Industrial Relations Bill 1988

Date Introduced: 28 April 1988
House: House of Representatives
Presented by: Hon. Ralph Willis, M.P., Minister for Industrial Relations

Digest of Bill

Purpose

To repeal the Conciliation and Arbitration Act 1904 and replace it as the principal piece of legislation dealing with labour relations in the federal arena.

Background

The Conciliation and Arbitration Act 1904 is the principal piece of federal law dealing with industrial relations in the Commonwealth jurisdiction. Other relevant pieces of legislation are the Trade Practices Act 1974, the Coal Industry Act 1946 and the Crimes Act 1914. Varying interpretations of the Commonwealth's primary industrial power under the Section 51 placitum (XXXV) of the Constitution to legislate for 'Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' as well as changes in public policy have led to numerous amendments to the Act. Towards the end of its period in office the Fraser Government ordered a departmental review of the Act. Before that review was completed there was a change of government and in July 1983 the Hawke government announced that, following consultations with the National Labour Consultative Council, it had decided to set up a three man committee to conduct the first comprehensive review of the federal system of industrial relations. The Committee, chaired by Professor Keith Hancock (as he was then) presented its report to the Government on 30 April 1985.

The report included 148 recommendations for change but generally favoured the maintenance of the present system of conciliation and arbitration. In particular, it gave little support to the advocates labour market deregulation
arguing instead that a more centralised system afforded the mechanism for a wages policy which it believed was a useful instrument for achieving macro-economic objectives. The Committee went on to add that it thought advantages claimed for a system devoid of conciliation and arbitration were 'speculative' and that arguments to the effect that economic benefits would arise from 'deregulation' of the labour market accounted inadequately, if at all, for the existence of imperfections and concentrations of power within the labour market. The Committee drew attention to the limits to the Commonwealth's power under the Constitution and recommended against the use of what it called 'exotic' powers, such as the corporations' power (section 51, placitum XX) to support legislation which would establish a framework for collective bargaining. As it felt that industrial parties which merely 'opted out' of the federal system would be likely to be caught by existing state regulations, the Committee argued that the main avenue for allowing greater flexibility was to allow parties to federal awards to agree to transfer from the ordinary conciliation and arbitration mechanism to one of their own choice. Accordingly, Recommendation 21 called for the Act to be 'amended to provide that parties who wish to make their own arrangements for the prevention and settlement of disputes by conciliation and arbitration may do so, and that the terms and conditions of employment resulting from those agreed arrangements would be able to operate to the exclusion of federal awards and state prescriptions'.

Criticism of the Report focused strongly on the Committee's views regarding labour market 'de-regulation' with a major theme being that the Committee had not been overly diligent in investigating alternatives to the 'centralised' system.

During the period that the Hancock Committee was conducting its inquiry, the High Court of Australia handed down a number of decisions which extended the apparent scope of the federal industrial power. In R v Coldham; Ex parte Australian Social Welfare Union (1983) 47 ALR 225 (the Social Welfare Union case) the High Court unanimously held that the expression 'industrial dispute' should not be given a technical or special meaning but should be understood in its popular sense. One result of this decision was that the range of matters which may be considered industrial matters was widened. In Re Lee; Ex parte Harper (1986) 60 A.L.J.R. 441, the High Court confirmed its decision in the Social Welfare Case holding that three teachers' associations could be registered under the Act as either or both the employers' or employees' work fell within the definition of 'industry' in the Act.

The Hancock Committee included in its findings a recommendation that the Commission's jurisdiction be widened to cover all matters capable of falling within the scope of these decisions. It recommended that this involve 'an evaluation and possible deletion of the terms 'industrial dispute', 'industrial matter' and 'industry' in the Conciliation and Arbitration Act so as to ensure that the statutory definitions do not have the effect of narrowing the jurisdiction that would otherwise be available within the current interpretations of section 51 (XXXV).
During the presentation of argument before the Full Bench of the Commission which handed down the National Wage Case of June 1986, the Australian Chamber of Manufacturers and the Victorian Employers' Federation sought writs of prohibition in the High Court asserting that the Conciliation and Arbitration Commission lacked jurisdiction to compel, through its awards and certified agreements, the payment of employee contributions to superannuation funds. This lack of jurisdiction was said to arise because superannuation was not a 'industrial matter'. The Court held that superannuation payments were an 'industrial matter'. Taken together with the High Court's decision in the Federated Clerks Union Case6 which had upheld an award clause promulgated under the Industrial Relations Act 1979 (Vic.) which compelling employers to consult with the relevant trade union before implementing technological changes, the decision in the Superannuation case7 meant that the apparent scope of the Commission's powers had been substantially widened by the Court prior to the drafting of Industrial Relations Bill 1987.

In addition to questions relating to the general jurisdiction of the federal tribunal the Hancock Committee made a number of specific recommendations relating to jurisdiction. One recommendation was that the definition of employee be amended to cover some quasi-employees, i.e. those hired on contract for the provision of labour only, or labour and equipment, where in all other aspects they are employees.8 It also recommended that the Commission be given jurisdiction to reinstate employees or to order compensation be paid where an employee is unfairly dismissed.9.

Section 2 of the Conciliation and Arbitration Act lists the chief objectives of the industrial system. The Hancock Committee recommended that they be recast to give greater weight to the public interest and to express a concern for the economic effects of industrial regulation. The Report specifically rejected suggestions that the objects of the system be more specifically related to economic principles or outcomes such as 'capacity to pay' and 'international competitiveness', the Committee finding that 'these [indicators] reflect economic doctrines that enjoy varying degrees of support and whose prescription might cause inflexibility, contention and confusion'.10

Another area considered in detail was the structure of trade unions. Most unions in Australia are craft unions where a union covers employees in the same trade or calling, e.g. plumbers, retail workers or clerks. Australia has comparatively few industry or enterprise based unions. The Committee felt that, in principle, a trend towards industry-based unions should be encouraged. Having reviewed the findings of the Senate Select Committee on Industrial Relations (1982), the Committee stated that 'We must be conscious, in particular, of the bonds of history, custom and practice, the questionable relevance of overseas comparisons and the impracticality of attempts to 'direct', by legislation, a
free trade union movement down a path of re-structuring which it does not wish to follow. The Committee was of the view 'that progress toward industry-based unionism should not be impeded by permitting even more unions based on crafts or occupations to be registered unless special circumstances exist.' It also felt that the large number of small craft unions was an undesirable and inefficient aspect of the system and recommended that, except in special circumstances, the minimum number of members in a federally registered organisation be 1000. It was also recommended that amalgamation be made easier in order to facilitate both a reduction in the number of unions and a gradual move to industry-based unions.

The relationship between Federal and State industrial relations systems was also examined. The dual systems exist as the Commonwealth's power in this area is limited to the matters referred to in the Constitution and is not an exclusive power. The Report noted the advantages of the dual system such as the accessibility of the State systems and local knowledge but concluded that these were outweighed by the disadvantages such as inconsistency of results, varying standards and forum shopping. While again noting the practical difficulties of change in the short-term, the Report recommended that the parties work towards an integrated Federal-State system in the long run.

One of the more controversial areas dealt with in the Report concerned penalties and the use of civil courts in industrial disputes. The Conciliation and Arbitration Act 1904 contains provisions which allow penalties for breaches of awards and other matters while the most controversial of the penalty provisions are sections 45D and 45E of the Trade Practices Act 1974 which prohibit secondary as well as some primary boycotts as to the 'bans clause' procedure contained in the Conciliation and Arbitration Act. The Committee found that since 1970 there had been few attempts to resort to those sanctions and that their presence in the Act did not seem to have been an effective deterrent to the use of direct action in industrial disputes. However, for this and other reasons the Committee concluded Australia's system was de facto one of 'voluntary arbitration' and that also given the absence of immunities to common law remedies as in, for example, the United Kingdom, that '[it did] not see the imposition of fines and sentences of imprisonment for strikes and lock-outs as a useful aspect of the conciliation and arbitration system'. It recommended that the new Industrial Relations Act contain no provisions for such penalties. It did, however, recommend that those organisations which persistently breach the rules of the official system be subject to exclusion from it (deregistration).

The Committee was divided both on the question of immunity from tort actions and with respect to the retention of section 45D and 45E of the Trade Practices Act 1974. In relation to essential services, the Report recommended that each case be taken on its own merits and noted 'the Commonwealth has no power to legislate directly to deal with industrial relations issues and therefore no power to deal with essential services as such. The States have power, but in areas where federal awards prevail the extent of power is limited and indeed uncertain.'
The Report also made a number of recommendations concerning the structure of the tribunal system. One major concern was that the body exercising the judicial power of the Commonwealth with respect to conciliation and arbitration should have appropriate expertise in dealing with industrial matters. The Committee recommended the establishing of a Labour Court to take over the broad responsibilities that currently reside with the Industrial Division of the Federal Court of Australia. It also recommended that members of the Labour Court also hold separate and concurrent commissions in the Australian Industrial Relations Commission which was recommended to replace the Conciliation and Arbitration Commission and a number of specialist tribunals. Of the recommendations relating to specialist tribunals, the one to give rise to the most controversy argued that 'The Australian Government should enter into discussions with the New South Wales Government with a view to the abolition of the Coal Industry Tribunal and the regulation of the coal mining industry, on a federal basis, by awards of the to be created Australian Industrial Relations Commission.'

The Report also recommended that the present Act and regulations be repealed and replaced with a simplified statutory framework.

Following extensive consultations with peak union and employer bodies and the States, the Industrial Relations Bill 1987 was introduced into the Parliament on 14 May 1987 by the Minister for Employment and Industrial Relations (as he was then), the Hon Ralph Willis.

The Minister stated in his second reading speech that 'this Bill reflects many of the Committee's recommendations, but it is by no means a faithful replica of the Report. Indeed some key recommendations of the Report have been rejected, whilst others have been substantially varied.'

The main area of departure from the Report of the Hancock Committee, and the chief source of controversy was what the government referred to as 'the compliance package'.

The chief elements of this package were:

- providing statutory support for the Commission to encourage the parties to insert formal grievance procedures in all their awards.

- the replacement of what the Minister described the 'substantially moribund' bans clause provisions with a new direction and injunction process. The range of penalties available under this process were to be tougher than those under the Conciliation and Arbitration Act and were to include fines, alterations to an organisation's eligibility rules to exclude specified groups from membership, and the imposition of conditions as to future industrial
conducted. A serious continuing breach of a direction by an organisation or its members would lead to deregistration

- this more punitive system of directions and injunctions was to exclude other injunctive remedies under State and Territory Law or in tort in relation to such conduct. However, it did not exclude common law actions for damages relating to harm to persons or property. Nor did it prevent prosecution for criminal offences.

- the Labour Court was to be given power to grant injunctive relief.

- In relation to secondary boycott disputes, jurisdiction to deal with contraventions by trade unions of sections 45D and 45E of the Trade Practices Act were to be vested in the Labour Court but no changes were to be made to the remedies available under that Act. However, persons wishing to take action for contraventions of Section 45D and 45E under the Trade Practices Act were to be required to refer the dispute initially to the Industrial Relations Commission before access to the Labour Court was available.

- the remedies available under the Trade Practices Act for contraventions of sections 45D and 45E were (if they were not already so) to be made paramount and exclusive of remedies under similar State Laws as in tort.

The proposed changes were vigorously attacked by employer organisations and received only a lukewarm response from the unions. Briefly, the employer organisations variously welcomed the new directives procedures but

- saw the Labour Court as 'not a real court'

- wanted existing common law injunctive remedies maintained as an alternative to, but not a substitute for, rights created under the directions procedure.

- felt that access to the Labour Court in boycott disputes should not be dependent on the matter first going before the Industrial Relations Commission.

The ACTU position appears to have been that the directions procedure apart from running contrary to the recommendations of the Hancock Committee, also posed a significant threat to their capacity to engage in collective bargaining.

On 26 May, the Government announced that it would not proceed with the Bill in the 1987 Autumn Session of Parliament. The following day the Prime Minister announced that the Autumn session would end on 4 June. The Parliament was dissolved on 5 June and a double dissolution election took place on 11 July 1987.
Throughout the election campaign employer associations maintained their strong public opposition to the 1987 Bill. On 6 June, the Minister issued a press release which stated that the compliance package proposed in the Industrial Relations Bill 1987 was still opposed by both employee and the ACTU and that ‘Accordingly, the Government has decided not to proceed with these disputed provisions. Instead, the system of compliance in the revised Industrial Relations Bill will be similar to that which currently exists. There will be limitation no employer access to common law actions. Sections 45D and 45E of the Trade Practices Act will remain within the jurisdiction of the Federal Court and there will be no mandatory conciliation procedures before the initiation of court proceedings. Monetary penalties for non–adherence to compliance provisions in the Industrial Relations Bill will be the same as those currently applying in the Conciliation and Arbitration Act. However, the range of non–monetary penalties in the Industrial Relations Bill will be retained’.  

In August, the ACTU Assistant Secretary claimed that the shelved Bill ‘held little comfort for unions and should be scrapped in favour of a similar bill covering amalgamations and other matters’.  

At the ACTU Biennial Congress in September, delegates representing all ACTU affiliates with little dissent endorsed the ACTU Discussion Paper, Future Strategies for the Trade Union Movement and Australia Reconstructed which contained the outline of a policy to weld Australia’s 300 plus unions into twenty large unions. 

In November 1987, the High Court handed down its decision on the Ranger Uranium Mines Case. In that case the Court held that in respect of disputes in the Territories, the Arbitration Commission had the power to make re–instatement orders. As much the proposed Labour Court’s work would have involved hearing matters relating to re–instatement and unfair dismissals, the decision provided a further reason for not proceeding with the controversial proposal to establish a separate Labour Court.

**Main Provisions**

As these are covered in some detail in the Digest dealing with the Industrial Relations Bill 1987, this Digest deals only with areas where that Bill and the current Bill are dissimilar.

The 1987 Bill provided for the creation of the Australian Labour Court (Clauses 15, 21, 47–93). Clauses 50–61 in the new Bill reflect the Government’s decision not to proceed with the proposed Australian Labour Court. Matters arising under the Bill will be dealt with by the Industrial Division of the Federal Court as is the case under the present Act.
Clause 60 provides that the Minister to have the right to intervene in the public interest on behalf of the Commonwealth in a matter before the Federal Court arising under the Bill. Where the Minister so intervenes the Court is to have power to award costs against the Commonwealth.

Clauses 62 - 83 contain the proposal to establish the Australian Industrial Registry as a statutory authority whilst the functions of the Industrial Registry have been revised to reflect the omission of the Labour Court proposal (Clause 63).

Clause 95 is a new provision inserted to ensure that certified agreements (see clauses 115 - 117) are not used as a device to undermine principles established by a Full Bench relating to the determination of wages and conditions of employment or in a manner which would be contrary to the public interest, e.g. the National Wage Fixing Principles.

Clause 112 clarifies the Commission’s powers with respect to the making of consent awards. It establishes a contrasting public interest test to that provided for the making of certified agreements.

Clause 115 revises the test to be applied by the Commission for certified agreements to ensure that the Commission is not constrained in deciding whether to certify an agreement by reason only that the agreement does not comply with the National Wage Principles. In the 1987 Bill the provisions dealing with certified agreements contained a public interest test that was in similar terms to that in consent awards under existing section 28 of the Conciliation Act.

Clause 116 has widened the scope for the Commission, except where expressly prevented from doing so by the agreement of the parties, to vary certified agreements to enable specific enforcement mechanisms to operate (i.e. the operation of bans clauses and stand down orders).

Clause 125 provides the Commission with the power to include or omit or vary a bans clause in an award. This reflects the decision of the Government to abandon its compliance package contained in the 1987 Bill and to maintain the status quo in the area of sanctions.

Clauses 156 - 163 reflect the decision to maintain existing sources of relief and arrangements for taking action against unions under sections 45D and 45E of the Trade Practices Act.

Provisions giving the Commission power to make directions in relation to industrial action and to deal with any breach of directions (Clauses 164 - 167, 215 of the 1987 Bill) have been omitted from the 1988 Bill.
Procedures set out in the 1987 Bill (Division 8) relating to unfair dismissal have been omitted from the current Bill in line with Government's decision that the Commission should be able, in accordance with recent High Court authority, to deal under its general powers with disputes over unfair dismissals, including the making of reinstatement orders.

Clauses 164–167 reflect Government's decision not to proceed with new compliance measures and its re-affirmed decision (28 May 1987) to preclude actions under State law from intruding into the federal industrial process. The provisions prevent action under State law in relation to: a) boycott conduct which comes within the Federal Trade Practices Act 1974 (Sections 45D and 45E and, b) orders in relation to industrial action of the Commission (e.g. by a bans clause). Clause 167, however, allows prosecution for conduct which involves a contravention of the ordinary criminal law and the industrial matters within the jurisdiction of a State industrial tribunal.

Clauses 188–93 relate to registration of organisations. Unions will now be required, except in special cases, to have 3,000 members before they can be registered. At present, under the Conciliation and Arbitration Act 1904, the figure is 100 members. The 1987 Bill set the threshold (as recommended by the Hancock Committee) at 1000. Clause 193 sets the period for review of unions with fewer than the threshold at 3 years. The previous Bill specified 5 years (Clause 223, 1987 Bill). On the latest available figures as at June 1987, there were 144 federally registered unions representing 2650600 workers.29 Almost half of these represent fewer than 3000 members. Yet, according to figures released by the Minister, seventy or so such unions constitute only 2.9% of total membership of federally registered unions.30 Sub-clause 193(6) provides that if a Presidential member of the Commission reviewing the status of the registered organisation is not satisfied that special circumstances exist justifying the continued registration of an organisation with less than 3000 members in the public interest, (s)he shall cancel its registration. Organisations which are deregistered can continue to exist as either voluntary associations outside the federal system or as registered organisations in any state system where they meet registration requirements.

Clauses 233–53 deal with the amalgamation of organisations. Here significant changes have been made. Where unions satisfy the 'community of interest test', a simple majority of votes cast in favour will approve an amalgamation. Where no 'community of interest' criterion applies at least a quarter of eligible members of organisations will be required to vote with a simple majority of votes being necessary to approve amalgamation. Clause 240 allows for speedier amalgamations where overall union coverage is unaltered.
Clauses 254 – 60: Federal Court is substituted for Labour Court. Similar changes are made in Clauses 293 – 97 dealing with procedure for cancellation of an organisation’s registration.

Clauses 298 – 334 set out the penalty levels for natural persons and bodies corporate under the Bill. All penalty levels have been adjusted from 1987 Bill. No penalty exceeds $1000 or 6 months imprisonment. No penalty is less than that applying for the same offence under the **Conciliation and Arbitration Act 1904**.

Clause 338 now provides a penalty for a body corporate, as well as for individuals, for publication of trade secrets.

Clause 311 restores the offence of incitement to boycott an award. This clause is the same as section 138 of the current Act. It did not appear in 1987 as it was made unnecessary by the directions process provided by that Bill.

Clauses 341 and 343 make the Attorney-General the relevant Minister to institute proceedings and authorise financial assistance under the proposed Act.

References

2. *Ibid*
3. *Ibid*, p.244
5. *Ibid*, p.376
7. Re Manufacturing Grocers’ Employers’ Federation of Australia and the Association of Professional Engineers Australia; Ex parte Australian Chamber of Manufacturers and the Victorian Employers’ Federation (1986), 60 ALJR 347
10. *Ibid*, p.529
11. *Ibid*, p.469
12. *Ibid*, p.470
15. *Ibid*, p.637
16. *Ibid*
For further information, if required, contact the Economics and Commerce Group.

24 August 1988

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