## Appendix 1

## Historical List of Acts, Highlighting Those Used in Analysis

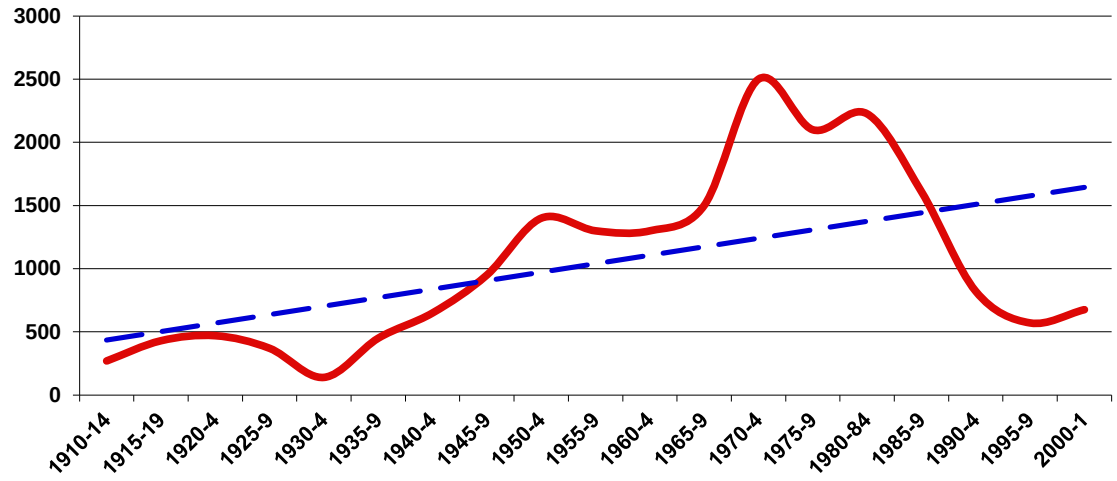
| | |
|---|---|
| 1904 | Commonwealth Conciliation and Arbitration Act 1904 No. 13 of 1904 |
| 1909 | Commonwealth Conciliation and Arbitration Act 1909 No. 28 of 1909 |
| 1910 | Commonwealth Conciliation and Arbitration Act 1910 No. 7 of 1910 |
| 1911 | Commonwealth Conciliation and Arbitration Act 1911 No. 6 of 1911 |
| 1914 | Commonwealth Conciliation and Arbitration Act 1914 No. 5 of 1914 |
| 1914 | Commonwealth Conciliation and Arbitration Act (No.2) 1914 No. 18 of 1914 |
| 1915 | Commonwealth Conciliation and Arbitration Act 1915 No. 35 of 1915 |
| 1918 | Commonwealth Conciliation and Arbitration Act 1918 No. 39 of 1918 |
| 1920 | Commonwealth Conciliation and Arbitration Act 1920 No. 31 of 1920 |
| 1921 | Commonwealth Conciliation and Arbitration Act 1921 No. 29 of 1921 |
| 1926 | Commonwealth Conciliation and Arbitration Act 1926 No. 22 of 1926 |
| 1927 | Commonwealth Conciliation and Arbitration Act 1927 No. 8 of 1927 |
| 1928 | Commonwealth Conciliation and Arbitration Act 1928 No. 18 of 1928 |
| 1930 | Commonwealth Conciliation and Arbitration Act 1930 No. 43 of 1930 |
| 1934 | Commonwealth Conciliation and Arbitration Act 1934 No. 54 of 1934 |
| 1946 | Commonwealth Conciliation and Arbitration Act 1946 No. 14 of 1946 |
| 1946 | Commonwealth Conciliation and Arbitration Act (No.2) 1946 No. 30 of 1946 |
| 1947 | Commonwealth Conciliation and Arbitration Act 1947 No. 10 of 1947 |
| 1948 | Commonwealth Conciliation and Arbitration Act 1948 No. 77 of 1948 |
| 1949 | Commonwealth Conciliation and Arbitration Act 1949 No. 28 of 1949 |
| 1949 | Commonwealth Conciliation and Arbitration Act (No.2) 1949 No. 86 of 1949 |
| 1950 | Conciliation and Arbitration Act 1950 No. 20 of 1950 |
| 1951 | Conciliation and Arbitration Act 1951 No. 1 of 1951 |
| 1951 | Conciliation and Arbitration Act (No.2) 1951 No . 18 of 1951 |
| 1951 | Conciliation and Arbitration Act (No.3) 1951 No. 58 of 1951 |
| 1952 | Conciliation and Arbitration Act 1952 No. 34 of 1952 |
| 1955 | Conciliation and Arbitration Act 1955 No. 54 of 1955 |
| 1956 | Conciliation and Arbitration Act 1956 No. 44 of 1956 |
| 1956 | Conciliation and Arbitration Act (No.2) 1956 No. 103 of 1956 |
| 1958 | Conciliation and Arbitration Act 1958 No. 30 of 1958 |
| 1959 | Conciliation and Arbitration Act 1959 No. 40 of 1959 |
| 1960 | Conciliation and Arbitration Act 1960 No. 15 of 1960 |
| 1961 | Conciliation and Arbitration Act 1961 No. 40 of 1961 |
| 1964 | Conciliation and Arbitration Act 1964 No. 99 of 1964 |
| 1965 | Conciliation and Arbitration Act 1965 No. 22 of 1965 |
| 1966 | Conciliation and Arbitration Act 1966 No. 64 of 1966 |
| | Conciliation and Arbitration Act 1967 No. 101 of 1967 |
| 1968 | Conciliation and Arbitration Act 1968 No. 38 of 1968 |
| 1969 | Conciliation and Arbitration Act 1969 No. 12 of 1969 |
| 1969 | Conciliation and Arbitration Act (No.2) 1969 No. 15 of 1969 |

1970 Conciliation and Arbitration Act 1970 No . 53 of 1970
1972 Conciliation and Arbitration Act 1972 No. 37 of 1972
1973 Conciliation and Arbitration Act 1973 No. 138 of 1973
1974 Conciliation and Arbitration (Organizations) Act 1974 No. 89 of 1974
1974 Arbitration (Foreign Awards and Agreements) Act 1974 No. 136 of 1974
1975 Conciliation and Arbitration Act 1975 No. 64 of 1975
1976 Conciliation and Arbitration Act 1976 No. 3 of 1976
1976 Conciliation and Arbitration Amendment Act 1976 No. 64 of 1976
1976 Conciliation and Arbitration Amendment Act (No. 2) 1976 No. 117 of 1976
1976 Conciliation and Arbitration Amendment Act (No. 3) 1976 No. 160 of 1976
1977 Conciliation and Arbitration Amendment Act 1977 No. 64 of 1977
1977 Conciliation and Arbitration Amendment Act (No. 3) 1977 No. 108 of 1977
1977 Conciliation and Arbitration Amendment Act (No. 2) 1977 No. 124 of 1977
1978 Conciliation and Arbitration Amendment (Federal Court of Australia) Act 1978 No. 53 of 1978
1979 Conciliation and Arbitration Amendment Act 1979 No. 110 of 1979
1980 Conciliation and Arbitration Amendment Act 1980 No. 35 of 1980
1980 Conciliation and Arbitration Amendment Act (No. 2) 1980 No. 36 of 1980
1980 Conciliation and Arbitration (Boycotts) Amendment Act 1980 No. 90 of 1980
1981 Conciliation and Arbitration Amendment Act 1981 No. 71 of 1981
1982 Conciliation and Arbitration (Management of Organizations) Amendment Act 1982 No. 143 of 1982
1983 Conciliation and Arbitration Amendment Act 1983 No. 33 of 1983
1983 Conciliation and Arbitration Amendment Act (No. 2) 1983 No. 115 of 1983
1984 Conciliation and Arbitration Amendment Act 1984 No. 162 of 1984
1985 Conciliation and Arbitration (Electricity Industry) Act 1985 No. 50 of 1985
1988 Industrial Relations Act 1988 No. 86 of 1988
1988 Industrial Relations (Consequential Provisions) Act 1988 No. 87 of 1988
1990 Industrial Relations Legislation Amendment Act (No. 2) 1990 No. 108 of 1990
1991 Industrial Relations Legislation Amendment Act 1991 No. 19 of 1991
1991 Industrial Relations Legislation Amendment (No. 2) Act 1991 No. 62 of 1991
1991 Industrial Relations Legislation Amendment Act 1991 No. 122 of 1991
1992 Industrial Relations Legislation Amendment Act (No. 3) 1992 No. 7 of 1992
1992 Industrial Relations Legislation Amendment Act (No.2) 1992 No. 215 of 1992
1992 Industrial Relations Legislation Amendment Act 1992 No. 109 of 1992
1993 Industrial Relations Reform Act 1993 No. 98 of 1993
1993 Industrial Relations Court (Judges' Remuneration) Act 1993 No. 104 of 1993
1993 Industrial Relations and Other Legislation Amendment Act 1993 No. 109 of 1993
1994 Industrial Relations Amendment Act 1994 No. 46 of 1994
1994 Industrial Relations Legislation Amendment Act 1994 No. 77 of 1994
1994 Industrial Relations Amendment Act (No. 2) 1994 No. 97 of 1994
1994 Industrial Relations Legislation Amendment Act (No. 2) 1994 No. 158 of 1994
1995 Industrial Relations and Other Legislation Amendment Act 1995 No. 168 of 1995

**1996** Workplace Relations and Other Legislation Amendment Act 1996 No. 60 of 1996
**1996** Workplace Relations and Other Legislation Amendment Act (No. 2) 1996 No. 77 of 1996
**1997** Workplace Relations and Other Legislation Amendment Act 1997 No. 198 of 1997
**1999** Workplace Relations Legislation Amendment (Youth Employment) Act 1999 No. 119 of 1999
**2001** Workplace Relations Amendment (Tallies) Act 2001 No. 7 of 2001
**2001** Workplace Relations Amendment (Termination of Employment) Act 2001 No. 100 of 2001
**2002** Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 No. 104 of 2002
**2002** Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002 No. 10 of 2002
**2002** Workplace Relations Amendment (Genuine Bargaining) Act 2002 No. 123 of 2002
**2002** Workplace Relations Legislation Amendment Act 2002 No. 127 of 2002
**2003** Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003 No. 20 of 2003
**2003** Workplace Relations Amendment (Protection for Emergency Management Volunteers) Act 2003 No. 76 of 2003
**2003** Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003 No. 137 of 2003
**2003** Workplace Relations Amendment (Fair Termination) Act 2003 No. 104 of 2003
**2004** Workplace Relations Amendment (Codifying Contempt Offences) Act 2004 No. 112 of 2004
**2004** Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004 No. 11 of 2004
**2005** Workplace Relations Amendment (Work Choices) Act of 2005
**2009** Fair Work Act of 2009
**2013** Fair Work Amendment Act 2013 (No. 73, 2013)

## Appendix 2

### Number of Disputes 1910-2001 (mean annual rate for five year periods)

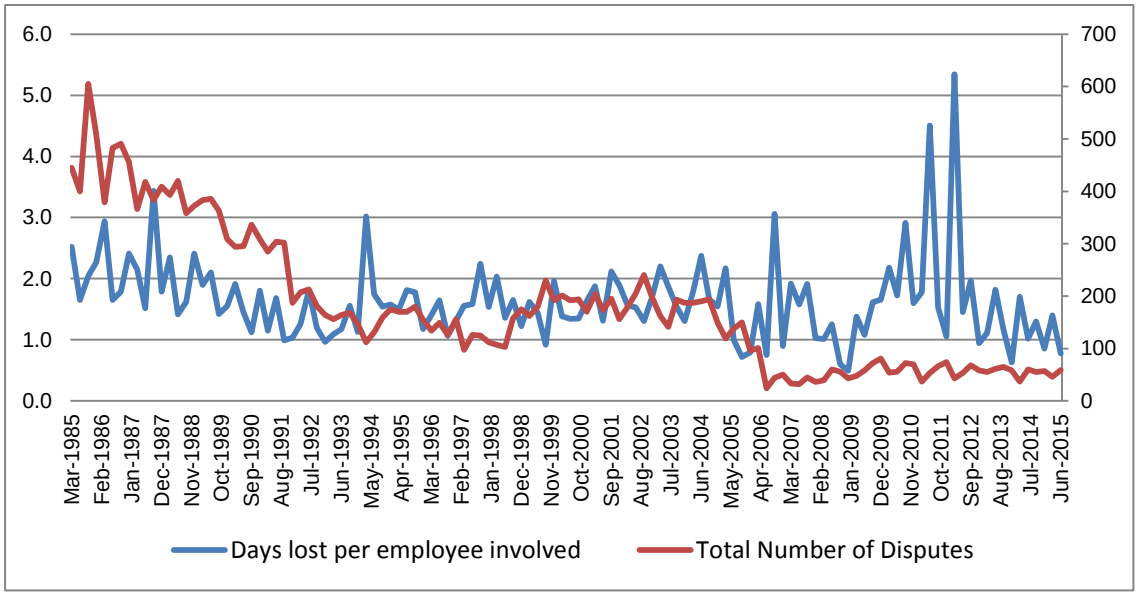



**Source:** Waters M (1982) *Strikes in Australia.* Sydney, NSW: George Allen and Unwin; ABS 6321.0 Industrial Disputes Australia (Time Series Spreadsheet via Ausstats).

**Note:** Figure for 2000-1 is annual mean for those two years.
From Harley B (2004) 'Managing Industrial Conflict' in Isaac J and Macintyre S (eds) *The New Province for Law and Order.* Melbourne, VIC: Cambridge University Press.

## Appendix 3

## Australian Industrial Disputes 1985-2014




Source: ABS Cat No 6321.0.55.001 Industrial Disputes, Australia

Figure 2 Australian Industrial Disputes 1985-2014 – LH axis: Days lost per employee; RH axis: Number of disputes

## Appendix 4

## Full Text of Objects of Pivotal Labor and Employment Relations Legislation, 1904, 1930, 1947, 1956, 1993, 1996, 2005, 2009,2013

*Commonwealth Conciliation and Arbitration Act – 1904* (No. 13 of 190

The chief objects of the Act are -

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.

*Amendments to the Commonwealth Conciliation and Arbitration Act – 1930* (No. 43 of 1930)

[Promotion of goodwill in industry by conciliation and arbitration.]

*Commonwealth Conciliation and Arbitration Act – 1947* (No. 10 of 1947)

The chief objects of this Act are -

(a) to establish an expeditious system for preventing and settling industrial disputes by the methods of conciliation and arbitration**;**

(b) to promote good will in industry and to encourage the continued and amicable operation of orders and awards made in settlement of industrial disputes;

(c) to provide for the appointment of Conciliation Commissioners having power to prevent and settle industrial disputes by conciliation and arbitration;

(d) to provide means whereby a Conciliation Commissioner may promptly and effectively, whether of his own motion or otherwise, prevent and settle threatened, impending. probable or existing industrial disputes;

(e) to provide for the observance and enforcement of such orders and awards;

(f) to constitute a Commonwealth Court of Conciliation and Arbitration having exclusive appellate jurisdiction in matters of law arising under this Act and limited jurisdiction in relation to industrial disputes; and

(g) to encourage the organization of representative bodies of employers and of employees and their registration under this Act.

*Conciliation and Arbitration Act 1956* (No. 44 of 1956)

The chief objects of this Act are –

(a) to promote goodwill in industry;

(b) to encourage conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;

(d) to provide for the observance and enforcement of agreements and awards made in the settlement of industrial disputes; and

(e) to encourage the organization of representative bodies of employers and employees and their registration under the Act.

*Industrial Relations Reform Act 1993* (No. 98 of 1993)

The principal object of this Act is to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging and facilitating the making of agreements, between the parties involved in industrial relations, to determine matters pertaining to the relationship between employers and employees, particularly at the workplace or enterprise level; and

(b) providing the means for:

(i) establishing and maintaining an effective framework for protecting wages and conditions of employment through awards; and

(ii) ensuring that labour standards meet Australia's international obligations; and

(c) providing a framework of rights and responsibilities for the parties involved in industrial relations which encourages fair and effective bargaining and ensures that those parties abide by agreements between them; and

(d) enabling the Commission to prevent and settle industrial disputes:

(i) so far as possible, by conciliation; and

(ii) where necessary, by arbitration; and

(e) encouraging the organisation of representative bodies of employers and employees and their registration under this Act; and

(f) encouraging and facilitating the development of organisations, particularly by reducing the number of organisations in an industry or enterprise; and helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

***Workplace Relations and Other Legislation Amendment (More Jobs, Better Pay) Act 1996*** (No. 60 of 1996)

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and

(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and

(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(k) assisting in giving effect to Australia's international obligations in relation to labour standards.

### *Workplace Relations Amendment (Work Choices) Act 2005*

The principal object of this Act is to provide a framework for cooperative workplace relations which promote the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(b) establishing and maintaining a simplified national system of workplace relations; and

(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and

(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and

(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:

(i) employee entitlements; and

(ii) the rights and obligations of employers and employees, and their organisations; and

(g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and

(ga) establishing a process for making modern awards; and

(h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and

(i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and

(j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(n) assisting in giving effect to Australia's international obligations in relation to labour standards.

### *Fair Work Act 2009*

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

### *Fair Work Amendment Act 2013 (No. 73, 2013)*

This Act deals with a number of matters including maternal leave, parental leave, right to request flexible hours, bullying and right of entry. In section 576(2)(aa) on the functions of the FWC, this language was added: 'to promote cooperative and productive workplace relations and prevent disputes'. Also relevant is the section dealing with **Schedule 3A – Conferences** to which is added:

(4) At a conference, the FWC may:

(a) mediate or conciliate; or

(b) make a recommendation or express an opinion.

(5) Subsection(4) does not limit what the FWC may do at a conference.

## Appendix 5

## Amendments to the Commonwealth Conciliation and Arbitration Act – 1930 (No. 43 of 1930)

A Labor Government came into power in 1929 at the onset of the Great Depression and changed the focus of the Act at level 1 from mitigating harm (prevention of strikes and lockouts) to creating value 'the promotion of goodwill in industry by conciliation and arbitration'. (The 'promotion of goodwill' with slight variations (including 'and harmony' or 'cooperation') was retained in all Objects until 1993.) To reinforce this object, the Act was amended to provide for the appointment of Conciliation Committees as administrative support (level 2) for the value creation. Although it could not be said that this amendment to the Act in itself is a pivotal moment, as will be seen, the approach of the Court in can clearly be said to constitute a pivotal approach to its task by setting a lasting procedural standard.

Surprisingly, in view of the onset of the depression and rapid increase in unemployment, S25D, inserted in 192 requiring the tribunal to consider the economic implications of its decisions, was repealed. Labor had opposed the insertion of this section in 1927 and now in Government, it had the power to repeal it. This section can be seen as a form of mitigating harm for employers and possibly also for workers insofar as it serves to avoid unemployment, but it was removed presumably to reflect union interest in removing a constraint on bargaining power. Nevertheless, as shown presently, the Court saw fit to apply this provision in substance in determining the course of wages. Further, the penal sanctions of the previous Act were omitted. These sanctions provided some mitigation of harm to employers in the case of strikes and unions in the case of lockouts. By omitting them, the government was maintaining in effect, that the positive value to unions of collective action (without sanctions) outweighed any harm to the economy associated with strikes and lockouts.

The rapid deterioration of the national economy is reflected in the unemployment rate which increased from 11% in 1929 to 19% in 1930 to 27% in 1931 and peaked at 29% in 1932.[1] The speed of the fall in prices ahead of the cost of living adjustments was even causing the real basic wage to rise. In these unprecedented circumstances, the Court faced an application from employers in 1930 for a reduction in the basic wage. Economists began to question the application of the basic wage without taking into account the capacity of the economy to sustain its existing level. This question featured prominently in the proceedings of the case, which resulted in the basic wage and margins being reduced by 10%. This was the first time that the Court engaged in a full-scale economic inquiry, with economists presenting detailed accounts of the state of the economy and suggesting the appropriate response from the tribunal. The arguments of the economists generally were that the state of the economy and the underlying factors were causing the malaise. Not all the States fell into line with this decision immediately, but eventually the differences prove to be minor. The Court also made exceptions to the

[1] Commonwealth Year Books, 1929, 1932.

cut in a number of cases.[2] Note that the framing of the economic analysis centered on mitigating harm (to the economy), which involved both the mitigation of harm to workers (in the form of unemployment) and employers in the form of threats to economic viability).

As the basic wage is a component of all wages, the reduction awarded lowered the general level of wages. (The double component feature of wages came to an end in 1966 when the basic wage concept was abandoned in favour of the minimum wage and the total wage concepts. Since then, a change in the minimum wage became a true 'floor' to wages and did not necessarily impact on wages generally.) In so doing, the Tribunal at level 2 was effectively engaged in formulating and applying a national wage policy as part of national economic policy. This was not prescribed in the Act or in the minds of those who set up the system, nor of Higgins when he fixed the basic wage. Higgins' earlier action was almost entirely socially directed (mitigating harm to workers). Here, however, the tribunal, on the weight of argument and evidence, was persuaded to consider 'needs' in the context of 'economic capacity'. This reflected the wide discretion at level 2 available to it but not to the federal government. The legitimacy to exercise that discretion was based in this case on the promise of mitigating harm (not the potential for creating value). Since then, economic considerations have remained one of the tribunal's main principles in determining national entitlement claims.

Employers had for years opposed the intervention of the tribunal in wage determination. But the weight placed by the tribunal on economic factors gave employers increased confidence in the system.[3] Despite the strong submissions of the unions against a wage cut, the cut did not provoke much dissent. In fact, there was widespread evasion of the minimum rates with workers choosing to work below award provisions in preference to unemployment.

As the economy recovered, the Higgins real wage was substantially restored in the 1934 case, and by 1937, with further recovery and drawing on economists' submissions, varying amounts averaging five shillings for the six States, were added to the basic wage as a 'prosperity loading'. This was a mix of creating value (increasing workers' purchasing power) and mitigating harm (containing inflation tendency). Note that the initial legitimacy of the economic arguments centered on mitigating harm, but in these subsequent arguments creating value was added to the mix. The outbreak of war in 1939 called for wage restraint. Influenced by the institution of child endowment, the tribunal responded by not raising the real value of the basic wage (mitigating harm to the economy).

Overall, while this period showed the importance of the tribunal actions under level 2, the change in the object under level 1 marked an expansion from just mitigating harm to also creating value with the object of 'the promotion of goodwill in industry by

[2] K Hancock (2013a) *Australian Wage Policy: Infancy and Adolescence*. Adelaide, SA: University of Adelaide Press. pp. 478 et seq. See also K Hancock (2013b) The Australian basic wage case of 1930–1931: Judge-made economic policy, *Economic and Labour Relations Review* 24(2): 181-204.
[3] DH Plowman (*Holding the Line: Compulsory Arbitration and National Employer Co-Ordination in Australia.* Melbourne, VIC: Cambridge University Press; KJ Hancock (1979) The first half-century of Australian wage policy—Part I. *Journal of Industrial Relations* 21(1): 1-19.

conciliation and arbitration' and the creation of a supporting Conciliation Committees. As we will see in the 1947 pivot, the object of promoting 'goodwill' required additional administrative support.

## Appendix 6

### Conciliation and Arbitration Act 1956 (No. 44 0f 1956)

As a result of the High Court's ruling in 1956 (The Boilermakers' Case) on the Constitutional requirement for a separation of powers, the Commonwealth Conciliation and Arbitration Court was replaced by two bodies - the Commonwealth Conciliation and Arbitration Commission to undertake conciliation and arbitration functions and make awards, and the Commonwealth Industrial Court to perform judicial function of interpretation and enforcement. We rate the intent to mitigate harm during this pivot as 'moderate' for labour and management and the intent to create value as also 'moderate' for both parties.

The chief objects of this Act are set out in Appendix 4. They were similar to the 1930 objects with an increased emphasis on level 2-speed and informality. Although the 1947 objects were not mentioned, the procedural features specified in those objects have generally been applied in practice and were given further emphasis in the Fair Work Amendment Act 2013 discussed below. However, a significant change took place in the administrative work of the Commission, which did involve aspects of creating value. This was mainly because of the approach taken by the first President of the Commission, Justice Sir Richard Kirby. This again illustrates how level 2 administration can be pivotal even without major changes in the objects.

The severe postwar inflation posed new problems for the tribunal in mitigating harm. In particular, how to apply the principle of 'economic capacity', which it had applied in circumstances of high unemployment and falling prices in the 1930s. Now there were the new circumstances of a boom, full employment, and sharply rising prices and incomes. This was a far cry from the circumstances of the 1930s, where the need to mitigate harm was clear. In the basic wage case of 1950-51, unions lodged a claim for an increase of ten pounds in the basic wage. The judges were divided and the majority awarded an increase of one pound or 14%.[4]

By the end of 1951, the wool boom had collapsed and unemployment was increasing even as wages continued to rise, propelled by automatic quarterly cost of living increases. Basic wage automatic adjustments accounted for 50% of the wage increase during 1950-52.[5] In this context, employers lodged a claim for a number of adjustments to the basic wage and standard hours, including the abandonment of automatic cost of living adjustments. The court (1952-53 case) rejected all the claims except the last. Its main argument for abandoning the automatic cost of living system was that this system was related to the 'needs' principle, which no longer applied as the main basis for determining the basic wage. In this case, the combination of creating value and mitigating harm to workers, in the form of household 'needs', was regarded as less salient during recessionary times than the immediate mitigation of harm to employers, in the form of 'capacity to pay'. Even though there was no reason to suppose

[4] JE Isaac (1951) The claim for a 10 pounds basic wage in Australia. *International Labour Review* 63(2): 165-66.

[5] JE Isaac and GW Ford (1966) *Australian Labor Economics Readings*. Melbourne, VIC: Sun Books, p. 11.

that economic capacity would vary with the cost of living,[6] henceforth movements in the cost of living (measured by the Consumer Price Index) were just one of the relevant factors in the determination of wage changes and the *automatic* principle never returned – focusing the role of the cost of living on mitigating harm (not creating value).

In the last two basic wage cases, the question of women's wages were raised. In the 1950-51 case, the unions submitted a claim for equal basic wage for adult men and women.[7] The Chief Judge refused to change the traditional standard and the other two judges conceded that the 75% standard prevailing in practice should be awarded. This standard was affirmed in the 1952-53 case. Here, there was a mix of creating value and mitigating harm. Avoiding a proposed reduction from 75% to 60% was, arguably, a form of mitigating harm to women. On the other hand, the claim for equal pay was an effort to mitigate greater harm and, in the process, create value for women. This was rejected, indicating that it is easier to prevail in an argument based on mitigating harm versus what could be seen as creating value.

This 1947 pivot facilitated increased administrative efficiency and informality at level 2, but it retreated from some value-creating aspects of wage policy. Instead, mitigation of harm to employers in the form of abandoning automatic increases and other increases in the cost of operations prevailed, rather than value creation for workers in the form of protecting their standard of living and equal pay for women. In 1956, there is another pivot (presented as an extra pivotal event in Appendix 6) which had important procedural implications, separating the arbitration and conciliation ~~standard-setting~~ award-making role of the commission from the adjudicatory interpretation role.

In the early postwar years, full employment and tariff protection strengthened union bargaining power and militancy. Sustained high employment strengthened the hand of unions in their claims for higher wages and the existence of tariff policy to protect industry allowed wage pressures to be absorbed by price increases. Even with persistent inflation, real wages rose throughout the 1950s and 1960s. The number of strikes rose considerably, but they were typically short in duration, and days per strike lost per person actually fell in the 1960s. What wage increases unions were not able to obtain from the tribunal (level 2), they obtained by pressure on individual employers in a limited form of enterprise bargaining (level 3). Kirby saw this as an opportunity to change the procedure of the tribunal. Greater emphasis was given to conciliation as a means of settling disputes. Kirby also engaged in public discourse by participating in professional conferences – an approach previously shunned by the judges of the court but complementary to a greater emphasis on conciliation (reinforcing the pivot).

The original aim of the 1904 legislation centered on 'preventing lockouts and strikes' — a form of mitigating harm — was replaced with an (implicit) appreciation of the role of industrial conflict in establishing the level of wages that could be determined by

[6] JE Isaac (1954) Basic Wage and Standard Hours Inquiry in Australia 1952-53. *International Labour Review* 69(6), p. 584.

[7] While the traditional standard going back to Higgins' 1912 award (Commonwealth Arbitration Reports, 22, The Fruit Pickers Case,1912, 247) is 54%, the prevailing market rates of the basic wage for women since World War II was about 75% of the male rate.

the market. This involved some mitigation of harm in avoiding protracted disputes. To the degree that this approach accelerated inflation and/or unemployment, however, there was harm that had to be mitigated as well.

New penal powers were enacted to deal with strikes, but despite heavy fines, the number of strikes continued to rise through to the 1960s. Creating value and mitigating harm clearly have special challenges under full employment, in a highly-protected economy, with strong unions.

The question of equal pay for men and women gathered momentum in the post war years. Women had entered a number of occupations previously the sole domain of male workers and had performed with equal skill. The 1972 claim by the unions resulted in the application of the ILO principle of equal pay for work of equal value. The dire consequences for female employment predicted by the employers (justifying the lower wage to mitigate harm) turned out to be a false alarm.

Continued full employment in a highly-protected economy strengthened union power and resulted in the unions engaging individual employers and at times groups of employers in securing wage increases above the awards. The momentum in these increases grew strongly in the 1960s and into the 1970s. Serious wage inflation resulted, the centralised system disintegrated with the extent of decentralised wage settlements. By 1975, unions, employers and governments appeared to be willing to accept a quasi-incomes policy, based on the logic of mitigating harm to the economy. This involved the determination of all wage claims on a coherent set of principles with wage indexation based on the Consumer Price Index (CPI) as a critical element.

The federal government's support for the system through sympathetic economic and social policies was essential for its success. A new (Coalition) federal government, however, did not meet this requirement. The system struggled and broke down in 1981. Another burst of wage inflation followed. The return of a Labor government in 1983 made an Accord with the trade unions. This paved the way for a more widely supported incomes policy, again on the logic of mitigating harm, administered by the Commission.

The economic reforms conducted by the Government opened up the economy to global competition resulting in balance of payments difficulties. A consensus developed that more enterprise-focused wage settlements would result in higher productivity growth and deal with the difficulties facing the economy. The Commission formulated principles involving the trade-off of inefficient work practices for national wage increases in the 1987 and 1988 national wage cases. These were termed the 'restructuring and efficiency; and the 'structural efficiency' principles respectively but both in essence called for a greater work efficiency trade-off. This approach combined the intention to mitigate harm (inflation) with creating value (operational efficiency).

The policy evolution occurred in the context of changing terms of the Accord between the Government and the trade unions. It is important to note that the Commission, as an independent statutory body, bound by its statute but not required to adopt submissions from Government any more than those from unions or employers. In this sense, the decision to mitigate harm or create value (and for whom) ultimately rested with the Commission and its assessment of the public good. As noted earlier, the constitutional basis giving the tribunal this power was removed in 2005.

This 1956 pivot covers a considerable time period during which the adjudicatory and administrative functions became more institutionally distinct and during which there was voluntary collective bargaining, administrative conciliation, administrative formulation of wage fixing principles to deal with wage inflation, and finally national Accords to do so more effectively. The mitigation of harm and the creation of value during this period became intertwined. Mitigating the harm from wage inflation was largely successful, while the creation of value in the form of expected productivity increases proved harder to achieve. The administrative pivot for the Commissioners to participate in public discourse at industrial relations conferences represented creation of value independent of the stated objects, with gains for labour and management leaders participating in the professional societies.

## Appendix 7

## Additional Concluding Reflections

For employees, over the last 100 years, there has been considerable progress in the terms and conditions of work. Standard weekly hours of work have been progressively lowered from 48 to 38. Annual leave and long service leave benefits have for some time become well-established entitlements. Equal pay for women is well entrenched in principle, although there remain residual areas of inequity. From 1907 to 2010, the real minimum wage has more than doubled; real GDP per person has increased four and a half times, while real average weekly earnings have increased nearly four times.[8] Losses from industrial disputes have fallen to very low levels. In all these ways, the tribunals have played a key role in creating value for workers and their representatives. However, the prospects for continued value creation along these lines appears to be more challenging.

In recent years, although the number and days lost from stoppages are at their historically lowest levels, new objects have been enacted to reduce the authority of the tribunal and weaken union powers, which have resulted in increased emphasis on individual worker and enterprise-based mechanisms for determining the terms of employment. From being a body with considerable discretion on procedure and principles in dealing with disputes, the tribunal now operates with greatly reduced scope under the direction of the government. It is no longer charged to encourage the development of trade unions and employer associations. This long-term trend highlights the degree to which creating value and mitigating harm are relative to a given stakeholder perspective – some will see it as causing harm and reducing value while others will welcome the developments. It has also been stripped of its *compulsory* conciliation and arbitration powers. The Commission's tasks of mitigating harm and creating value with respect to wages has been entrusted more to market forces or to safety net 'modern awards' for those not engaged in enterprise bargaining. The percentages of all employees under the different employment arrangements in 2014 were: collective agreements (mostly enterprise) 39%; individual arrangements 35%; award 36%.[9] It can intervene in industrial disputes generally only at the initiative of the parties – an arrangement that creates value for the stronger party in the labour market and increases the risk of harm for weaker parties (which could be labour or management). For unions, the right to strike admitted in 1993, has been more tightly regulated and restricted. The result is more variation in wages and working conditions,

[8] R Hamilton (2015) *A History of the Minimum Wage since 1907.* Richard Kirby Archives. Available at: https://www.fwc.gov.au/sir-richard-kirby-archives/exhibitions/history-min-wage (accessed 1 January 2018).

[9] ABS (Australian Bureau of Statistics) (2014) *Employee Earnings and Hours, Australia, May 2014*. Cat. No. 6306.0.

and generally increasing the power of employers relative to unions. Wage inequality has grown especially since 1996.[10]

With globalization, falling union density, reduced tribunal authority and more enterprise-based settlements since the 1990s, real wage earnings have persistently fallen behind the gains in labour productivity. The share of profits in GDP is rising and that of wages is falling. These developments have come despite the object of the Act since 2009 being focused on 'fairness'. The logic with each change has been framed as mitigating harm and/or creating value, but more often than not, it has been one-sided rather than the form of "shared value" articulated by Porter and Kramer.[11]

[10] I Watson(2016) Wage inequality and neoliberalism: the Australian experience. *Journal of Industrial Relations* 58(1): 131-149.

[11] ME Porter and MR Kramer (2011). Creating shared value. *Harvard Business Review* 89(1/2): 62-77.