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The New Conciliation and Arbitration Act in Australia

by

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In a series of articles published in the International Labour Review *in 1924*[1], *an account was given of the Commonwealth Conciliation and Arbitration Act of 1904, under which a Federal Court of Conciliation and Arbitration was constituted " for the prevention and settlement of industrial disputes extending beyond the limits of any one State ". The Court attained a considerable measure of success, but in recent years its limited legal powers and the slowness of its procedure have combined with external conditions to lessen its effectiveness and lead to dissatisfaction with its working. After many proposals for reform had been made and rejected, an amending Act was passed in June 1928 which extends the powers of the Court, and makes many changes in its procedure and in the provisions laid down for industrial organisations. The substance of the new Act and its relation to present conditions are discussed in the following article, which has been contributed by an observer on the spot, who has made a special study of the subject. The survey of the facts is supplemented by the expression of the writer's views on the various elements of the problem, and on the psychological difficulties that lie behind the failure to reach an agreed solution.*

THE FIRST CONCILIATION AND ARBITRATION ACT

THE Australian workers had always, in the language of Sir Charles Dilke, demanded " a life of comfort and well-earned partial leisure against a life of mere existence "[2], but in the extremely fierce industrial warfare of the early nineties of the last century — notably the shearers' and the maritime strikes — they had

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[1] Vol. X, Nos. 4-6, Oct-Dec. 1924 : " The Development of State Wage Regulation in Australia and New Zealand ", by D. McDaniel SELLS.

[2] *Problems of Greater Britain*, Vol. II, Part VI, ch. ii.

been hopelessly defeated.[1] Their sufferings, together with election successes, made insistent their demand that the State should interest itself in the quarrels between employer and employee, and Courts for the purpose of settling industrial disputes were instituted in South Australia and New South Wales. In 1900 the Australian colonies were federated under the Commonwealth of Australia Constitution Act. By section 51 of this Act, the Federal Parliament was given power to " make laws for the peace, order and good government of the Commonwealth " in respect to 39 specific objects. One of these objects was " conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ". With " unheard-of boldness and swiftness " the Commonwealth advanced to the " practical solution of a question over which the world was still speculating "[2] when in 1903 Mr. Alfred Deakin introduced the Conciliation and Arbitration Bill into the House of Representatives. That statesman hoped that this legislation would herald " the establishment of a people's peace ", and " a new phase of civilisation ". " The object of the measure ", he said, " is to prevent strikes. We now substitute a new regime for the reign of violence by endowing the State with power to impose, within limits of reason, justice, and constitutional government, its deliberate will upon the parties to industrial disputes. " He envisaged, as the result of the new methods, " as great a transformation as the creation of the King's Peace brought in civil society ".

The Bill had been prepared chiefly by Mr. C. C. Kingston, Minister for Trade and Customs in the first Federal Administration. It is an excellent example of the new Australian draftsmanship, where conciseness and clarity of diction distinguish it from the obscureness and clumsiness that are typical of the older legislation. Mr. Gilchrist was referring primarily to this measure when he wrote : " The Australian legislation on industrial disputes is the most interesting and most instructive in the world. "[3] The measure was passed in 1904 with barely a murmur of dissent, and a Court of Conciliation and Arbitration was thereupon constituted. The Federal experiment of endeavouring to stamp out strikes and

[1] Viscount Bryce, in *Modern Democracies* (Vol. II, p. 246) writes : " Few countries had suffered more from strikes during the later years of the nineteenth century than had Australia. " In the conflicts of the early nineties, it is estimated that the men lost £400,000 in wages, while in business alone Australia lost approximately £5,000,000.

[2] Jane T. STODDART : *The New Socialism*, p. 243.

[3] Bulletin No. 23 of Indian Industries and Labour Series.

lockouts by legal machinery was thus begun in most auspicious circumstances. The framers of the Constitution had foreshadowed a comparatively restricted area within which the Court was to operate; it was designed by them " for dealing with the rare case of industrial crises of national magnitude "[1], leaving the States to provide for their own labour conditions. The political platform of Labour is unification rather than federation for Australia, and the trade unions helped in this policy of subordinating State machinery by approaching the Federal Court wherever possible in preference to State Arbitration Courts or Wages Boards. They had also grounds for believing that they would obtain a more favourable award from the Federal tribunal. The employers at first keenly resented interference in the conduct of their business and challenged the Court's jurisdiction on every conceivable point, but it soon became apparent that they preferred the Federal Court to the State authorities. They had realised that it was to their advantage to have conditions throughout Australia as uniform as possible, so that a manufacturer would not find himself prejudiced because a rival in a neighbouring State was working under a more favourable State award or law. Disputes were deliberately fabricated and made inter-State so that the Court would have jurisdiction. From being a court contemplated to deal with disputes essentially federal in nature, i.e. mainly those where workers in their occupation moved from State to State (e.g. shearers, seamen), it thus developed into the most important industrial authority in Australia. At the present time there is a disposition among the unions to return to the State authorities, because the Labour Party, which has held the reins of government in recent years in most of the States, has made it possible for the workers to obtain through State Acts of Parliament or awards better terms than formerly. The employers, however, are averse to this new movement towards decentralisation, so that their leaning towards the Federal Court is in marked contrast with their attitude of earlier years.

The Federal Arbitration Court and its Work

It cannot be said that the Court has fulfilled the bright hopes entertained by the fathers of the Constitution in respect of it. Dr. Jethro Brown (President of the Court of Industrial Arbitration

[1] Professor Harrison MOORE, in *Australia: Economic and Political Studies* (edited by Meredith ATKINSON), p. 73.

of South Australia) put the position fairly when he gave his opinion that industrial arbitration in Australia " cannot be said to have been an unqualified success ".[1] The reasons for this failure are due both to the limited legal powers that the Court has under the Constitution and to the inherent weaknesses of arbitration. The chief are perhaps :

(1) The difficulty of showing exactly where the Court's powers ended. This uncertainty provoked a sense of irritation and discontent among those workers who found themselves — unjustly as they thought, because the grounds were legal — denied access to the Court. For much the same reason there was, only too frequently, an absurd overlapping of federal awards with those of State Courts or State Wages Boards.

(2) The long delay in reaching the Court, due to the congestion of its business. This was mainly the result of the amplification of the Court's activity before referred to. At present there are about 180 matters pending before it ; but Ministries have not deemed it expedient to increase the personnel of the Court.

(3) The lengthy hearing incidental to applications. It is not uncommon for a matter to be actually in Court for the greater part of a year before the dispute is adjusted. The result is the imposition of a great strain on the funds of the organisations which are parties before the Court.[2]

(4) The inability of the Court to establish a common rule affecting all employees in an industry. By this is meant that the Court may not, after making a careful investigation, settle the conditions that are to apply to an undertaking and prescribe similar conditions for other undertakings. The Federal Parliament, by section 38 of the Conciliation and Arbitration Act 1904, purported to empower the Arbitration Court to declare that any condition of employment determined by any award in relation to any industrial matter should be a common rule of any industry in connection with which the dispute arises. The High Court, however, in Whybrow's case No. 3 held that this section was

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[1] *Australia : Economic and Political Studies*, p. 213.

[2] The expenses in five proceedings were as follows : Waterside Workers' Federation of Australia *v.* Commonwealth Steamship Owners' Association and others (award 1914 and later matters to 1919) : £9,378 ; Federated Engine Drivers' and Firemen's Association of Australasia *v.* Colonial Sugar Refining Co. Ltd. and others (award and variations 1918) : £4,305 ; Australian Boot Trade Employees' Federation *v.* Whybrow and Co. Ltd. and others (award 1910) : £2,990 ; Federated Mining Employees' Association of Australia *v.* various mining companies (award and variations 1915-1919) : £3,550 ; Australian Postal Electricians' Union *v.* Public Service Commissioner and another (variations and award 1913) : £1,743.

ultra vires the powers of the Commonwealth Parliament under the Constitution.[1] The Court stood firmly by the old common-law meaning of arbitration as something binding specific parties before an arbitrator where a particular matter in which those parties were directly interested lay in dispute. In practice the Court had jurisdiction only over those employers who had unionists in their establishments. Employers who paid wages to men, all of whom were non-unionists, would be exempt from the Court's award, to the prejudice of other employers who, because they had engaged union labour, would be bound by the conditions prescribed by the Court. But the High Court has recently begun to whittle away the inconveniences attaching to the lack of a common rule. It has fully realised that the inability of the Arbitration Court to make a common rule in industry imposes an obstacle in the way of the co-ordination of industrial conditions throughout Australia. To scale down its own judgment in Whybrow's case, it is giving a wider meaning to the expression " industrial dispute ". Thus in the Cinema case, the High Court made it possible to join as respondents persons who were not at the time employing members of any claimant union, merely because they were carrying on the business in which such members of the claimant union might possibly be employed.[2] This case establishes, in effect, that a union can summon any employer before the Arbitration Court even though he employs no unionists, and have him bound by the award in that industry. The mere fact that an employer is paying a less wage to his staff of non-unionists than is prescribed by the Court for unionists is sufficient to create a matter of substantial interest to the union, and, therefore, an industrial dispute within the meaning of section 51 of the Constitution. A union has now, in law, the means of compelling an employer to pay the same wage to all employees, so that there will be no inducement to an employer, by engaging non-union labour at lower rates, to discriminate against its members. An important advance has thus been made towards establishing a common rule in industry, and something has been done to loosen the shackles that have been encumbering the work of the Arbitration Court.

(5) The failure of the Court, in fixing wages, hours, and

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[1] Australian Boot Trade Employees' Federation *v.* Whybrow and Co. and others; 11 Commonwealth Law Reports.

[2] Burwood Cinema Limited and others *v.* Australian Theatrical and Amusement Employees' Association; 35 Commonwealth Law Reports.

general conditions of employment, to take economic realities sufficiently into account. In determining the minimum wage for unskilled labourers, the following principles have been followed by the Court : (*a*) the wage must be sufficient to enable a man, his wife, and three children to live a decent life as members of a civilised community ; (*b*) the wage varies with the cost of living as shown by the retail price index number supplied by the Commonwealth Statistician ; (*c*) the wage must be paid by all employers in the industry, large or small, prosperous or otherwise. If the business or the industry cannot pay a decent living wage enabling a man to live according to Australian standards, that business or industry has no title to existence.

It is objected that the Court, in adopting the cost of living as the test for the wages level, has placed wage fixation on a faulty foundation. Economists are strongly of opinion that in principle wages should be determined on the basis of productivity. The adjustment of wages by a cost-of-living index number can provide, at the best, only an approximate measure of productivity. The method adopted by the Court in the determination of wages is therefore hardly in accordance with the teaching of the economists. In spite of this, however, Australian wages have not been unduly raised or decreased. This is due, to some degree, to the fact that the Court, in adjusting the wage, has admitted evidence as to the prosperity of industry. A feature of the present has been the upward trend in wages ; but when rising prices are taken into consideration, the real wage does not show any marked increase, as the following figures serve to indicate :

Year	Real wage index (Base : 1911-1912 = 100)
1908-1909	98
1913-1914	98
1920-1921	102
1921-1922	113
1925-1926	110

As Mr. Dyason has said, " despite the paraphernalia of enquiries and formulae, tribunals have, for the most part, in the matter of wage rates, done little more than register the results of economic forces ".[1]

The workers, too, while accepting the cost-of-living principle as the determinant of wages, complain of the lag in the rate at which wages follow rising prices. This is, of course, due to the delays of Court procedure. They also find fault with the means

[1] *Economic Record* (of Australasia), May 1928, p. 114.

by which the Court measures the fluctuation in living costs. It is certainly difficult to make an index number or formula that will faithfully reflect alterations in the price level of goods and services constituting the regimen of the workers. There is, of course, the objection to wage fixation on the ground that it tends to reduce the volume of production per head. A minimum wage in practice becomes a standard rate, and the more qualified unskilled worker has no inducement to work beyond the capacity of the average man. Where there is no regulation of wages, a wage plasticity can reward the worker according to his capacity. Moreover, the man who, through age or disability, is not worth the basic wage to his employer, could find employment at a reduced figure if the employer were at liberty to pay him that wage. This can, of course, be done under Australian law, but a license must be obtained if a wage below the minimum is to be paid, and employers do not care for the trouble thereby entailed.

As regards hours and other conditions of employment, there is more reason to find dissatisfaction with the Court's work. Evidence for and against the variation of an award to obtain a curtailment of the working week or as to some usage in industry is always conflicting. Unfortunately, statistical data are not available even to the extent that they are in a plaint concerning wages. Each side obviously claims more than it really deems just or likely to be obtained. The unionist stresses the social side of a question; the employer the economic. The worker is concerned with distribution, as distinct from production, in which, of course, the employer is primarily interested. The Court has no intimate or first-hand knowledge of the facts and technique of industry, and must rely on the evidence submitted and the skill with which such evidence is canvassed and presented. In order to terminate a dispute, the Court is given to compromise as a *modus vivendi*. Its primary function being to prevent or settle disputes, there is a danger that the Court may unduly emphasise the standard-of-living aspect, to the prejudice of the employer in his competition with oversea rivals.

(6) The reluctance of unionism to renounce the strike weapon, in spite of the fact that the Act declares a strike to be illegal under heavy penalty. The Attorney-General made it clear from his correspondence with trade unions that they were not prepared to forgo, unconditionally, the use of the strike.[1] Hitherto, however,

[1] Parliamentary Debates, 1927-1928, p. 5280.

it has not been found practicable to fine a union under the Act for refusing to obey the Court.

(7) The widening of the breach between employer and employee. How far the marked feeling of resentment parting workers and employers, which certainly exists in Australia, is due to the presence or policy of the Court, it is impossible to estimate. For the want of harmonious co-operation between employer and employee, which has often been commented on by foreign observers[1], the unions are not solely to blame. On the other hand, Australian employers are not so eager, as it is often alleged, to get rich quickly with a view to early retirement. Employers in Australia are more and more realising their responsibilities, as welfare services and the provision of opportunities for their employees' advancement bear increasing testimony.

Undoubtedly the present industrial position as between employer and employee is unsatisfactory. The Prime Minister (Mr. Bruce) was adverting to this when he said : " There is something wrong with our present system of industrial conditions." Reports of banking and mercantile institutions draw attention to it with monotonous regularity. Still, it is easy to exaggerate the situation : oversea journals that describe Australia as the land of strikes and civil turmoil are labouring under a serious misapprehension. The actual working days lost in Australia through strikes during the period 1923-1927 are shown in the following table :

Year	Working days lost	Wages lost
		£
1923	1,145,977	1,275,506
1924	918,646	917,699
1925	1,128,570	1,170,544
1926	1,310,261	1,415,813
1927	1,712,000	1,666,000

These figures compare very favourably with those of Great Britain in the corresponding period. The average number of working days lost in Australia was 0.7 per wage earner per annum ; in Great Britain it was 2.37 per wage earner per annum. Again, allowing for the difference in population, Australia has — at least since the disastrous days of 1890-1891 — experienced no such gigantic break-down of industry as Great Britain suffered in the transport strike (1920), and the general strike and coal dispute

[1] Cf., for example, Emeritus Professor THWING : *Human Australasia*, p. 45. Cf. also the article by Mr. P. A. MOLTENO in the *Contemporary Review*, Aug. 1927.

(1926). The major Australian strikes have been confined to the engineering, transport, and coalmining trades; in other industries strife is exceptional.

Proposals for Reform

It has already been pointed out that some of the present disappointment with the work of the Court is due to its limited equipment. Attempts have been made by Act of Parliament to enlarge its powers to enable it to meet an even wider class of case than it has been dealing with; but these Acts, in so far as they purported to add anything of importance, were declared *ultra vires* by the High Court. This pointed the way to a referendum, under section 128 of the Constitution, for an alteration of the Constitution in such a way that the Federal Parliament could enact the necessary measures to increase the powers of the Court. On three occasions the people were asked in this way to approve of an alteration in their Constitution, but on each occasion consent was refused. The last referendum was taken in 1926, during the life of the present Ministry. Had it been successful, the Court could have been empowered (*a*) to make a common rule in industry, (*b*) to control all corporations whether inter-State in character or not, (*c*) to make provisions for all industries whether inter-State or not, (*d*) to vary conditions in the different States as circumstances warranted. In short, the Federal Parliament would have been able to give the Court full control over industry in Australia.

The Act of 1928 and its Provisions

The Bruce-Page Ministry represents a coalition of the Nationalist and Country Parties, and it was returned to power in 1925 by a substantial majority in both Houses on a distinct promise to remedy the defects in the arbitration system. But the failure of the 1926 referendum compelled it, in redemption of its pledge, to frame legislation within the limits permitted under the Constitution. The new Bill — the twelfth amendment of the original Conciliation and Arbitration Act of 1904 — was drawn up after careful consultation with many interests, including, of course, employers and employees, and embodied some of the suggestions offered by the Commonwealth Council of Federated Unions. It was introduced into the House of Representatives on 17 December 1927 by the Attorney-General, who explained that his Bill had

both a negative and a positive object : to avoid strikes and lockouts to the greatest degree possible and to build a " vigorous and positive co-operation between employer and employee towards a definite object — the success of the particular industry and the well-being and contentment of the community generally ".

Early in 1928, the Prime Minister proposed to convoke an Industrial Peace Conference to consist of representatives of the more important bodies. The Australian Council of Trade Unions demanded, however, as a condition precedent to its participation : (*a*) the immediate withdrawal of the Bill from the House ; (*b*) the right to endorse all worker delegates to the Conference. It also took umbrage at the proposed composition of the body : it objected, for example, to the presence of delegates from the Australian Women's National League, on the ground that it was a non-industrial association. These demands were refused by the Ministry and the Conference was not held. On 16 May debate on the measure was opened by the Leader of the Opposition, and the Bill thence occupied the greater part of the House's attention till it was passed on 12 June, against vigorous and even bitter opposition by the Labour Party. It was forthwith reported to the Senate, and passed by it on 14 June.

The substance of the Act falls into the following classification :

(1) The prevention of overlapping between Federal and State tribunals.

(2) The attempt to correlate the awards of the Court with economic realities.

(3) The introduction of a system of voluntary arbitration as distinguished from compulsory arbitration.

(4) The further application of the principle of conciliation.

(5) Improvements in court procedure.

(6) The reponsibility of organisations for the conduct of their officers and members and for the general observance of awards.

(7) Provisions relating to the rules of an organisation.

(8) The introduction of the compulsory ballot into industrial organisations.

(9) Provisions designed to secure the observance of awards and of the provisions of the Act and to protect the Court in the performance of its functions.

An explanation in outline of these headings will now be attempted.

The Prevention of Overlapping between Federal and State Tribunals

Two Conferences were held (in 1922 and 1923) by the Federal Ministry with the Premiers and Attorney-Generals of the States to terminate " the clashing jurisdictions, conflicting and overlapping awards, uncertainty, delay, expense, loss and other unsatisfactory features of the present machinery for dealing with industrial disputes "; but no working agreement was reached. In some industries there are more than 30 State and Federal awards in simultaneous operation; in the State of Victoria alone, there are 60 industries subject to concurrent Federal and State awards. Employers' organisations and trade unions can choose the award that best suits them; the result of this duplication of authority is, in the language of the Attorney-General, an " incoherent and chaotic state of affairs ". Under the new Act, the Court must decide and affirm whether it is more desirable that it should deal with the dispute rather than a State authority. Should it so declare and make an award, then any State award or order thereon is null and void. Furthermore, once the Court has dealt with a certain matter, a State industrial authority is *ipso facto* precluded from jurisdiction in that matter, even though it may be possible for it to make an award that is not in direct conflict with the Federal award. Provision is made whereby a conference, if advisable, between judges of the Federal Arbitration Court and State industrial authorities, for the purpose of securing co-ordination between orders or awards made under Federal and State Acts, may take place. These principles should be made clear: (*a*) if there is a conflict between Federal and State awards, then, if the Federal award is within the constitutional power, it shall prevail; (*b*) even if there be no such direct conflict or inconsistency, that is, even where it is possible for the parties to obey both awards, nevertheless, the State award cannot stand if into that field the Federal Court has entered. Any doubts as to the power of the Federal Parliament to declare this principle of delimitation and demarcation were removed by the High Court decision in the case of Cowburn *v.* The Clyde Engineering Company.[1] In this way it is hoped that the problem of duplication will, in its worst features, solve itself by preventing one party from playing off a Federal award against a State award and *vice versa*.

[1] Reported in 37 Commonwealth Law Reports.

The Necessity for correlating the Awards of the Court with Economic Realities

The Act does not affect the practice of the Court in fixing the basic wage for unskilled workers, with the implication that there shall be margins for skill. But in the determination of wages (apart from the basic wage and the preservation of margins for skill) and in the matter of hours and conditions of labour (apart from the requirements of general health and sanitation) — piece work, bonus work, payment for holidays, time off for smoking. travelling time and other allowances claimed over and above the normal wage — the Act insists that the Court's practice shall change. Hitherto the Court has prescribed wages and conditions according to what it considers the Australian standard of living, leaving it to the legislature, by tariff duty or bounty, to enable the industry to comply with the award. The Court is now directed to make its award in these matters within the limits of present economic possibilities; it must take into account the economic capacity of the industry and the economic condition of the community as a whole. The Act does not help the judges to determine what the capacity of industry and the condition of the community are; but the Court must no longer suggest that the Houses should find ways and means to meet its awards. When an award is made with regard to present economic realities, it will be the duty of Parliament to determine whether it is desirable that higher wages or shorter hours should obtain in the industry. If the legislature be so minded, it can grant a bonus on export or raise the tariff duty; but it should not be constrained to grant a bounty or increase the tariff because the Court has already prescribed a wage or working week beyond the present capacity of industry or the community.

A provision not unlike the one just considered, because it is designed to safeguard the public interest, is to be found in the Forty-four Hours' Week Act (1925) enacted by the Parliament of New South Wales. That provision is thus worded: " The ordinary working hours in any industry may be increased beyond those prescribed in this section if the Court or Board is of opinion that, in the public interest, such increase should be allowed. "

The Court is further obliged, in making its awards, to provide as far as possible for uniformity throughout an industry in relation to hours of work, holidays, and general conditions in that industry.

This should facilitate the harmonious working of big factories. To the McKay Harvester Works, over 30 awards now apply, containing differing provisions relating to rates of pay, hours of labour, holidays, etc. A standardisation of operating awards should be a boon in the management of big concerns such as this.

The Development of a System of Voluntary Arbitration as distinct from Compulsory Arbitration

The Act, by introducing the principle of voluntary arbitration, makes an approach to the Canadian system (Industrial Disputes Investigation Act) and the American State Boards of Arbitration and Federal Railroad Labour Board and the systems in force in Denmark and Norway. Provision is made by which employers or employees may submit any industrial matter to a judge or conciliation commissioner of their own choosing. In other words, there is made available the skilled service of an impartial arbitrator appointed by the Commonwealth. For this purpose a dispute need not necessarily exist, as it is not a question of invoking the Court's jurisdiction. The result of such voluntary arbitration proceedings is not, however, enforceable in law, for the Court's power, under the Constitution, begins only where there is a " dispute ". The observance of a determination — it is to be known as a " determination " to distinguish it from a binding award — will rest upon the honour and good faith of the parties concerned. This innovation — voluntary arbitration under the Court's aegis but gratuitous in character — must be distinguished from the conciliation proceedings already known to the law, for conciliation, if fruitful in result, will be binding on the parties.

The Further Application of the Principle of Conciliation

Under the original Act, agreements arrived at between the parties may be filed in the Court, and they thereby become the legal equivalent of the award of the Court. The Court has avowedly encouraged such agreements, preferring to arbitrate only if the conference or preliminary negotiation has proved abortive. The new Act makes a further attempt to emphasise the prevention of disputes as distinct from their settlement. By virtue of an Act passed in 1926, a conciliation commissioner was appointed with

power to deal with industrial troubles on the basis of conciliation. His work has given satisfaction and his Report shows that he has been able to handle many disputes, and thus prevent them from going into court. The Act of 1927-1928 seeks to enlarge this principle by the constitution of conciliation committees. These committees are to consist of a chairman who is paid for his services, and an equal number of representatives from both sides, and are to be appointed by the Chief Judge of the Court. In the appointment of these representatives, the Chief Judge must take into consideration any recommendations submitted by the interested organisations. There need be no actual dispute to enable these committees to act; a committee, should it foresee friction, may handle the matter before it grows into a dispute. It is hoped that the Court's time, as well as the funds of the organisations, will thus be economised. Agreements reached in a committee can be certified to and filed in Court, and have then the full force of an award. Should a committee be unable to agree, a majority may make a recommendation to the Court as to the terms of a proposed award. The Court, after giving the minority an opportunity to be heard, may then convert the recommendation, or a modification or variation thereof, into an award.

The Act also assists the conciliation principle in another way. Under the original Act, boards of reference consisting of employers and employees may be appointed to deal with matters referred to in an award. The new Act enables these Boards to handle any matter which they think will affect the good relations of the parties in reference to an award. A decided step has thus been taken by the Act to substitute the principle of the round table for that of the formal atmosphere of the Court environment. Many who ultimately believe that conciliation will absorb arbitration, nevertheless consider that the Court, by its mere presence, will serve a useful purpose. The parties know that if conciliation fails, compulsory arbitration will follow. Thus Mr. W. P. Reeves, in moving the second reading of the first New Zealand Conciliation and Arbitration Act, said that " unless you have in the background an Arbitration Court, the Conciliation Boards will not be respected and they will be virtually useless ". Others hold that conciliation can function without compulsory arbitration standing behind the chair; they think that it would be strengthened if the Court were abolished, because there would be fuller and franker discussions. Parties would not fear to disclose information on the ground that it might be used to their prejudice in subsequent Court proceedings.

Improvements in Court Procedure

Procedural reforms of importance are three in number :

(*a*) The introduction of the representative action so long confined in England to the courts of equity. By making certain persons representative respondents, the Court is enabled to make a representative order where it appears to it that there are numerous persons having a common interest in any matter. The object is, of course, to curtail the considerable expense associated with the service of the necessary court papers upon a large number of respondents when a matter is before the Court.

(*b*) The permission accorded to barristers and solicitors to appear in the Arbitration Court if the Court grants them leave. Under the original Act, they could be briefed only if the other side gave its consent. This consent was not always available ; but various devices have been resorted to in order to defeat the provision. Union secretaries, for example, study law and with this equipment appear in Court to argue the case for their union. Correspondingly, legally qualified practitioners are made directors of companies, and, *qua* employees of that company, are eligible to represent the organisation in court. Sometimes a student at law, having completed his course of studies and passed all requisite examinations, deliberately abstains from being admitted to the Bar and is thus not disqualified from holding a brief in the Arbitration Court. A more absurd case is that of a practitioner who has been struck off the roll of barristers and solicitors for misconduct or other cause. The punishment and the stigma placed upon him serve to qualify him to practise in a Court where the reputable practitioner is debarred. The Act should remove this anomaly, and at the same time make available the best trained men for this important service to the community.

(*c*) The policing of awards by Commonwealth officers. The Act provides for the appointment of inspectors whose duty it will be to see that the Act and the Court's awards are being observed. Hitherto representatives of both sides have seen to this, and sometimes unpleasantness and irritation have followed from the indiscretion of these representatives.

The Responsibility of Organisations for the Conduct of their Officers and Members and for the General Observance of Awards

There are, in the new Act, clauses the object of which is to regularise the position of the trade union in law by making the principle of vicarious liability applicable in practice to it. It is well established in English law that the corporation or artificial person is responsible for the acts of its servants and agents acting within the scope of their employment and the powers of the corporation. In Australia the trade union, upon registration, becomes a corporation known to the Arbitration Act, and the new Act endeavours effectively to fix the union — as well as the employers' organisation — with liability for the acts of its members and servants. The original Act prohibits, under a penalty of £1,000 in the case of both the guilty organisation and the guilty member or servant, all inter-State strikes and lockouts; but the penalty has never been enforced. It was far too heavy a fine with which to visit an erring member or servant. In the case of an organisation, it is extremely difficult to prove, by legally admissible evidence, that a union has authorised a strike. Press reports are not evidence and no unionist will dare come forward and say what has taken place at a union meeting. But it is comparatively easy to show that an employer has brought about a lockout. The penal clause could thus be enforced against an employer but not against a union, and this was generally realised. The penalty has been effective in preventing lockouts but not strikes. The new Act retains the penalty of £1,000 in the case of an organisation or an employer: but in the case of the individual member or servant in default the penalty is £50. These are, of course, maximum penalties. The Court, when about to apply the penalty, is directed to take into account as mitigation any *bona fide* efforts that have been made by the committee of management of the organisation or any of its officers to prevent a commission of the offence, and provision is made by which penalties imposed on the individual may be recoverable out of the organisation funds up to a certain amount. A union, however, would always pay the full amount of an official's fine.

By exaction of the penalties it is hoped to terminate the irritation tactics commonly spoken of as the " sectional strike ", which has become, in recent years, a feature of Australian industrial warfare. When the workers desire better conditions, they strike

in A's establishment, enabling his rival, B, to capture A's trade. The union provides strike pay, and when A is forced to concede the demand, work is ceased in B's establishment. The whole strength and resources of the union are concentrated at a given time on one or two selected firms or factories. Sometimes, by preconceived plan, the men walk off a vessel a few minutes before the time fixed for departure, with the casual remark that they may be back in a few hours, or, if not, the following morning. They know that the ship cannot sail without them. Under the new Act, the Court may, upon application for that purpose, declare that in such circumstances a strike exists. Such a declaration permits other employers in the industry to lock out their employees, without being guilty of a breach of the Act; in other words, legal sanction is given to the lockout. Similarly if an employer attempts a partial lockout, the Court may, on application for that purpose, authorise a strike of the union for the whole industry. In respect of the strike and lockout the parties are thus placed by the law upon an even footing.

Furthermore, if a substantial number in a organisation refuse to accept employment, either at all or in accordance with existing orders or awards, such orders or awards may be cancelled by the Court. An organisation may expel any of its members guilty of a breach of the law, and failure to exercise this power is a ground upon which the Court may deregister that union. Should an organisation attempt to evade the Act by introducing a domestic rule contrary to any award, or should the members observe an informal understanding that is in violation of an award, the Court may similarly decree deregistration.

Provisions relating to the Rules of an Organisation

The new Act makes it imperative that the rules of a union shall provide for certain matters, and the rules covering these matters may not be altered except by a majority vote taken by secret ballot. The Court may disallow any rule which (*a*) is contrary to law or to any order or award, (*b*) is tyrannical or oppressive, (*c*) prevents or hinders members from observing the law or the terms of an order or award, or (*d*) imposes unreasonable conditions upon membership or application for membership. It is mandatory that every organisation shall keep the following records: (*a*) a list of its members showing their names and postal addresses; (*b*) a list of the names, postal addresses, and occupations of the

members of its committee of management, of its officers, and of every person holding, whether as trustee or otherwise, property of the organisation; (*c*) an account, in proper form, of its receipts and payments and of all its funds and effects. A copy of these records, certified by a statutory declaration of the secretary or other prescribed officer of the organisation to be correct, is to be filed with the Registrar of the Court. Accounts of the organisation are to be audited yearly by a qualified person. If the organisation does not appoint a qualified person as auditor, the Court may appoint an auditor at the organisation's expense. The Registrar of the Court may at any time require a special audit of the accounts of an organisation, and for that purpose may appoint a qualified person whose remuneration shall be a charge on the Commonwealth Treasury. It is expected that by these means members will be given a firmer hold of their affairs and be placed in possession of information as to the manner in which their contributions and levies are being disbursed. Any member of an organisation who is an officer thereof and has been expelled because his actions amount to a contravention of the Act may not hold office in that organisation again without the Court's leave.

The Act, by repealing a provision of the original Act, enables members to resign from a union during the pendency of any dispute or matter before the Court. It was undoubtedly a hardship that a man should be legally liable to pay union dues even though he had left the industry. Some large unions are practically always before the Court either in the matter of an award or on application for interpretation, so that a man has often found it difficult to resign.

The Introduction of the Compulsory Secret Ballot

In the view of many — both among employers and employees — the most important clause in the Act is section 45, which introduces the compulsory ballot into industrial organisations. It may be noted that of the 149 unions registered under the Act, only 7 at present provide satisfactorily for an effective secret ballot. It is provided in section 45 that any ten members of an organisation may, when any vote is taken or about to be taken in any election of the committee or of officers of the organisation or in respect of any resolution proposed for adoption by the organisation, demand that the vote be taken by secret ballot. If the demand is not acceded to, the Court may authorise the taking of a ballot under the supervision of its officer, provided that the demand

is *bona fide* and " relates to a matter of substantial importance ". If the union does not hold this ballot as directed, it is liable to a penalty of £500. Furthermore, to prevent intimidation any ten members may make application for a secret ballot by letter enclosed in an envelope marked " Secret Ballot " and enclosed in another envelope addressed to the Registrar of the Court. The Registrar is not to disclose to any person other than a judge the names of the members so applying, and the judge may then, if satisfied that the applicants are members and that the application is *bona fide* and " relates to a matter of substantial importance ", give directions for the taking of a ballot as before. The ten need not apply jointly : if within a period of 21 days there be, in all, ten applicants, the Court may grant the request. Moreover the Court may, on its own initiative, at any stage of the proceedings in relation to a dispute, order a secret ballot to be taken upon any matter upon which it deems it desirable that the opinion of the organisation should be obtained. If the Court believes that any secret ballot of an organisation has not been fairly held, it may declare the ballot void and order a fresh ballot under the control of its own officer. A penalty of £50 or, in the alternative, imprisonment for six months may be imposed on any person who (*a*) obstructs the taking of the ballot as directed, (*b*) uses any form of intimidation to prevent any person from voting, (*c*) falsely represents in an application that he is a member of an organisation. Any officer of an organisation who refuses to assist in the taking of the ballot by withholding the register and lists of the members is subject to the same penalty.

The principle of the secret ballot is, of course, recognised by American industrialists, and the Australian Industrial Delegation, which was appointed by the Commonwealth Government to investigate the methods and working conditions in industry in the United States, in its Report[1] draws attention to this. The Beeby Act of New South Wales (1918) contains, too, provisions for the holding of a secret ballot, and there is also in force legislation in New Zealand to the same end. But the machinery provisions in section 45 of the Federal measure are distinctly more elaborate than the New South Wales and New Zealand devices.

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[1] Page 63.

Provisions designed to secure the Observance of Awards and of the Provisions of the Act and to protect the Court in the Performance of its Functions

The Act makes available a penalty of £20, or, in the case of an officer of a registered organisation, £100, should any person prevent, or endeavour to prevent, any person from offering or accepting employment or working in accordance with the terms of an award or order of the Court by any of the following methods : (*a*) violence to the person or property ; (*b*) threats ; (*c*) pecuniary penalty or injury ; (*d*) intimidation of any kind, to whomsoever directed ; (*e*) abusive or insulting language ; (*f*) declaring or joining with other persons in declaring goods or places or persons or undertakings or positions " black " ; (*g*) any other form of boycott or threat of boycott. If an organisation imposes any penalty or disability upon a member because he is working in accordance with the terms of an award, it is liable to a fine of £500. Any person who at any meeting of an organisation or at any public meeting moves, seconds, or puts to the meeting any resolution abusive or insulting to the Court or one of its judges may be penalised to the extent of £20. For printing or publishing any report inciting to commit a breach or to non-observance of the Act or containing language insulting or abusive to the Court, the penalty is £100. Any person creating a disturbance or taking part in a disturbance near any place where the Court is sitting may be fined £100, or be imprisoned for six months, or both.

Moreover the Court, on application, may direct that evidence relating to trade secrets or the profits or financial position of any party or witness to Court proceedings be taken in private, and such evidence may not be published without an order of the Court. For contravention of this provision as to publication, the penalty is £500 or imprisonment for six months. Protection may thus be given to those who, by their evidence, assist the Court.

It should be observed that the Act makes no attempt to stifle legitimate comment or report of its proceedings. But of late there is a marked habit in certain unions to pass resolutions recording " disgust " with the " biased " awards or orders of the Court. The Press, too, on both sides, has not been restrained in its criticism. The more important Australian newspapers are anti-labour in tone and inclined to carp when an award favours the workers. Some of their criticism of the Court's decision in the Forty-four

Hour Case was most partial and embarrassing. There is thus ample ground for the relevant provisions in the new Act.

Labour and Other Opinions on the Act

The measure was received by the Parliamentary Labour Party and the unions with the greatest resentment. The Party during debate announced its intention of making the Bill an issue at the next election and, if returned to power, of repealing its principal sections.

The Party reads the measure as a gigantic attack on trade unionism and the industrial conditions and privileges won by the workers. It refuses the assurance of the Attorney-General that the Act will " give the greatest assistance to trade unionism that has veer been offered by any legislature in Australia ". It is particularly incensed with the sections that impose penalties, that provide for inquisitorial procedure such as the compulsory ballot and the auditing of union accounts, that instruct the Court to correlate awards with economic realities, and that aim at legalising the extension of disputes to meet the case of the sectional strike. The latter provision it describes as the negation of conciliation and arbitration, in that a lockout, in certain circumstances, is legalised. Because the workers in two or three factories, in desperation, strike, the other employers in the industry may approach the Court for a declaration of a lockout. The penalties, they say, cannot be collected. They quote the opinion of a former Liberal Premier of New South Wales, Sir Charles Wade, that " the introduction of penalties in the form either of imprisonment or of fine is an illusory protection ".[1] Section 45 is described as "ludicrous" and "unworkable ". Labour declares that it has no quarrel with the principle of the secret ballot; on the contrary, it claims that it is an integral part of the union machinery. It regards section 45 as unnecessary and insulting, an " unwarranted interference with the management of industrial organisations ". Attempts to enforce the section, it is said, will involve the unions at the behest of a disgruntled few in such expense and embarassment as to render them unworkable. Mr. Charlton and Mr. A. Green (both of whom represent mining constituencies) estimate the minimum cost of holding a ballot for the Northern Miners' Union of New South Wales to be

[1] *Australia, Problems and Prospects*, p. 36.

£200. Mr. Charlton fears that the more important unions will find themselves compelled to appoint two permanent officials whose duties will be confined to the taking of ballots. Mr. W. W. Hughes, the Nationalist War Prime Minister of Australia, than whom, perhaps, because of his intimate connection over a long period with industrialism, no one better understands the psychology of the Australian worker, goes the length of saying : " I do not know a union in the country — certainly none that I have ever been connected with — that would take a vote on any question if the Court ordered a secret ballot. " Of course, if the union members refuse to vote by general understanding, the section will become farcical. If a secret application is made to the Court for a ballot, how is a judge to satisfy himself that the applicants are *bona fide* members of the union? Regulations under the Act do something to establish indentification by providing that such applications should be supported by a statutory declaration setting forth the facts relied on by the applicants and accompanied by membership cards, contribution cards, pence cards, union badges or buttons, receipts for subscriptions, or other evidence that the applicants are members of the organisation. The statutory declaration is also to set out facts relied upon to establish the *bona fides* of the applicants. But union lists are ever changing ; membership badges are trafficked in, and organisers have been known to redeem them in pawnshops. Some unions do not issue receipts for subscriptions paid. Thus in the coalmining industry it is customary to hold a meeting of the union on the Monday before pay-day. At that meeting a levy is struck, and as each man receives his wages at the pit-head, he pays his contribution to the union representative who, however, gives no receipt. In spite of the regulations, therefore, the risk of impersonation and misrepresentation remains a source of danger. There is, furthermore, the objection of time. Suppose that, at the Court's dictation, a ballot is undertaken. Membership of one of the unions — the Australian Workers' Union — is over 150,000. A great deal of preparatory work in regard to printing, etc., is involved, and the ballot papers must be despatched in the case of outback districts by special messenger. Officials of this Union consider, from their own experience, four and a half months as the minimum during which a ballot which is to embrace all seasonal workers will have to remain open.

A case, however, can be cited where a compulsory ballot has been successfully undertaken ; this was the action of the New South Wales Arbitration Court in exercising its powers under the Beeby

Act. Because of strife between officials and members, the Breadcarters' Union was rapidly growing unworkable. Supervised by the Department of Labour and Industry, a ballot for the election of union officials was taken. The result was the gaining of all important executive posts by candidates nominated by the rank and file, and so majority rule was restored. In all about 900 votes were recorded. It will of course be observed that in this instance a comparatively small union only was concerned.

The Labour intelligentsia contends that industrial peace will not be gained with the present Act; it is possible only with a comprehensive survey of the situation. Inquisitorial reform of union management and the recasting of the Court's methods and procedure are insufficient. Further, unemployment due to other causes is working far more havoc than the strike or lockout. Unemployment is due mainly to the inability to obtain work and not to the wilful rejection of it by strike. The Report of the Development and Migration Commission (1928) upon unemployment and business stability in Australia points out[1] that at the date of the last Census (April 1921) " 72,882 males — 52.26 per cent. of the total unemployed males — were classified as unemployed through scarcity of work, while 4,511 — 3.24 per cent. of the total unemployed males — were classified as unemployed through industrial disputes ". Goverment, therefore, should give its attention to the major causes of unemployment and the abuses of capitalism as well as to the abuses of unionism.

Future Prospects

Admittedly the settlement of industrial disputes is not, strictly speaking, judicial in character; it is, as Viscount Bryce has it, " a function that is really rather administrative than judicial ".[2] The danger, of course, of placing industrial disputes within the cognisance of a court is that the traditionally good name of justice may grow somewhat tarnished in the eyes of the community if its awards provoke discontent in any quarter. To this it may be answered that the High Court of Australia, like the Supreme Court of the United States, has not uncommonly, as interpreter of the Constitution, to disallow Federal or State legislation as *ultra vires*, and it has therefore to run the gauntlet of keen political

[1] Pages 34-35.
[2] *Modern Democracies*, Vol. II, p. 216.

criticism. It cannot be said that either of these Courts has suffered in its prestige or in the respect of the people. And it is scarcely conceivable that an administrative board would inspire a similar confidence as arbitrator in industrial disputes; disinterestedness and impartiality are associated in the public mind with the judicature rather than with the administration.

The Attorney-General firmly believes that State intervention in matters industrial has come to stay in Australia, so that the abolition of the Court itself would " create new problems without any satisfactory means at hand for solving them ". He confesses that his Act does not furnish " anything like a complete solution to all industrial troubles "; but he claims that it is a " definite contribution to the cause of industrial peace and progress ". No fabric of importance, of course, has yet sprung flawless from the brain of one generation; Mr. Deakin realised this when, in explanation of the original Act, he said : " It is not a matter of to-day or to-morrow — in the sense of a single measure or device. "

Since the passage of the Act through the legislature, however, an invitation issued by the Associated Chambers of Manufacturers of Australia to Unionism to meet them in conference to discuss unemployment and industrial matters generally has been accepted by the All-Australia Trade Union Congress. It has been suggested by union officials that out of this session there may develop some new machinery of direct contact between employer and employee that will make resort to the Court unusual. If this suggestion fructifies, then one of the larger objects of the Act — the encouragement of conciliation — will have been won. Should, however, the new collective bargaining break down, it is difficult to see how the Act can function with success. For its success, both parties must approach the Court in a spirit of peace; there must be no scuffling on the temple steps. To enforce the Act in the teeth of a hostile Unionism will, at the best, drive resistance sullenly underground into unlawful associations. Filling the gaols may bring about a legal peace; but it will be the illusory peace which according to the gibe of the Roman satirist[1], prevailed in Britain during the first century — *solitudinem faciunt, pacem appellant.*

[1] TACITUS : *Agricola*, chap. 30.