Problems of Australian Compulsory Arbitration[1]

by

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The Australian system of industrial regulation by federal and state arbitration machinery was briefly described in these pages last year in the course of a general assessment which concluded that the system of compulsory arbitration had in the past half century been beneficial in its effects.[2] *The general acceptance of this system, however, does not mean that there have not been criticisms from both sides of industry. These are described in the present article, which also contains a somewhat different assessment of the achievements of compulsory arbitration.*

THE working of the Australian system of compulsory arbitration has recently been the subject of severe criticisms from the trade unions[3], from some sections among the employers[4], and from the academic writers.[5] Though few think it desirable, or even possible, to abandon compulsory arbitration entirely in favour

[1] The author wishes to acknowledge the assistance derived from comments made on an earlier draft by D. A. Ross, I. G. Sharp, D. C. Thomson and E. L. Wheelwright, while, of course, bearing the sole responsibility for what has now been written.

[2] See O. de R. FOENANDER: "The Achievement and Significance of Industrial Regulation in Australia", in *International Labour Review*, Vol. LXXV, No. 2, Feb. 1957, pp. 104-118.

[3] See Australian Council of Trade Unions: *Report of Arbitration Committee* (1955); and H. J. SOUTER in *Unions, Management and the Public*, edited by K. F. WALKER (Nedlands, University of Western Australia Press, 1956).

[4] See Institute of Public Affairs, Victoria, in *I.P.A. Review*, Sep. 1955.

[5] See Leicester WEBB in *Unions, Management and the Public*, op. cit.; D. C. THOMSON: "A Survey of Australian Industrial Tribunals", in *Industrial Law Review* (Derby, Engineering-Legal Society), July 1955; Kingsley LAFFER: "The A.C.T.U. Arbitration Proposals", in *Public Administration* (Sydney), Mar. 1956.

of a system of collective bargaining, many feel that important problems remain to be solved and have misgivings concerning some of the ways in which the system is developing.

Before discussing these criticisms in detail, it may be useful to consider what achievements can fairly be attributed to the system.

The Achievements of Compulsory Arbitration

In the writer's opinion the most notable achievements of the Australian system of compulsory arbitration are: (1) the early provision of machinery to assist the resolution of conflicts between employers and employees; (2) the early recognition of trade union status and the granting to unions of equal standing with employers in proceedings before arbitration tribunals; (3) assistance to the weaker groups of workers by determination of their wages and conditions on the same principles of "wage justice" as those of stronger groups; (4) the assistance in the enforcement of determined minimum wages and conditions that has been afforded to the trade unions by the legal sanction behind arbitration awards; and (5) the adjustment of general wage levels according to the state of the national economy.

These characteristics of the Australian system cannot, however, be regarded as features peculiar to compulsory arbitration. Similar developments have in many cases occurred within collective bargaining systems. Voluntary or statutory machinery, or both, to assist the settlement of disputes, is very widespread. So also is recognition of the trade unions, which, however, has often come more slowly in collective bargaining countries. Full employment has greatly helped the weaker groups of workers, though not usually to the same extent as has Australian arbitration, and special wage-fixing arrangements have been useful to these workers in some cases. Collective bargaining countries differ greatly in the legal enforceability of bargained contracts, but some have approximated the Australian result. Under some collective bargaining systems attempts have been made through joint action by employers and trade unions to link wage levels to general economic conditions. Thus each of the above five results of the Australian system can be matched by examples of broadly similar developments elsewhere.

It might still be claimed for compulsory arbitration that no one collective bargaining system yet possesses all five characteristics of the Australian system, and this is perhaps the strongest point that could be made by defenders of it. It could also be argued that it appears to some extent to be in the nature of a compulsory arbitration system to develop these particular characteristics:

parties to disputes have to be recognised ; criteria of fairness which help the weaker groups are likely to be adopted ; the minimum conditions granted by awards have to be enforced ; and wage-determining authorities cannot ignore the possible economic effects of their decisions. Nevertheless there appears to be no inherent reason why a single collective bargaining system should not develop all five features if desired.

As for the more general favourable results attributed to compulsory arbitration by its defenders, such as the progressive improvement in wages and conditions in Australia, it must be recognised that in this respect also broadly similar developments have occurred in collective bargaining countries. It is reasonable to suppose that comparable progress would have been made in Australia if she had developed under collective bargaining instead of under compulsory arbitration. Many of the arguments adduced in support of compulsory arbitration in Australia are therefore irrelevant to an assessment of the *system* as such. It must also be recognised that some important developments in Australia have occurred directly through legislation, the arbitration authorities merely implementing the latter. A striking recent example of this is the introduction of paid long-service leave by legislation in five states.[1]

Problems of Compulsory Arbitration

But it is not enough that the achievements of the Australian system are overestimated in this way ; in addition the various problems and questionable results to which it has given rise are often overlooked. These may be discussed under three headings : *(a)* the high degree of uniformity in wage determination and its effects on industrial relations ; *(b)* the legalism of the system ; *(c)* the limitations of the system as a source of wage policy. Attention here will be concentrated on the first two of these.

Uniformity and Its Effects

There is a high degree of uniformity in the wages determined under Australian compulsory arbitration. Most of the 44.3 per cent. of Australian workers (excluding certain minor categories) under Commonwealth arbitration awards receive a male or female basic wage determined on uniform principles of " capacity to pay ", and a " margin " or differential determined on uniform principles of

[1] Foenander (op. cit., p. 110) mentions only four states; South Australia, with a system differing from the others, has recently joined New South Wales, Victoria, Queensland and Tasmania.

" comparative justice " based on margins in the metal trades.[1] A change in the federal basic wage tends to apply uniformly to all these workers and a change in margins in the metal trades results in more or less similar changes in the margins of all other workers in this highly articulated wage structure. Many salaried workers are also included in this system and even high-ranking Commonwealth public servants have their salaries determined partly on the principles applied in determining the margin of the engineering fitter. The 44.3 per cent. of workers under the various state wage-determining authorities also tend to have their wages fixed on uniform principles within their own separate jurisdictions.

There is not, however, complete uniformity. Though important decisions of the Commonwealth or of the principal state authorities usually have a good deal of influence on one another and on other authorities, significant differences between them can nevertheless exist. This combination of extensive uniformity within jurisdictions with some measure of diversity between them makes the situation somewhat confusing. The uniformities, on the one hand, make for an inflexibility that can impede the settlement of disputes. The diversities, on the other hand, which often mean that different groups of workers in a factory operate under different awards of different authorities, can give rise to alleged inequities which cause unrest. Thus both the uniformities and the diversities create problems of industrial relations and it is possible to argue plausibly both for more uniformity and for less.

It is the uniformities, however, that give rise to the more fundamental problems of the system. The diversities mentioned above arise from the federal character of Australian government rather than from compulsory arbitration as such, and would largely cease to exist if Australia were to adopt a unitary system. It should be noted also that the special attention now focused upon these diversities is to a considerable extent a by-product of the stress on uniformity within each separate jurisdiction. The uniformities, in contrast, arise largely from the character of the arbitration system itself. We may take the working of the Commonwealth system as an example. The uniformity arises here from a desire to bring the settlement of industrial disputes within the rule of law, and the belief that this requires the determination of relative wages on uniform principles of " wage justice ". It is the degree of skill, danger, etc., and not economic conditions or the bargaining strength of employers and employees that the Common-

[1] See D. W. OXNAM : " Industrial Arbitration in Australia : Its Effects on Wages and Unions ", in *Industrial and Labor Relations Review* (New York State School of Industrial and Labor Relations), July 1956, for a description of the Australian arbitration system and some account of its working.

wealth arbitration authorities ideally look to in determining differentials, and their practice conforms to this ideal as much as possible. Apart from such explicit objectives the need for defence against trade union tactics of playing off one decision against another might well make the development of principles involving uniformity almost inevitable under a general system of compulsory arbitration.

It would be surprising, however, if the same principles suited all industries and disputes equally well. For example, a pattern of relative wages determined by arbitration that is very acceptable to weaker groups of workers may be frustating to stronger groups. Workers employed in a prosperous industry will not see this wage pattern in the same light as those employed in a struggling industry. Arbitration decisions based on uniform principles cannot always take adequate account of special conditions obtaining in an industry or of particular circumstances surrounding a dispute. To be sure, an arbitrator can often find a way out of a difficulty by a special interpretation or application of his principles, by the judicious granting of minor fringe benefits, and by similar means. His freedom of manœuvre is, however, necessarily limited by the principles to which he has committed himself. This underlying inflexibility in the working of the system is inevitably a source of much frustration and industrial discontent.

This unfortunate result tends to be accentuated by the rather limited responsibilities of employers and trade union officials under compulsory arbitration. In a collective bargaining system the wages decided upon are determined by the parties themselves ; and, however reluctantly, the latter have to accept responsibility for and defend what has been decided. A trade union official has continually to interpret to his members what is being done, and suitable methods of communication within the union have to be developed. Much information about economic and other conditions may be disseminated in the process. It must be recognised that under Australian compulsory arbitration also, many trade union officials are highly responsible and have good communications with their members. It is, however, characteristic of the system that such obligations can often be evaded. The situation is a little complex, as allowance must be made both for the fact that in virtually all arbitration awards many clauses are arrived at by agreement between the parties, and for the substantial amount of direct bargaining that occurs supplementary to arbitration.

In the present context, however, these aspects of the system are of limited significance. The matters settled by compulsory arbitration tend to include the more important issues in awards and the more difficult disputes, and it is usually easy for, say, a

trade union official who so desires, to dissociate himself completely from such decisions and place most of the responsibility on the arbitration authorities. As he has not participated in these decisions himself he may feel under no great pressure to interpret them to the trade union members he represents. Even when amicable and favourable agreement has been reached with the employers regarding many clauses in the award he may still feel free to castigate the arbitrator and the employer regarding the compulsorily arbitrated clauses. He will often indeed be in a position both to gain credit for favourable decisions and to repudiate all unfavourable ones, though the possibility that he may attract some of the blame himself if he consistently fails to secure what the membership considers reasonable may in some cases impose limits in the long run.

The factors we have mentioned go far to explain a feature of the system on which overseas students in Australia frequently comment, namely the unwillingness of many trade unions and workers to abide by the terms of awards. Such unions and workers do not feel bound for the duration of an award, as workers under collective bargaining tend to do for the duration of their contracts, but feel free to raise and go on strike over matters of substance, as well as grievances, at any time. This result is not altogether surprising in a system in which decisions are frequently imposed rather than agreed to by the workers concerned, which are then not adequately explained to them, and which are likely in any case to be based on principles the reasonableness of which as applied to their own circumstances will often seem doubtful.

It is probable that the system also has adverse effects on the quality of trade union leadership. Relative wages, as we have seen, are determined mainly according to principles of " comparative justice " and, given his principles, the amount of discretion available to the arbitrator on important issues is often relatively small. Decisions turn mainly on the skill and other characteristics of particular types of work and the adequacy of their reward compared with other similar work. The scope for reasoned economic argument is usually very limited, and special ability and knowledge on the part of employer and trade union officials, though they do count, are much less important for the result than they are in the case of their negotiating counterparts under collective bargaining. A union official of very limited ability and outlook may " get by " for a very long time as a result of the extent to which the arbitration system, by its readiness to raise margins generally when margins in the metal trades rise, and by its detailed regulation of conditions of work, does his work for him. In less important matters there is more scope for ability, but smooth advocacy and resistance

and the ability to pick up and make use of legal implications will often be the qualities required.

Collective bargaining, when it exists supplementary to the arbitration system, is not commonly sufficiently well developed to affect the argument greatly. When it is so developed it tends to be a consequence of rather than a significant causal factor in the appearance of special abilities, being usually too small a part of a union's activities to be important causally. Special abilities do, of course, exist. It is not intended to convey the impression that all employers and trade union officials are of poor quality and that communication within trade unions is invariably bad. Recent studies of Australian arbitration have stressed the great differences in the working of the system in different industries [1], and a high degree of competence, responsibility, and organisational vitality are displayed in some cases. The argument here is merely that compulsory arbitration tends to have a dampening effect on the development of these attributes, and even to facilitate the growth of their opposites.

A compulsory arbitration system tends also in many cases to inhibit conciliation and the development of voluntary machinery for dealing with grievances and settling disputes. This may not be immediately apparent because of the large amount of conciliation and direct negotiation which does occur. The industrial relations pattern differs greatly as between industries [2] and may also differ as between firms within an industry. Some industries and firms use voluntary procedures and conciliation to a very large extent ; others very little. A firm may use these methods extensively for dealing with minor issues but rely on compulsory arbitration for more important issues. There is great variety in Australian industrial relations. It must also be said that arbitration personnel commonly, though not always, put very great conciliatory efforts into trying to assist parties to disputes to resolve their differences. When, as under the Commonwealth system in recent years up to 1956, a conciliation commissioner combined the functions of conciliator and arbitrator, parties were sometimes unwilling to conciliate effectively for fear that any concession made at this stage might tell against them if the matter came to be arbitrated upon. Accordingly a distinct class of conciliators was established in 1956, and these are said to be doing useful work.[3]

[1] See Kenneth F. WALKER : *Industrial Relations in Australia* (Cambridge, Mass., Harvard University Press, 1956) ; and Mark PERLMAN : *Judges in Industry* (Carlton, Victoria, Melbourne University Press, 1954).

[2] See WALKER, op. cit, and PERLMAN, op. cit.

[3] See D. W. OXNAM : " Recent Changes in the Federal Arbitration System ", in *Australian Quarterly* (Sydney, Australian Institute of Political

(Footnote continued overleaf)

The direct bargaining that occurs is mainly supplementary to the arbitration system ; it is rare for industries and firms to settle their affairs entirely without reference to arbitration. Most of this bargaining is of an informal character, within firms, concerning wage payments above award rates. These have been very widespread indeed in the post-war period under full employment and, theoretically at any rate, lack any solid permanent status. In many firms and sections of industry, however, employers and employees negotiate agreements for wages above award rates and for special conditions, and these agreements can often be registered with the arbitration authorities and by this process acquire the legal force of an award. In such arrangements the minimum wages and conditions determined under arbitration awards almost invariably provide the reference point for the negotiated wages and conditions. For example, the agreement may provide for a payment of £1 above the award rate for a particular type of labour. In a small number of cases the employers and employees in an important section of industry habitually determine the major part of their wage structure and conditions of work by direct negotiation, leaving relatively few issues, or perhaps none at all, to be settled by compulsory arbitration. Recently the central trade union body, the Australian Council of Trade Unions, has negotiated an agreement with employers, similar in essential respects to legislation in some of the states, covering long service leave for workers under Commonwealth awards.

Thus, the statements that " the awards and determinations of Australian industrial tribunals ... are in the nature of minima, not maxima ; they have never been otherwise " and that " wide scope remains for bargaining between employers and employees, whether through organisations or otherwise " [1] are correct. Unfortunately, however, they are also very misleading, for they do not tell the whole story. To get a balanced picture of the working of the Australian system, one must consider the way it operates when one side wants to bargain directly and the other refuses to do so. This kind of situation is of great significance for an understanding of the system. It is the settled policy of many employers, particularly in the important and influential metal trades, to refer disputes about all matters of any importance, and frequently those about relatively minor matters as well, to arbitration. They do

Affairs), Mar. 1957, for an account of the 1956 changes ; and *Industrial Information Bulletin* (Department of Labour and National Service), Sep. 1957, pp. 845-855, for a report by the President of the Commonwealth Conciliation and Arbitration Commission on the first year under the new legislation.

[1] FOENANDER, op. cit., pp. 112-113.

not favour making concessions to employees by mutual agreement with them but prefer to stand by arbitration awards and to insist that any changes be made only through the arbitration system.

There are a number of reasons why such an attitude has developed. In many cases the firms and industries have grown up under arbitration ; there was no pre-existing voluntary machinery and because of compulsory arbitration they have not felt any urgent need to develop it. A firm or industry which makes some concession by voluntary agreement with employees runs the risk that the trade union might seek and be successful in having the concession embodied in an award and applied more generally than the employer desires.[1] For many employers the minimum wages and conditions determined under arbitration serve as a convenient focal point, opportunely provided by the arbitration system, on which they can try to hold the line against trade union demands. Moreover, as the determination of minimum wages on principles of comparative justice leaves arbitrators so little room to manœuvre in the granting of wage increases, many employers feel that they have little to lose by refusing to negotiate directly. A further consideration is that authorities concerned with tariffs, price-control and similar matters tend to base their calculations on award wages. Compulsory arbitration thus tends to inhibit the development of direct bargaining and voluntary machinery in many cases by making them seem unnecessary and undesirable.

It is, of course, not only in Australia that employers have sometimes been unwilling to bargain with employees. In collective bargaining countries the trade unions have frequently had to put very great pressure on employers, through prolonged strikes, to induce them to negotiate. Under collective bargaining, however, it is necessary for the parties eventually to arrive at some sort of accommodation and after a series of such episodes voluntary machinery of some sort will probably be established.

The important difference under compulsory arbitration is that the parties are under no such necessity to sort things out for themselves and arrive at a working basis. This is because the existence of a general compulsory arbitration system, at any rate as it has developed in Australia, profoundly modifies the use that may be made of the strike weapon. It has become a basic tenet of the arbitration system that employees cannot expect both to enjoy the benefits that arbitration affords and at the same time remain free to go on strike. As Professor Foenander puts it, " a party to a dispute cannot reasonably expect to have it both ways,

[1] See R. W. HARVEY : " Principles and Precedents in Industrial Relations ", in Australian Institute of Political Science : *Productivity and Progress*, edited by John WILKES (Angus and Robertson, 1957).

as many union officials would like—that is to say, enjoy the benefits of authoritative aid in the form of an award, and at the same time feel at liberty to resort to direct action if dissatisfied with the contents of an award ".[1] Arbitrators, without question, often do their best to encourage conciliation between parties to disputes. If, nevertheless, an employer refuses to engage in direct negotiations, or if such negotiations fail, and a union persists in strike action, the arbitration authorities will frequently, at the request of the employer, take action to force the employees to return to work.

Under the Commonwealth system, for example, one sanction is that a recalcitrant union may be deregistered and thus " cease to be entitled to the benefits of awards ". There are hazards associated with deregistration that trade unions dislike and weaker unions tend to avoid getting into a situation where it might occur. Stronger unions regard it less seriously and employers have not usually felt it expedient to incur unrest by reducing wages and conditions below award levels. Often it is simply part of the battle of tactics that goes on between employers, trade unions and arbitration authorities ; and in the long run, in order to get the benefits some other union may have received, a deregistered union is likely to apologise, be given a lecture on good behaviour, and then be accepted back by the arbitration system. In a small number of cases, however, a rival union attracts members from a deregistered one, and becomes accepted as their spokesman by the arbitration authorities. It is the danger of this that gives deregistration its main significance as a sanction.

Much more important, however, again taking the Commonwealth system as an example, is the development of procedures whereby a strike can be treated by the Commonwealth Industrial Court as contempt of court and punished accordingly. In the Metal Trades Award, in 1952, a clause was included forbidding unions under the award to be in any way, directly or indirectly, a party to or concerned in any ban on work under the award. A similar clause has since been included in many other awards and is not unlikely in the course of time to be included in all of them. If a serious strike occurs and there is no such clause in the relevant award the employers are likely to ask for one to be included. If the workers concerned in a strike under an award containing this clause refuse a court order to return to work, the union may be fined up to £500 for contempt of court. A number of such fines have been imposed, but the imminent threat of such a fine is usually sufficient to induce a union to call off a strike.

[1] FOENANDER, op. cit., p. 115.

Arbitration authorities are often cautious, both about introducing the above clause into awards, and in enforcing it, but they do so in many cases and the use of the strike weapon by a union may then be very effectively restricted. Direct bargaining between employers and employees under Australian compulsory arbitration thus operates under limitations absent from collective bargaining systems. Professor Foenander has expressed the view that, " compulsory arbitration . . . should not be regarded or relied upon as the final solution of the industrial problem of a country. It should be contemplated rather as being in the nature of a halfway house, or accommodation, on the road to an ultimate full freedom of genuine collective bargaining." [1] But unfortunately for this view there are elements in the Australian system that directly relieve employers and employees of the necessity of developing their own machinery.

Some of the consequences of such a system can readily be envisaged. We have previously seen that under compulsory arbitration the trade union official is under no great pressure to be well informed concerning the economics of his industry; both decision and the responsibility for it can often be handed over to the arbitration system. Similarly the employer and his associations can remain largely ignorant of what constitutes good industrial relations and how these might be achieved. When a dispute occurs an employer often merely instructs his industrial officer or his association to bring the matter before arbitration and hopes that the matter will be duly settled. Investigation of basic causes and development of the more positive aspects of industrial relations can be, and often are, neglected indefinitely. When ultimate reliance is placed on court orders to striking workers to go back to work, maturity in industrial relations is far away. Fortunately, satisfactory industrial relations have developed in many firms and industries in spite of the system, and, as we have seen, much direct bargaining does occur. It is regrettable that the framework of compulsory arbitration retards rather than assists such developments.

The Growth of Legalism

A by-product of the system is the growth of legalism. This arises in part from the constitutional difficulties of a federation and from the particular nature of the Commonwealth powers [2]; but these aspects, though of very great importance, are largely peculiar to the Australian federal system, and will not be discussed

[1] FOENANDER, op. cit., pp. 116-117.

[2] See D. C. THOMSON, loc. cit.

here. It is enough to point out that they do afford opportunities to a party appearing before an arbitration authority to raise legal and constitutional points if this appears to suit its interests in a particular case, and that they require the participation in many proceedings of people with sufficient legal qualifications to be capable of dealing with such points. The opportunities available are frequently taken advantage of and expensive litigation sometimes ensues. Appropriate constitutional amendments, if they could be secured, would greatly reduce these difficulties, though some must always remain in a federal system.

There is, however, a strong tendency in Australia to make the Constitution something of a scapegoat in these matters. Quite apart from the Constitution the approach to arbitration in Australia is basically legalistic. The assumption, referred to above, that a party which receives benefits from arbitration cannot be allowed to strike for more, arises essentially from the notion that a decision as to what is " just " in the circumstances is arrived at and enforced by legal processes. Such an imposition of " justice ", however reasonable it may be in law, unfortunately does not make for good industrial relations. As we have seen, it relieves the parties to disputes of that necessity for working out solutions to their own problems which in collective bargaining countries has stimulated the growth of knowledge, responsibility and maturity on the part of negotiators and the development of voluntary machinery. This legalistic approach, and the penalty system which is a corollary of it, could be largely dropped, if desired, without constitutional amendment. This indeed would be seen as the obvious thing to do if it ever came to be felt in Australia that a major object of the system was to foster and assist the development of good industrial relations in a positive sense, for it would thus be recognised that the existing legal approach was largely irrelevant. The minimum wages and conditions determined by the arbitration authorities would then be genuine minima and the parties would be as free as they are in, say, Great Britain or the United States, to bargain for wages and conditions above the minima.[1] It is, however, beyond the scope of this paper to consider the various possibilities that emerge.

Further elements of legalism arise from the character of hearings before arbitration. It is obvious that when minimum wages and conditions of work are set down in great detail by an arbitrator there is much room for discussion of precedents, the interpretation of awards and the like, and that the abilities of people with legal

[1] See E. I. SYKES : " The Role of Law in Industrial Relations ", in *Australian Quarterly*, June 1957.

training are likely to make them particularly useful in procedures involving such matters. This is illustrated by the fact that attempts from time to time to curtail the part played by lawyers have been largely unsuccessful, and by the very great demand that exists from employers' associations and large employers for individuals with limited specific legal training to work as industrial advocates. There might seem no obvious reason why compulsory arbitration should be any more legalistic in these respects than collective bargaining, which often involves very similar discussions concerning the details of contracts between employers and employees.[1] Special factors seem, however, to arise in Australia. One of these is that, though much of the work of arbitrators, especially in dealing with grievances, is carried out very informally, a large part remains where judicial style is maintained, counsel appear, wigs are worn [2] and senior arbitrators are called judges, even when their work is not strictly judicial. This greatly affects the tone of the system. Other aspects are the greater reliance placed on arbitration as compared with negotiation in Australia, and the fact that an Australian arbitrator is in an altogether different position from an arbitrator under voluntary machinery, whose employment depends on his continuing to give satisfaction to both sides. In stating a case before an arbitrator in Australia the restrictive principles he is expected to follow must never be lost sight of and the real issues in dispute may be given correspondingly less attention.

One relatively minor matter may be mentioned at this stage. Protection of the " public interest " has always been part of the Australian conception of arbitration, and it is felt that possible collaboration between employers and trade unions to raise both wages and prices should not be facilitated. In introducing the new Commonwealth legislation in 1956 the Minister for Labour and National Service, Mr. H. Holt, put the point as follows :

> There is a public interest, which must be protected. It is not difficult to imagine in a country like ours, where industry is not as competitive as it is in some other countries, agreements between management and labour in a particular section of industry, which are profitable to both but are likely to place an additional burden on the consumer.[3]

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[1] D. C. THOMSON : " Effect of Precedent on Arbitral Decisions ", in *Sydney Morning Herald*, 30 Sep. 1957.

[2] Since the above was written the President of the Commonwealth Conciliation and Arbitration Commission has announced that, except on ceremonial occasions, wigs and gowns would not in future be worn by judges of the Commission and need not be worn by counsel.

[3] See Commonwealth of Australia : *Parliamentary Debates*, 10 May 1957, p. 1989.

The protection afforded the public interest by the arbitration system is, however, very limited. A monopolistic employer and a trade union who desire to do so are not prevented from conniving to exploit the public. All the arbitration authorities can do is refuse to register any agreement they may make and thus prevent it from having any legal force. This very limited protection to the public is, in fact, used very little and hardly seems worth the discouragement to direct negotiations that it sometimes causes. When used it sometimes appears to be little more than a rationalisation for deciding a case in a certain way. In any case, it would seem more satisfactory, where monopoly is objected to, to deal with it by specific legislation for its control.

Certain other legal aspects of the Australian system are also worthy of discussion. The most obvious of these is the effect on the trade unions' traditional " right to strike " of the threat of penalties if orders to return to work are disobeyed. It is clear that the right to strike has now been seriously curtailed and is only maintained at all in some of the Australian arbitration systems by such caution as still exists in the making and enforcement of these orders. It should be noted also that a trade union may be fined for a strike of some of its members, even when it may actually disapprove of and do much to discourage it. To avoid fines trade union officials may be required not only to refrain from officially sponsored strikes, but also to act virtually as strike-breakers of unofficial ones. When threatened by the danger of fines most trade union officials do, in practice, try to bring strikes to an end as the danger point is approached. This, no doubt, is the purpose of the penalty provisions. Far too little thought has been given, however, to the possible long-run effects of such a system. A not unlikely outcome in some cases is that trade union officials might become more and more the administrative agents of the arbitration system, and the trade unions become, in consequence, seriously weakened as independent entities.[1] It is significant that some trade union officials privately welcome the aid the penalty provisions give them in controlling their membership. A possible result in other cases is rank-and-file rejection of moderate trade union officials and their replacement by more militant ones. There is little doubt that the strength of extreme elements in some Australian unions is partly related to the working of the arbitration system.

Those who strongly support the development of the system as an ever stronger method of legal control might perhaps regard the former result as desirable, whilst closing their eyes to the latter

[1] See M. BLACKBURN : *Trade Unionism : Its Operation under Australian Law* (Melbourne, Victorian Labour College, 1940).

possibility. It is frequently argued that just as the State assisted the trade unions in various ways when the existence of unemployment made them weak, so under full employment it may have to adopt policies to check their great strength. There are many sides to this question ; but unquestionably the State does sometimes feel impelled to act in this way, especially when the trade unions are clumsy and incautious in the use of their power. Means should, however, be found which are consistent with full recognition of the importance for Australian democracy of a vigorous, independent and strong trade union movement. The increasing restriction of the right to strike seems inconsistent with this requirement. The strike is, without question, a crude and in many respects an outmoded weapon. It is dangerous, however, to enforce its disuse ; this should come about through the improvement of industrial relations. Australian compulsory arbitration facilitates continuance of the kind of industrial relationships that retard the abandonment of the strike weapon, and then tries to get over its difficulties by penalties.

A more difficult issue is the development of other methods of control of the trade unions. A trade union is registered with the Commonwealth arbitration system, which may again be taken as an example, subject to various conditions as to its purposes, organisation and rules. The arbitration authorities thus acquire a considerable measure of control over various internal affairs of registered unions.[1] In recent years the Commonwealth arbitration authorities have also been given the power, where proper application by a trade union or a group of its members has been made, to make arrangements for the control of union elections. This latter power is not an essential part of the compulsory arbitration system, but may be mentioned here because of the way in which it extends the growth in external control of the trade unions that has developed under that system. Its value is amply shown by Merrifield in his account of the struggle for control of the Federated Ironworkers' Association.[1] Unfortunately, however, there is a tendency for many relatively minor matters, which should properly be settled within the union itself, to be made the subject of litigation and decision by the arbitration authorities or by the courts. All bodies of public importance are no doubt subject at present to some measure of public control, and trade unions can hardly be exempt, especially when, as in Australia, they have sometimes been unable to run their own affairs in a manner acceptable to community standards of administrative integrity. There is no easy

[1] See Leroy S. MERRIFIELD : " Regulation of Union Elections in Australia ", in *Industrial and Labor Relations Review*, Jan. 1957.

solution to the problem of reconciling the need for some measure of public control with the need to safeguard trade union independence and self-reliance. Detailed control seems now, however, to be accepted too readily. Greater reluctance on the part of arbitrators to settle internal trade union matters, and the running of greater risks in arbitration legislation itself, both seem desirable. There should also be more recognition of the extent to which poor organisation and communication in trade unions, and the strength of extreme elements in some of them, which in different ways help to create the problems that lead to external control, are facilitated by the working of the compulsory arbitration system itself. Modification of the system would then be seen as an alternative to the increasing measures of control arising out of its effects.

Economic Aspects

It is an advantage in a country as dependent on a fluctuating export income as is Australia to have a general wage level largely determined by the arbitration system. The economic aspects of Australian arbitration can, however, only be touched on in this short article.[1] Many criticisms of decisions are made by employers, trade unions, economists and others. Major decisions like the determination of the basic wage are made by legal men who almost invariably lack any economic training and whose economic reasoning is usually rather amateurish at best. It can nevertheless be argued that the arbitration judges usually look at more sides to an issue than their critics and that most of their important economic decisions, when looked at broadly, are fairly commonsense and defensible.

Many problems, however, remain to be solved. The first of these is that of wage policy under full employment. Because of high wool incomes, which have been able to bear a burden of redistribution to wage earners, this problem has not yet become of critical importance in Australia. The second, which might only arise seriously if much more collective bargaining supplementary to the arbitration system develops, is that of reconciling a general wage level determined by arbitration according to economic conditions, with direct bargaining over particular wages. There is a tendency now in some quarters to regret that the minima determined by arbitration are not also maxima and to seek to develop the arbitration system in the latter direction. A more satisfactory approach,

[1] For some discussion of recent economic issues see " Arbitration in Australia ", in *Round Table* (London), Dec. 1956 ; and Kingsley LAFFER : " Cost of Living Adjustments in Australian Wage Determination ", in *Industrial and Labor Relations Review,* Jan. 1954.

however, from the standpoint of industrial relations, would be to give the strongest encouragement to direct bargaining concerning payments above the minima, and to put it on a more formal basis than is usually now the case. The general wage level could still be adjusted according to economic conditions through changes in the basic wage, and the like. A third problem is the lack of uniformity between the minimum wage decisions of the different Commonwealth and state authorities that sometimes occurs and that tends to cause industrial unrest. The issues involved in this question are, unfortunately, too complex to be discussed here. It will be clear, however, from this brief introduction to the economic aspects of Australian arbitration, that Australia is faced with important problems to which compulsory arbitration has not yet provided the answer.

Conclusion

As stated earlier in this paper the Australian system of compulsory arbitration has notable achievements to its credit. At present, however, this system appears to be operating without any clearly thought-out purpose or sense of direction. In important sections of industry arbitration seems to be retarding rather than assisting the development of good industrial relations. The growth of legalism is having adverse effects, both on industrial relations and on the trade union movement, and important problems in the economic sphere remain to be solved.