2

Getting to the Bargaining Table: Coercive, Facilitated and Pre-Commitment Bargaining

Breen Creighton

Introduction

In consequence of a series of major industrial disputes in the early 1890s, Australian employers had successfully asserted the principle of 'freedom of contract': that is, their right directly to 'negotiate' terms and conditions of employment with employees as individuals, without third party (ie union) 'interference'. Put differently, they had established that they did not need to come to the (collective) bargaining table unless or until they chose to do so. For some years after 1895, they rarely did so choose.[1]

These events led a number of the colonial legislatures to adopt measures providing for processes of 'compulsory' conciliation and arbitration in the event that employers and workers (and their organisations) were unwilling or unable to resolve their differences through what would now be recognised as collective bargaining. Most important of all, they led to the inclusion in the Constitution of the newly-emergent Commonwealth of a power to make laws for 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.[2] This provided the jurisdictional underpinning for the *Conciliation and Arbitration Act 1904* (Cth) (C&A Act), and thereby, for the establishment of a system of industrial regulation that remained in place for the greater part of the 20th century.[3]

1 See further Stewart et al 2016 at 52-59, and the sources cited therein.
2 Constitution s 51(xxxv).
3 All colonies/States put in place some form of arbitral model in the late 19th to early 20th centuries – although until the 1980s Victoria and Tasmania adopted a rather different approach from the other jurisdictions. This