AUTHORITARIANISM IN INDUSTRIAL RELATIONS — THE AUSTRALIAN SITUATION*

By observers in other countries the Australian system of compulsory arbitration is usually regarded as highly authoritarian in nature. This characterisation is usually accompanied by an inference of condemnation, that is to say the implied suggestion is that this represents a "bad" state of things or at least one that represents a half-way house on the way to something better; the "something better" of course would be some form of what is usually called free collective bargaining. It is the purpose of this article firstly, to investigate the question at what points and to what extent the Australian system is correctly described as authoritarian and secondly, to determine whether the elements of authoritarianism which exist represent a phase appropriate to a community in a certain stage of development which may be expected to disappear with the development of more sophisticated industrial relationships. It is not intended to present an elaborate comparison with collective bargaining nor to elaborate in any detail the question whether the latter technique represents the ultimate desirable goal.

Not much has been written about the Australian system and what does exist has come mostly from two classes, lawyers and economists. Of the lawyers it may be said that they tend to concentrate too much on the provisions of the arbitration statutes and court decisions as to their interpretation,[1] whilst economists look too much to the wage fixing activities of the tribunals and are prone to forget that the tribunals deal with many situations not involving economic data, for instance a dispute

* In this article the decisions of the High Court of Australia (appearing in the Commonwealth Law Reports or the Argus Law Reports) have been cited respectively as "C.L.R." and "A.L.R." Other case references have been kept to a minimum but the following citations have been used: —

C.A.R. — Commonwealth Arbitration Reports.

A.R. (N.S.W.) — Reports of the decisions of the New South Wales Industrial Commission.

F.L.R. — Federal Law Reports.

Q.J.P. — Queensland Justices of the Peace Journal.

1. In considering High Court decisions on the competence of Commonwealth industrial authorities, one can easily be introduced into a highly rarified atmosphere of constitutional interpretation which has little to do with the day-by-day working of industrial tribunals,

as to demarcation[2] or one involving the question of wrongful dismissal of a worker. There seems to be a considerable need for some study at a University level of the whole topic on an inter-disciplinary basis. Some impression of what the system really does can indeed be gained from perusing the decisions of the various industrial tribunals from the viewpoint of the factual situations involved and the technique adopted in dealing with them rather than from that of the actual decisions arrived at. On the other hand, perusal of the High Court decisions on the Federal arbitration jurisdiction may well give an unreal picture inasmuch as one tends to get the impression of a highly legalistic system operating under tremendous difficulties caused by a complex constitutional structure.[3]

Anything approaching a true picture, moreover, cannot be gained without some knowledge of trade union-employer relationships and attitudes and it is precisely here that factual data are very difficult to attain. Official figures dealing with the number of strikes, the amount of man-hours lost through industrial stoppages, the number of disputes settled and so on are of little help in this connection and may indeed prove positively misleading.

One can take an "authoritarian system" in labour relations as being one where the State, through its Parliaments, administrative agencies or courts plays a substantial part in regulating the form and content of industrial relationships and the conduct of one or the other of the two parties operating in industry and in imposing its own solution in an actual area of dispute. It is not implied that such a system necessarily operates on an undemocratic basis or that the intrusion of the State represents something of which community feeling at large disapproves.

The aspects where the Australian system is usually regarded as State interventionist in character are probably four in number, *viz.* direct legislative intervention, the process of dispute settlement, the existence of penal sanctions in respect of strike activity or other forms of what in Australia is usually termed "industrial action" or "direct action" and, lastly, the degree of control over the internal affairs of trade unions.

2. *I.e.* a dispute where a trade union claims for its members the exclusive right to perform work of a certain type.

3. The constitutional limitations on the Federal industrial power are considerable but certain techniques have decisively mitigated their severity. In an actual case before it, however, the High Court has had naturally to abide by the actual language in which the arbitration power has been conferred on the Commonwealth Parliament and a decision whether an industrial dispute exists, for instance, can involve very technical learning.

There is of course a good deal of legislative activity in regard to such matters as the observance of health and humanitarian standards in factories, the provision of workmen's compensation, the method of payment of wages and the like but this represents a pattern which is common to countries not possessing a compulsory arbitration system. It represents a regulation not of industrial relationships but of the conditions of the worker considered as an individual member of society. Some States in Australia have legislated on matters such as long service leave which could equally well have been left to the industrial tribunals. On the whole however the vital matters of wages and hours have been left to the industrial tribunals. This is a matter of necessity so far as the Federal sphere is concerned as the Federal Parliament lacks power under the Commonwealth Constitution to deal directly with the regulation of industry, but State Parliaments have full power to deal with industrial matters subject to the obvious geographical limitation. One should of course add by way of qualification that some State Parliaments, notably that of New South Wales, have legislated directly on the subject of the standard working week whilst many State Parliaments have prescribed what might be called "minimum standards", that is to say industrial awards are required to contain provisions on certain matters not less favourable to employees than those set out in the statute. They may of course be more favourable. These aspects do not however suggest an unusually advanced degree of direct legislative intervention when one considers for instance that there is a minimum wage law in the United States where the quantum is directly prescribed by Congress. The distinctively Australian legislative intervention in trade union affairs is a somewhat more special consideration and is dealt with as a separate aspect.

We come to the question of dispute settlement. It is in reference to this aspect that the word "compulsory" in the title usually applied to the Australian system, is currently regarded as having its aptest application. That the Australian arbitration tribunals can assume jurisdiction in a dispute whether the parties wish it or not and in the last resort resolve it by a legally binding decision is undoubted. However the cases where the Court in a real dispute situation compulsorily forces a solution on the parties are of a somewhat marginal nature. All the Australian statutes place considerable emphasis on conciliation and whilst there are numerous critics who say that there should be more conciliation and less arbitration,[4] it is undoubted that some considerable legislative thought has gone into an attempt to improve the conciliation technique. In a real dispute situation the possibilities of conciliation, for instance through compulsory conference and other methods, are exhausted before arbitration is resorted to. The system explicitly en-

4. Much of the force of this criticism vanishes when it is realised that in many situations the parties are asking not for settlement of a dispute but determination of general questions by an act of a legislative character,

courages a negotiated settlement, though it is doubtless true that the presence of the court system tends to produce less direct negotiation as a pre-court stage and tends to encourage conciliation in the presence of the Court. Bargaining takes place "in the shadow of the Court".

However it is impossible to assess the realities of dispute settlement unless one appreciates what the Australian industrial courts really do under the guise of dispute settlement. In some of the preceding paragraphs hereof the phrase "real dispute" has been used. It is somewhat different to convey the shades of differentiation here involved. Though the earlier State arbitration statutes refer to the settlement of disputes as the essential function of the arbitration tribunals,[5] yet the typical activity in which the tribunals engage is not so much the settlement of isolated pieces of industrial "trouble" on a "party-against-party" basis as the laying down of general industrial rules and norms — a legislative activity. In such cases the parties of course will argue for and against, but what they are really doing is to invite the Court to make a legislative direction, *e.g.* as to wages and hours, which will operate over a considerable segment of industry. In such a case the initiative rests in the normal case with one of the parties — either trade union or employer. The Court does not normally initiate the matter. This process is very clearly observable in the Federal area where the constitutional limitations would most clearly seem to inhibit it. The Federal arbitral body is by the terms of the Commonwealth Constitution limited to conciliation and arbitration for the prevention and settlement of disputes extending beyond the limits of any one State; yet the requirement of "dispute" is satisfied by the fact of a claim made by one party which is not acceded to by the other and in actual practice the dispute is set up by the service of a "log" of claims by one party on the other to which that other does not agree. Whilst the award of the Court is technically binding only on the parties, that is to say the initiator and the party on whom the "log" is served, yet there is no limit to the number of parties on whom such service can be effected and the trouble and expense which such multiple service might be expected to produce is mitigated in practice by the registration with the court of trade unions and of federations of employers, each one of which upon registration is a legal person. Under the auspices of such a "paper dispute" system, it is obvious that legislation on a wide scale is possible and it is through such a system that the declared national basic wage is made standard through those parts of industry which have Federal awards.

In the system in vogue in the United States the result reached by a collective bargaining agreement and the result reached by an arbitrator

5. It must be remembered however that two States, *viz.* Victoria and Tasmania, have remained faithful to the wages board system under which the function has always been frankly legislative,

under the American system of grievance arbitration are clearly differentiated. In Australia they are not. Many Australian awards perform essentially the same function as a collective bargaining contract in America though the Australian award takes the form of a court order, though often agreed upon, and not of a contract. The essentially legislative character of award-making has been recognised by the High Court of Australia.[6]

Where the parties really desire legislation, it is they or one of them who bring the matter into Court. The tribunal does not initiate the claim and force the parties to come into Court, though no doubt it would do so if one of them resorted to direct action and a state of actual or potential industrial dislocation was thereby produced. Moreover the typical industrial awards are very largely the product of agreement. The actual disputed area may be but small; the award becomes something of a code for industry or a particular segment of industry. Many of the matters which go into it, in fact most of them, would be the product of agreement. The analogy of a consent judgment is very apt. In fact in some cases the whole award may be a consent award and this is particularly frequent when variations of an existing award are concerned.

Moreover all the systems[7] recognise the possibility of industrial agreements between union and employer on industrial conditions in general. In some areas, notably in the building industry, direct collective bargaining flourishes and I am informed that arrangements are frequently very informal, for instance by an exchange of letters. Typically however industrial agreements are registered with the Court as this gives them the status of awards and the possibility of enforcement by proceedings for a prescribed penalty instead of by purely common law methods.[8]

One should also add that both the award and the registered industrial agreement, except where they impose restrictions on strike action, usually prescribe employer and not employee obligations. For instance, the wages prescribed are minimum wages so that whilst the employer is bound under penalty to pay the minimum rate, there is nothing to stop the parties from agreeing to a higher rate and "over-award" payments are

6. *E.g.* in *Waterside Workers Federation* v. *Alexander* (1918) 25 C.L.R. 434; The *Boilermakers'* Case (1956) 94 C.L.R. 254 and [1957] A.C. 288.

7. Save in Victoria and Tasmania. In the Federal area, too, the industrial agreement functions within certain rigidities due to the Commonwealth Constitution.

8. The difficulties as to what exactly are the common law remedies, and who are the parties to take them, under a collective bargaining contract have always been recognised.

common in private industry.[9] Frequently arrangements are very informal. The parties are in fact agreeing what shall be the actual rate as distinct from the legally operative minimum rate.

All in all, therefore, it can be seen that whilst in a real dispute situation the Court can and does compulsorily take over the dispute, the situations where it actually finishes the matter by a compulsorily binding adjudication are rarer than those which are settled by conciliation. In a situation where the "dispute" really consists of a desire to have Court legislation with a view to regulate industry the parties really go into the Court area of their own initiative.

Some may be disposed to deny the reality of the distinction above sought to be drawn between the dispute situation and the legislation situation. Any decision, it may be said, which in some way changes existing rights is legislative in character even though its area of application is very small,[10] whilst on the other hand an application for a change of the law involving a large number of industries involves a dispute, in the sense of an unresolved difference of opinion, in all cases where the other party does not agree to the change. It is indeed difficult to crystallise the nature of the difference in precise legal terms and it is quite probable that there are a number of situations where the two elements both appear to a degree which differs from situation to situation. However there appears to the writer to be a difference not only in degree but in principle between, for instance, (a) the situation where waterfront labour threatens to strike because it objects to handling a certain type of cargo and the dispute is resolved by the arbitrator holding that the men shall be supplied with special gloves and should be paid an additional shilling per hour and (b) the situation where the arbitrator includes in an award dealing with a large number of metal trades industries, a clause providing for the proportionate rate of additional wage to be paid to workmen engaged on shift work where the parties have different opinions about this point but have never made it a direct action issue.

One vital point however bearing on the question of authoritarianism is the extent to which the individual or the trade union can decline to be brought into the system or can withdraw from the system. In New Zealand, for instance, whilst the employer can be brought before the arbitration tribunals against his will, the converse only holds good if the trade union decides to become registered. Registration of trade unions is optional and they become subject to the award making and

9. Adequate figures on this very interesting phenomenon are however difficult to obtain.

10. Some decisions are however obviously judicial in character as they involve the application of *existing* rights, *e.g.* a decision on the question whether a worker was properly dismissed for misconductt

dispute settlement powers of the tribunals only if they become registered. [11] Moreover, they can of their own volition cancel their registration, thereby withdrawing from the system.[12] The Australian system is otherwise. Registration of trade unions with the arbitration courts is indeed optional. However, registration of unions, though conferring considerable benefits on the unions themselves and considerably facilitating the award-making process, especially in the Federal area, is not a condition for the assumption of jurisdiction by the Court over employees. There is no doubt that trade unions or even unorganised employees can bring the employer before the Courts against his will either by application to the Court in the States or by the creation of an interstate dispute in the case of the Federal tribunal; there is however equally no doubt that the employer has like powers as regards employees whether they are represented by a registered trade union or not. Again whilst a few of the States permit voluntary de-registration,[13] this is not the general pattern and cancellation of registration can, for instance in the Federal sphere, be effected only by order of the tribunal itself. The fact that the working of the system is not dependent on the existence of registered trade union organisations is illustrated by the recent High Court decision of *R.* v. *Portus and Qantas Empire Airways*.[14] The Australian air pilots had previously been organised in a union of employees registered as an organisation under the Commonwealth arbitration statute under the name of the Australian Air Pilots Association and a certified industrial agreement existed between the Association and Qantas Empire Airways Ltd. The members of the Association, however, presumably impatient with the controls of the arbitration system, purported to resign from this Association, that is to say they purported to disband the previous organisation. They then formed a voluntary association called the Australian Air Pilots' Federation which was not registered. The constitution and by-laws of the Federation contained, *inter alia,* provisions regulating the conduct of its affairs and for the appointment of officers. The officers entered into negotiation with Qantas Empire Airways regarding conditions but an *impasse* was reached. A Commonwealth Conciliation Commissioner summoned a compulsory conference and the point was whether an industrial dispute, the necessary basis for the existence of Federal industrial jurisdiction, existed. The Commissioner held that an industrial dispute existed between the company and such pilots as had been continually in the employ of the company and were members of the new Federation. This holding was challenged in the High Court upon an argument that the Federation, being unregistered and therefore merely an unincorporated association, could not be a party principal in a

11. See Tyndall: *The New Zealand system of Industrial Conciliation and Arbitration* (reprinted from International Labour Review, Aug. 1960), p. 5.
12. *Industrial Conciliation & Arbitration Act* 1954 s.85 (N.Z.).
13. *E.g.* in New South Wales,
14. [1962] A.L.R. 81

dispute. The High Court however held that this was beside the point. The dispute was not with the voluntary association as party principal; it was a dispute with defined existing employees and that was enough to provide a jurisdictional basis. This case was not, to use the phraseology of the judgment, one of a paper dispute "consisting of carefully drawn logs of demand and general refusals" [15] but there is no doubt that the tribunal would have had jurisdiction if it had been. There is no doubt, for instance, that a Court award could have been made if the company had pursued the technique of serving individual employees with written demands, provided only that the situation of "no agreement" was not confined to one State only.[16]

We now come to the question of penal sanctions available against strikes or other forms of resort to direct action. Here there exists a rather formidable apparatus on paper. It is not implicit in the system that resort to strike action is illegal; some form of direct provision or Court order is necessary for that result to be attained. All the States contain some form of statutory provision against strikes, though in some the prohibitions are merely against striking without going through the process of a secret ballot or without giving certain notices — provisions which by implication recognise a general right to strike. However these provisions are but rarely implemented and action under them rarely attains its object unless it is supported by moderate trade union sentiment. It is significant that in the States which have the most thorough-going prohibitions, *viz.* South Australia and Western Australia, prosecutions have been less frequent than in Queensland and New South Wales which have only qualified prohibitions.[17] It is however true that most of the State provisions permit the industrial tribunals to deal with strike situations by way of special orders and injunctions and in actual fact emergency situations will be dealt with by such orders irrespective

15. *Ibid*. at 85. The situation was rather what has been previously designated herein as a true dispute situation with a likelihood of industrial trouble and the matter was brought within the purview of the arbitration court apparatus by the action of two other airline operators.

16. This is in view of the requirement of the Constitution that the dispute must extend beyond the limits of any one State. In view of the fact that it has been held that the dispute is the integer, not the industry, so that a state of "no agreement" existing in more than one State is enough, this requirement has never proved a real stumbling block.

17. It is a fact that in most States the Federal system of awards is more widespread and significant than the State one but it should also be remembered that technically a State anti-strike statute applies to all industries in that State, even to those industries which are governed by a Federal award — *Mt. Kembla Collieries* v. *Craig* (1924) 23 A.R. (N.S.W.) 162.

of the question whether the strike is technically legal or illegal.[18] In the Federal sphere — nowadays much the more important one — there has been no legislation illegalising strikes since 1930. However it lies within the constitutional competence of the arbitration tribunals to include clauses in their awards making a strike a breach of an award. Infraction of one of these so called "anti-ban" clauses enables the Commonwealth Industrial Court to order an injunction breach of which is punishable by severe penalty.[19] Anti-ban clauses are included in the awards governing the turbulent industries such as waterfront and maritime employment. Invocation of the injunction procedure has been quite frequent in these industries but this fact should not lead us to forget that this situation is not a typical one in industries governed by Federal award and the majority of Federal awards do not contain an anti-ban clause.[20] It is probably a fair summary to say that the tribunals, State and Federal, have the power, by and large, to render a strike situation unlawful and invoke legal procedures to suppress it. Whether they convert the potential into the actual depends largely on their assessment of the situation. On the whole the weapons are used only in emergency situations. The big stick is kept in the cupboard, but it is not often used. If one may be pardoned the use of mixed metaphors, one would say that the weapons of suppression are considerable but they work as it were at half-cock. Whether it is desirable to keep penal provisions which are but sporadically enforced is highly debatable. It might well be regarded as leading to a public contempt for the law. There is much to be said for the replacement of some of the absolute prohibitions on strike action by some form of law which would define the element of culpability by reference to the nature of the strike and its causes, for instance, whether it represents a direct flouting of a court award or was merely the outcome of resentment at the time taken to hear a union claim by the courts.

In the sphere of trade union internal affairs there is a high degree of State intervention which would be inconceivable in countries which follow the collective bargaining tradition. Common law provided remedies through the ordinary courts in the case of expulsion or victimisation of members in actual breach of the union rules or through disregard of the procedural requirements of natural justice. However, common law had no answer where the union rules themselves were so

18. More than once the Queensland industrial tribunal has issued injunctions against the continuance of a work stoppage even though there has been a ballot of employees in favour of strike action, a circumstance which renders the strike under the law of this State not illegal, *e.g. Brisbane City Council* v. *Ryan* (1949) 43 Q.J.P. 97 (Queensland Industrial Court).

19. See *Conciliation & Arbitration Act,* 1904-1960, ss.109, 111.

20. However, the very important and far-reaching Metal Trades Award does contain such a clause.

framed as to permit oppression. In Australia, however, the Commonwealth arbitration statute, followed in this respect by some of the State statutes, contains provisions whereby union rules themselves which impose conditions which are oppressive unreasonable or unjust are rendered invalid and a union member can apply for a declaratory judgment accordingly and provisions whereby unions can be directed by the Court to observe the requirements of their rules. Under the first mentioned type of provision, union rules which permitted expulsion of members for doing acts which in the opinion of the union council were "contrary to union principles" or for doing acts which would be likely to bring the union into disrespect have been invalidated;[21] so too have rules designed to close candidature for office against persons who are identified with an organisation opposed to the programme of a particular political party.[22] Complementary to this type of controls, is that associated with the registration process itself. Registration of unions is approved only if the union rules comply with a number of requirements laid down in the relevant statutes and regulations and registration can be cancelled by reason of the state of the union rules or the manner in which they have been implemented. On the whole one would be disposed to say that controls of this type are approved, or at least not vociferously dissented from, by the body of the trade union movement. More contentious are the provisions, introduced over the period 1949-1951, which allow the tribunals to set aside union elections for office, on the ground of irregularities, at an inquiry conducted by the tribunal and also permit a union election to be conducted under the direction of the Court itself on a request for such action being received from a prescribed proportion of the union membership. The disputed ballot provision did useful work and uncovered some bad cases of corruption in the case of some of the unions which in the late forties had fallen under Communist domination but the provision for what have been rather unhappily called "Court controlled ballots" is resented in many quarters as representing an unjustifiable interference with a union's right to control its own affairs.

Overall characterisation is of course not easy. It can fairly be asserted that in the day by day routine functioning of the system the element of agreement plays a very large part, far more than is generally realised. There is a tendency to turn to the Court but this represents rather a way of life than something imposed by law. In dispute situations the cases where the Court imposes a compulsive solution are rather peripheral in character. The same may be said of the invocation of the

21. See such cases as *Ford* v. *Federated Miscellaneous Workers' Union of Australia* (1954) 79 C.A.R. 147; *Kenney* v. *Operative Painters & Decorators' Union of Australia* (1955) 81 C.A.R. 166; *Cameron* v. *Australian Workers' Union* (1959) 2 F.L.R. 45.

22. *Little* v. *Flockhart* (1951) 73 C.A.R. 18.

penal sanctions to deal with direct action. Where the Court exercises its legislative function in the way of promulgation of general rules and norms, it certainly does make the decision but only because that is what the parties expect it to do and even here the cases where the Court is merely setting the formal seal to something upon which the parties have already in substance agreed are very numerous. It cannot be denied however that in the last resort all the compulsive apparatus of the law is available.

There are many merits and demerits in the system when set opposite the methods of direct bargaining. It is not the purpose of this article to investigate or evaluate these in detail. It seems wrong however to regard the system as one which is apt to meet the needs of a society with a primitive system of industrial relations and which will in time wither away. It may be that there will be more of direct bargaining in Australia in the future but it is difficult to believe that the nation will ever abandon that ultimate control by the voice of the State which is at present exercised through the arbitration courts. In an age where the concepts of the welfare state have become more and more paramount, it is surely reasonable to believe that such an important area of human activity as the relations between employer and employee should not be left to the philosophy of *Iaissez faire* and it seems rather a naive premise that the cause of national prosperity is best served by making the two parties in industry as equal in power as possible and sending them forth to pit their bargaining pressures against each other. The Australian system embodies a belief that the State should do more than keep the ring in such cases. Much the same may be said about controls over strikes. All countries, no matter what their ideological climate may be, are forced to take some measures in the way of repression, direct or indirect, when a strike assumes or looks like assuming the status of a national emergency. One has only to think of the provisions of the Taft Hartley law in the United States. The point is that in collective bargaining countries the exertion of control must come from outside the system of industrial relations itself. In Australia however the arbitration system has an in-built system of controls which can be used at discretion. The English nineteenth century system of controls over strikes exerted through the tort actions for damages in the ordinary courts [23] and exerted in the interest of the protection of property rights and business expectancies, was of course the very worst type of action possible and its gradual whittling down and the virtual withdrawal of the Courts from this area [24] should be deplored by no-one. But it does

23. *E.g.* such decisions as *Quinn* v. *Leathem* [1901] A.C. 495 and *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426.

24. As manifested by the decision in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435. Recent English decisions however suggest that this withdrawal is not as absolute as might appear: *e.g. Rookes* v. *Barnard* [1961] 3 W.L.R. 438, though this case has now been overruled — [1962] 3 W.L.R. 260.

not follow that there should be no controls, and the reposing of power to take action in tribunals acquainted with the realities of industrial relations should surely not be regarded as an indication of unthinking repression. Whether the Australian tribunals make the most enlightened use of their opportunities is open to question but it is arguably better to leave such opportunities in their hands than to leave it to sporadic and possibly hastily conceived and vindictive legislation.

So far as trade union regulation is concerned, it may well be that the provisions regarding union elections are ephemeral and will pass when the nation ceases to feel the need for them. However the scrutiny of trade union rules seems to have the elements of permanence; the provisions here represent an attempt to provide the answer to the problem created by the possible victimisation of minorities through the existence of compulsory unionism or closed shop in one or other of its forms. The trade union has vast powers for good or evil; its activities seem to call for at least as much control, though of course differently slanted, as that other phenomenon of modern life, the commercial company. More and more the trend is towards legislation to control the restrictive practices of large commercial combinations; it is understandable that there should also be a social impulse towards regulation of union combination activity where this is anti-social, whether it take the form of an unreasonable use of the strike weapon or oppression of minorities. This does not seem to represent a harking back to the bad old days of repression of the worker or the reflection of the outlook of a primitive system; it may well be the pattern of the future.

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