Notre Dame Law Review

Volume 35
Issue 5 *Symposium*

Article 7

9-1-1960

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THE AUSTRALIAN COMPULSORY ARBITRATION SYSTEM

*by Daniel O'Connell**

The legislation of the United Kingdom on trade union activities is not directly germane to a discussion on the Australian system of settling industrial disputes, but some introductory observations on it will serve to put the system in focus. I am sure that I do not need to remind the audience of the Combination Acts of 1799, 1800 and 1825. These inhibited the development of trade unionism in England, but even while they operated many of the practices that are now familiar to us in industrial relations developed. Among them was collective bargaining and the growth of employers' associations. So long as employers could keep unionism out of their factories they could avoid negotiation, but after the middle of the nineteenth century this proved impossible. The year 1875 is the turning point, for then the Employers' and Workmen's Act and other legislation freed trade unions from criminal liability for strike action and gave protection to union property. The Trade Disputes Act, 1906, released unions also from civil responsibility arising out of strikes.

These series of statutes had the effect both of stimulating collective bargaining and of compelling compromise by the threat of strike. By 1948 60 per cent of workers in England were covered by collective agreements, including those of the most important industries, coal, iron, steel, engineering and shipbuilding, construction, cotton and railways. Collateral with this development has been a growth of national unionism making possible national agreements, and hence a common rule throughout an industry.

By Australian standards the English machinery for settlement of industrial disputes is rudimentary.[1] In 1896 the Conciliation Act gave the Board of Trade authority to enquire into the causes of existing and impending strikes; to take the measures for the parties to meet under an impartial chairman; and to appoint a conciliator or an arbitrator on the application of both parties. The voluntary character of arbitral settlement is fundamental. In 1919 the Industrial Court Act was passed; under this legislation, any dispute could be referred by either party to the minister of labour, who could appoint a conciliator without power to decide, or arrange for negotiation, or, with the consent of both parties, refer the dispute to an industrial court, a single arbitrator or a special arbitration board.

In one respect this arbitral procedure is not novel. The first Arbitration Act was passed in 1824, and it was expanded in the Arbitration (Master's and Workman's) Act, 1877. These made it possible to enforce an award in court, but neither provided for settlement of disputes over future wages and conditions nor required the parties to proceed to arbitration. The real change in the later acts was one of emphasis, the process of mediation being withdrawn from the

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1 See generally PORTUS, THE DEVELOPMENT OF AUSTRALIAN TRADE UNION LAW (1958); FOENANDER, TOWARDS INDUSTRIAL PEACE IN AUSTRALIA (1937).

private into the public domain, and to this extent engaging public sentiment in settling of disputes.

In essence, however, English law leaves the conditions of work to the parties themselves. It is still not clear to what extent a collective agreement, a common law contract, for example, is enforceable. In fact, during World War II, legislation was enacted rendering certain agreements judicially enforceable, apparently on the assumption that in its absence they would not be enforceable. In New Zealand it was held in *Beattie and Coster Co., Ltd. v. Duncan*[2] that a union acts as an agent for its present members and may consent on their behalf. This leaves the position of subsequent members unsatisfactory.

Growth of the Australian System

Apart from the Combination Acts none of the English statutes just mentioned applied to Australia. Employment was regulated by colonial Master and Servant Acts, which until around 1870 permitted imprisonment for breach of contract by the servant. At this point it is necessary to recall that Australia is a federation of six former colonies, each of which has had responsible government since the middle of the 19th century. Divergent legislation produced divergent industrial law. At the present time, except in Victoria, there is power to fine, and in some cases to imprison, strikers. The South Australian Act is as old as 1878, and the Western Australian one of 1892 is virtually a copy of an English Act of 1867. The survival of these penal provisions may appear anachronistic in a culture which has an egalitarian basis and a militant working class tradition, yet this survival seems more than ever likely now that technological development and a large migration of unskilled labour from the continent has turned the traditional Australian worker into a middle class minor capitalist, and taken the sting out of the class war. Security, and this includes security against the effects of other people's industrial controversies, is now a greater value than working class solidarity.

Generally speaking, Australian industrial law developed more or less along English lines until 1904. The event which brought a fundamental change was the great strike of 1890, which was not concerned so much with conditions of labour as with compulsory unionism and the right of employers to employ non-union labour in preference to union. It had the effect on the employing class of demonstrating the economic results of mass working class action; its failure demonstrated to the unions, who bankrupted themselves in the process of fighting the employers, that there was little to be gained by violence. Both sides were thus disposed to search for a permanent method of settling differences without industrial strife. Before a Royal Commission set up in New South Wales to report on the causes of the strike it was advocated that a system of compulsory arbitration be devised. New South Wales took no action but South Australia did, in 1894 enacting that, if half of each group party to a labour dispute desired conciliation, a board of conciliation would be set up. It lacked, however, decisive power of action.

In the same year, 1894, New Zealand passed the first compulsory arbi-

2 New Zealand L. Rep. 1220 (1922).

tration act during a wave of social legislation that followed the advent to office of the first Liberal-Labour Party in the Empire. Either party could refer a dispute to a standing Court of Arbitration but had power to make awards binding on registered unions. Non-registered unions were not compellable, but they tended for a variety of reasons to disappear. This act was adopted by Western Australia in 1900 and by New South Wales in 1901. The Australian system, however, made three modifications on the New Zealand:

1. Under the New Zealand system conciliation must precede arbitration. It was found in practice that conciliation was not adequate and that two-thirds of the disputes went on to arbitration. The Australian acts amalgamated the processes.

2. The registrar of the court was given power to compel arbitration even when both parties did not desire it.

3. The New Zealand system made the award operative only between the parties to the dispute. This meant that, if a dispute involved tailoring, every tailor would have to be sewed with a log of claims to ensure uniformity of wages and conditions in the industry. The Australian legislation made it possible for the court to declare practice or award to be a "common rule" throughout the industry affected by a dispute. This was in response to union pressure and was a condition of union support for the system.

At the same time compulsory arbitration was coming to be accepted, machinery was also being devised to ensure social justice for workers without the necessity of their enacting disputes. Hence, as a parallel development, wage boards appeared at the same time as industrial courts, with power to fix a minimum wage. A worker paid less than the minimum wage could sue to recover the difference. The wages boards were elected by both workers and employers with independent chairmen. There was an inevitable tendency for the wage fixing and arbitral functions to vest in the one body; this was first done in New South Wales in 1908 when the industrial court was empowered to hear appeals from wages boards. The competence to fix wages is not independent upon an antecedent dispute, and hence there is no stimulus to artificial disputes.

The Commonwealth System

In 1900 the six colonies federated to form the Commonwealth of Australia. The great strike of 1890, which tied up several industries, had not been confined to one colony but had extended throughout the continent. It was obvious that the unions would federate and proceed to uniform action throughout the states, but it was still an enlightened action to include in the Commonwealth Constitution power to legislate federally to produce a uniform solution to a nationwide dispute. The element clause in the Constitution prescribes that Parliament might legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

The framing of the clause has had an inhibiting effect on the process of industrial social justice. In the first place, settlement is limited to cases of "industrial disputes." What is industry? What is a dispute? A dispute between

school teachers and the government, for example, is not an "industrial dispute," and the Commonwealth has no jurisdiction over it. In the second place the dispute must extend over more than one state before there is Commonwealth jurisdiction. This has had the effect of stimulating interstate sympathy strikes in order to gain Commonwealth, as distinct from state, jurisdiction. In the third place, since there is no Commonwealth jurisdiction except in respect of a dispute, there can only be Commonwealth action with respect to the parties to a dispute. Hence there can be no common rule throughout industry as there is in the state system.[3] A union must act federally and serve claims on every employer in the industry. It has been held that rejection of a log of claims by one employer in each state creates a dispute and brings the matter within Commonwealth jurisdiction. But even then workers who joined the industry after the settlement of the dispute are not parties to the award because they were not parties to the dispute.

Acting under its constitutional powers the Commonwealth Parliament in 1904 set up the Commonwealth Conciliation and Arbitration Court. Today about half the Australian workers are covered by its awards which, in virtue of the paramountry clause in the Constitution, take precedence over state awards in the event of inconsistency, though not necessarily in the event of mere overlap. What constitutes inconsistency has proved a perplexing, almost metaphysical problem.

Although the court must wait for a dispute to arise before taking social justice action it has inevitably taken the initiative in the wage fixing process by laying down conditions of work in an award settling a nationwide dispute; and, since a dispute exists upon service and rejection of a log of claims, the only problem about securing this initiative is a mechanical one. Some words must at this point be addressed to the problem of characterization of the functions of the Court. These fall into four categories: (1) conciliation; (2) award making; (3) interpretation of awards; and (4) decision that an award has been broken and resort to penal remedies.

In appearance all four acts belong to the judicial sphere of government, but when one considers the similarity of functions with those of state wages boards the legislative nature of arbitration becomes more obvious. Until 1956 the Commonwealth Court could both make an award and police it, and to this extent was exercising legislative, executive and judicial functions in combination. In 1918 the High Court of Australia characterized formations as follows:

> The judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist and are deemed to exist at the moment the proceedings are instituted, whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare but not to enforce what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.[4]

Pursuing this characterization the High Court in 1956 held that the amal-

3 Australian Boot Trade Employees' Federation v. Whybrow & Co., 11 Commonwealth L. Rep. 311 (1910).

4 Waterside Workers Federation v. Alexander, 25 Commonwealth L. Rep. 434 (1918).

gamation of functions in the Arbitration Court offended the doctrine of constitutional separation of powers, and held certain of the functions invalid.[5] This decision was upheld by the Privy Council, which remains the ultimate appellate tribunal. The Commonwealth Parliament was thus required to separate functions and it has created two entities in place of the Court, a Conciliation and Arbitration Commission which exercises the award-making or legislative function, and an Industrial Court which is invested with the judicial power over awards once made. In addition the conciliation process may be exercised by a number of conciliation commissioners before a dispute goes to arbitration.

Relationship of Arbitration and Collective Bargaining

Portus, one of the conciliation commissioners, has recently summarized the salient features of both state and Commonwealth systems as follows:

> 1. They encourage the organization of employees and employers into trade unions and employers' organizations.
> 2. They encourage collective bargaining between these groups representing employers and employees and they provide that the terms of a collective agreement will be legally enforceable.
> 3. They aim to settle industrial disputes not by strikes and industrial warfare but in default of agreement by an award binding on the parties to a dispute.
> 4. They make it possible for the terms of collective agreements and awards to become a common rule binding on all employers and employees in the industry concerned.[6]

It is evident, then, that collective bargaining and arbitration are interconnected processes and not antithetical. Collective agreements are registerable in the state industrial courts and acquire the force of awards. They are also registerable with the Commonwealth Commission, but since the Commission only has jurisdiction over disputes an agreement is registerable only when in settlement of a dispute.[7] A wage fixing agreement has been held not to be in settlement of a dispute, and hence it is not registerable. However, it remains a common law agreement, and since in Australia a trade union has corporate status, it is more effective than the traditional collective agreement in England. The High Court has indicated in *obiter* that there would be no difficulty involved in suing on it.

There are, therefore, the following remedies available to enforce collective bargains:

1. If unregistered, they are common law contracts, and, though specific performance is unlikely to be granted, an award of damages is sufficient inducement to performance.
2. If registered they render all unregistered agreements unenforceable.
3. If registered there is a right of action, with penalties for breach.
4. To an indeterminate extent, in the case both of registered and unregistered agreements, mandamus and injunction are available.

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5 Boilermakers Case, 1956 ARGUS L. REV. 163.
6 Portus, *op. cit. supra* note 1.
7 Federated Engine Drivers & Firemen's Assn. v. Broken Hill Proprietary, 16 Commonwealth L. Rep. 715 (1913).

5. Also to an indeterminate extent contempt of court may be ordered for failure to act pursuant to a registered agreement.

The integration of the collective bargain in the arbitration system has altered the status and emphasis of industrial agreement. It is no longer a matter of private law but engages public interest in a public document covered by statute. It binds persons not members of the industry at the time of contracting, though previous to registration objection may be lodged by interested parties. This objection will be adjudicated upon and the industrial court will then order registration or otherwise. An agreement is usually for a fixed time, and may be varied by a subsequent arbitral award. The whole process of arbitration is, in fact, ancillary to agreement. For example, in the state systems more or less emphasis is placed upon preliminary negotiation, and the industrial court will have power to call a conference of the parties and only in the event of failure to agree will it proceed to issue an award. Compulsion thus follows a breakdown in contract and is not in substitution for it.

Wage Fixing and the Arbitral Process

The social justice emphasis has been paramount in the development of the Australian system, and in the result the industrial courts have become instrumentalities of economic policy in the distribution of the national income. The process began with the fixing of a minimum wage. One of the pioneer undertakings of the Commonwealth Arbitration Court was to fix this minimum on a nationwide basis in 1907.[8] It fixed a basic wage based on "the normal needs of the average employee, regarded as a human being living in a civilized society." This basic wage was fixed at 42 shillings, and it has been steadily adjusted until today it is some six times that figure. Of course the adjustment must await a dispute, but since a dispute can be generated merely by making a claim the Commonwealth instrumentality easily gains jurisdiction to order increases by varying of awards.

The first step of fixing a minimum having been taken, the next followed as matter of course. This was to fix differentials for added skills or difficulties of work. These are known as margins. The possibility inherent in this system of maintaining social stratification was not fully adverted to until 1954 when the Court laid down that the margin for skills in the engineering trade should be proportionate to what they were before the war. The same formula was then applied to other industries, and tended to become uniform throughout the country as the state wages boards and industrial courts adopted it.

Last year the engineering industry made a claim for increased basic wage and increased margins. The marginal increase was raised 28 per cent and margins all up the scale adjusted accordingly. Almost as a matter of course state wages boards adjusted their awards on the same principle. The figure of 28 per cent rise was arrived at after long analysis of the country's economic prospects and in the light of productivity figures. The increase tends to be inflationary but there is a link, largely implicit, between the arbitral determinations and government banking policy which minimizes this effect, especially

8 Harvester Judgment, 2 Court Arbitration Reports 1.

at a time of great increase in productivity and a general tendency towards competitive price cutting. In theory the increase in productivity should yield income and capital gains to shareholders and increased income to labour with proportionate increase for skills. There are inevitable stresses and strains in the system, but no tremendous alarm is evident.

To illustrate the effect of the margins policy on wages one may instance the case of the university professor who before the war was in receipt of a salary of 1,100 pounds, about four times the then basic wage. The present basic wage, when adjusted on a pre-war basis, theoretically yields the professor a margin for skill that should put his present income at 4,750 pounds to maintain the differential that existed between his salary and the basic wage in 1939. Actually it is at present 3,500 pounds, the professional community always lagging behind, for lack of machinery, the industrial community. Since the banking and insurance groups are seeking to have their margins fixed on the same basis as the industrial community, the whole professional group should be brought into line within a year or so. With this time lag, then, the professor should theoretically maintain the relative standard of living which he enjoyed in 1939, just as the fitter and turner does. Needless to say it does not work out quite like this, owing to changing social practices. The fitter and turner, for example, could not have afforded a refrigerator in 1939 whereas today this is taken for granted. On the other hand, the professor will not have a maid servant today and will live in a smaller house but he will spend more on travel, gadgets and motorcars. Strictly speaking, too, the net margin is not what it was in 1939 owing to the higher tax incidence on higher salaries. The class gap thus tends to narrow despite the maintenance of differentials.

Principal Effects of the Australian System

We can now sum up the main features of the Australian system.

1. It offers almost automatic machinery for equitable distribution of the national wealth. How you view this depends, no doubt, on whether you gain or lose in the process. Employers on the whole claim it is inflationary but the actual capital expansion in industry (35 per cent increase in share values last year alone) indicates that wage increases are not the only, or perhaps the fundamental, feature of inflation in Australia. Workers appear to like the system because the skilled worker is now acquiring a middle class complex and is more interested in margins over the basic wage than anything else. It is significant that the militant unions are making applications more for margins than for other conditions of labour. To this extent labour and capitalism are being wedded and industrial quiet and efficiency seems to be the result.

2. Although there is no compulsory unionism the system is heavily weighted in favour of it. An employer's privilege to switch labour and employ non-union labour is restricted by many arbitral awards, which might prescribe employment preference to unionists or limit the grounds for discharge, or require discharge of employees who do not join unions. Freedom to form a rival union is limited by the process of registration, the courts not very readily buying trouble with existing unions by validating rival ones, especially when an award limits employment to members of a registered union.

3. In addition to the usual law against strikes and lockouts, some arbitration acts provide that a refusal to work according to the award terms is punishable by fine. The wording of these enlarges considerably the definition of "strike." Where the penal clauses prove ineffective there is an inherent power to punish for contempt of court. Hence the employer has an automatic recourse to governmental machinery in the event of industrial strife and the union has the expectation that by playing along with the system it will gain an increased share in the national income.