the excellent *Foundations of Arbitration*.⁵ It would have been helpful if more detailed consideration were given to developments over the subsequent period, especially if that material was presented with a greater analytical focus. I was surprised that there was little reference to some of the historical analysis performed for the 'New Social Settlement' research project being conducted by the Centre for Public Policy at the University of Melbourne.⁶ This research, along with other studies, has focused attention on the role of the system in constructing notions of 'employment' and 'unemployment', especially in the period between the wars. On a similar theme, it would also have been interesting if the book gave consideration to the interaction and conflict between the conciliation and arbitration system and other aspects of labour law, for example the common law of employment, and the development of occupational health and safety regimes and regulation of employment discrimination.

All in all, while it is extremely useful to have this book as a resource covering the first one hundred years of the operation of the conciliation and arbitration system, it does little to add to existing scholarship in the area. If those who were responsible for the introduction of conciliation and arbitration in 1904 had approached their task in such a restrained manner, there would have been nothing to celebrate in 2004.

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⁵ Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (1989).

⁶ See, eg, Richard Mitchell, Jill Murray and Anthony O'Donnell, 'Labour Law and the New Social Settlement' in Committee for Economic Development of Australia (ed), *Growth* 49 (2001).