

Who was H.R. Nicholls?

by J.W. SHAW and G.P. HARRIS

In the midst of recent controversy concerning the dismissal by Peko Wallsend of 1,100 workers at the Robe River undertaking in the Pilbara in Western Australia, mention has been made (often with conspiratorial connotations) of the H.R. Nicholls Society. This small group, formed in February this year, is dedicated to the radical restructuring (and, perhaps, abolition) of the statutory system of conciliation and arbitration which has been an entrenched feature of Australian society for most of the century. It appears that Charles Copeman, the chief executive of Peko Wallsend, is a member of the Society and is thus perceived by the media as being part of the union-busting New Right, together with other business and intellectual critics of a regulated labour market and the authority of industrial tribunals.

The impact of Mr. Copeman's personal political philosophy upon his company's confrontation with the Western Australian Government and industrial tribunal is a matter for conjecture. But the dispute has focussed attention upon the H.R. Nicholls Society and its leading figures, who include John Stone (former Treasury Head and now *Sydney Morning Herald* columnist), Hugh Morgan of the Western Mining Corporation, Gerard Henderson, Senior Advisor to Opposition Leader Howard, and leading officials of the National Farmers' Federation.

While members of the Society claim tactical impact upon the employer successes in the Mudginberri Abattoir dispute in the Northern Territory and the Dollar Sweets dispute in Victoria, Prime Minister Hawke has described the groups hardline anti-arbitrationist theory as economic lunacy.

Some clue as to the soundness or otherwise of the approach of this new industrial force may be gleaned from an understanding of the claim to fame of H.R. Nicholls, whose name the free marketeers have enthusiastically embraced. Who was H.R. Nicholls?

On 7th April 1911, the *Hobart Mercury* published an editorial entitled "A Modest Judge." It was written by Henry Nicholls, the newspaper's octagenarian editor. The newspaper vigorously attacked the then President of the Commonwealth Court of Conciliation and Arbitration, Henry Bournes Higgins. A pioneer of Australian arbitration, Higgins was both a justice of the High Court of Australia and a judge of the Arbitration Court. He is regarded, nowadays, by those of the deregulating Right as very much a foundation member of the Industrial Relations Club. Of Irish origins, Higgins was a lawyer, politician and judge in the same milieu as figures such as Alfred Deakin and Isaac Isaacs. He was a substantial character in Australian political history and is the subject of a scholarly biography by John Rickard, published in 1984, as "H.B. Higgins: The Rebel As Judge."

Nicholls, on the other hand, was not a man of established intellectual calibre in law, economics or industrial relations. He was a strongminded and polemical journalist who had for many years written for newspapers sold on the Australian goldfields. He edited the *Mercury* from 1883 until 1912, and was 82 at the time of his controversial article attacking Higgins.

In the Arbitration Court, Higgins had clashed with a barrister, H. E. Starke (subsequently appointed as a judge of the High Court), during which the judge admonished

Starke not to speak disrespectfully of the Government which Higgins described, at one point, as "those above us." Starke had inferred that the Government encouraged Broken Hill labour organisations which he described as "the most tyrannical" he had known. A Labor Government, elected in April 1910 led by Andrew Fisher, was in power.

Slenderly based upon this transitory exchange, Nicholls' vitriolic journalism began by proclaiming that Mr. Justice Higgins was "a political judge . . . appointed because he had well-served a political party." The article then indicated that Higgins would not allow reflections upon those to whom he was indebted "for his judgeship."

Apparently upon the initiative of Higgins, the Attorney-General of the day (W.M. Hughes) commenced contempt proceedings against Nicholls in the High Court of Australia. In June 1911, the case came before the High Court sitting in Melbourne. But Nicholls was completely unprepared to defend either the accuracy or the tone of the article he had penned. His counsel rose before the High Court to admit that, insofar as the article might convey the meaning that the judge owed his appointment to a Labor Government, it was inaccurate. Nicholls withdrew the sentences which contained such an imputation and expressed his regret for their publication. This concession was described by Sir Samuel Griffith, the Chief Justice, as "very proper." The withdrawal and apology was manifestly appropriate both because the editorial attack represented a simplistic, prejudiced attack upon a judicial figure of substance and because the suggestion that Higgins was a Labor appointee was quite erroneous. Higgins was appointed to the High Court in 1906 and to the Arbitration Court in 1907, during the period of Deakinite Liberalism. Given this significant error in the editorial and the subsequent apology tendered by Nicholls to the High Court, the description of the article by Higgins' biographer as "slipshod" seems justifiable.

It is true that the High Court did not determine the contempt proceedings on the basis of the withdrawal and apology. Rather, in a commendable affirmation of the right of free and robust criticism of the courts, the judges took the view that even if an individual judge were libelled in a manner which might bring the individual judge into contempt, it would not follow that everything thus said amounted to a contempt of the court. Sir Samuel Griffith thought that the imputation of want of impartiality to a judge was not necessarily a contempt of the court. Moreover, the words written by Nicholls were not, so the High Court held, calculated to obstruct or interfere with the course of justice or the due administration of law in the Court. This piece of judicial liberalism did not, however, represent any ringing endorsement of either the style or content of Nicholls' journalism. And for the contemporary critics of the arbitration system, the 1911 High Court judgment represents a pretty hollow forensic victory.

The *Nicholls' Case* does not portray any heroic episode in Australian industrial relations or law. An erroneous and intemperate editorial, which its author was not prepared to defend, was held not in any technical contempt of the High Court. This is surely a rocky foundation from which to attempt to bring down centralised wage fixing in 1986. One is entitled to ask whether the H.R. Nicholls Society will produce more than the ill-informed bluster of the writer whose name it has adopted.