

CHAPTER 12

ARBITRATION IN INTERNATIONAL AND COMPARATIVE PERSPECTIVE

PART I. A VIEW FROM ABROAD: COMPULSORY ARBITRATION IN AUSTRALIA

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An audience composed almost exclusively of North Americans might be forgiven for questioning the relevance of a paper on, of all things, the arbitration of labor disputes in Australia. Let me begin by suggesting three reasons why a gathering of this kind might want to take an interest in the development and future of a system radically different from that operating in the United States or Canada—or indeed anywhere in the world.

The *first* reason is that Australia currently offers a remarkable example of a labor relations system in transformation. While dwarfed by the magnitude of the changes sweeping Central and Eastern European countries as they struggle with the awkward transition to market economies, the pace and extent of reform in Australia has been unusual for a developed nation with an entrenched approach to the regulation of industrial conflict. The political and economic factors behind the reform process have a familiar ring—(1) the insistence that firms and industries become more efficient to compete effectively in the emerging global markets; (2) the philosophical shift toward regulation through market forces rather than bureaucratic planning; (3) the insistence of management on (re)claiming greater flexibility over the allocation of work and its rewards through the adoption of human resource management policies; and (4) the growth of marginal or

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precarious employment in the form of casual, contract, or clandestine work. In many countries these pressures have tended to swing the pendulum away from organised labor, reducing the incidence of collective bargaining or producing less favourable outcomes for workers. In some instances, as in the United Kingdom, the process of change has been hastened by legislation directed at reducing the power of trade unions. Even where collective bargaining has survived as a significant institution, as in Germany and Sweden, it has frequently gravitated away from national or industrial level negotiations and toward individual enterprises or workplaces.¹ But in Australia the changes have gone deeper still, prompting a reevaluation of the entire legal framework governing the resolution of disputes. Remarkably, this has been a process where the trade union movement, far from a helpless observer, has been an active agent for change.

The *second* reason stems from the most important feature of the transformation of the Australian system: the downgrading of the role of compulsory arbitration of interest disputes. In one way or another, labor arbitrators and mediators play an important role in almost every industrialised market economy, but in none is that role as pervasive and distinctive as in Australia. The concept of compulsory arbitration, adopted a century ago and virtually unchallenged until the last few years, has given Australian labor relations a truly distinctive cast and attracted generations of international scholars. While it still occupies a central place in the regulatory framework, it has become an endangered species, its importance diminished by recent legislative reforms and its very existence under threat from at least one (and possibly both) of the main political parties. For international observers it may become a last chance to see this unusual species of labor arbitration before it is rendered extinct by the forces of globalisation and deregulation.

In that light the *third* reason for tracking Australian developments is rich with irony. At the very time many of Australia's politicians, employers, and union leaders seem prepared to dump compulsory arbitration, there are indications that the United States government is willing at least to consider its advantages as a

¹For a useful summary of these trends, see Clarke, *Conclusions: Towards a Synthesis of International and Comparative Experience of Nine Countries*, in *International and Comparative Industrial Relations: A Study of Industrialised Market Economies*, 2nd ed., eds. Bamber & Lansbury (Allen & Unwin 1993), 245.

model for labor market regulation.² Australia was recently visited by Ray Marshall, former Secretary of Labor in the Carter administration and a member of President Clinton's Commission on the Future of Worker-Management Relations. During his stay he praised aspects of the local system and expressed bewilderment as to why Australia might want to move down the American path, as so many of its leaders seem intent.³ It is hard to believe that the American political process would ever permit the kind of dramatic change required to incorporate an element of compulsory arbitration. Nevertheless, the attention is interesting and may perhaps help to remind Australia's would-be radical reformers that the grass is not always greener on the other side. In this paper I hope to give some idea of why compulsory arbitration has survived so long in Australia, the pressures it is now under, and the practical advantages it has to offer as a means of regulating conflict in the labor market.

Labor Arbitration in Australia

Almost every labor relations system around the world makes provision for the mediation of disputes, and/or for the more formal process of third party arbitration in the event that settlements cannot be negotiated. Since the end of the 19th century in Australia, these processes, even for the private sector, have been funded and regulated by the state rather than through contractual agreement between management and labor, as is often the case elsewhere. Rather than the parties appointing their own mediator or arbitrator, they take their dispute to a public tribunal. But what is truly distinctive about the Australian approach is that the processes are *compulsory* in nature. Once a dispute comes to the attention of the tribunal, whether by referral from one of the parties or otherwise, the parties are compelled both to participate in whatever conferences or hearings the tribunal decides to hold and to abide by any orders or decisions issued by the tribunal.

The theory behind this approach is deceptively simple, and one that was most famously articulated by H.B. Higgins, one of its

²Bruce & Carby-Hall, *Rethinking Labour-Management Relations: The Case for Arbitration* (Routledge 1991), also propose a system of compulsory arbitration (albeit one with rather different features from that operating in Australia) as a panacea for the problems facing the British system of labor relations.

³"While Australia has got a lot of problems, I don't think they have got a lot to learn from us about how to deal with them," *quoted in* The Australian, Feb. 17, 1994, at 9.

leading proponents and a member of the first federal tribunal. Compulsory arbitration, wrote Higgins, would create a "new province of law and order" to replace the "rude and barbarous process of strike and lockout."⁴ Rather than threatening and inflicting harm on each other in order to gain the upper hand in the course of bargaining, management and labor would be compelled to substitute reason for might.

Whereas many other countries flirted briefly with compulsory arbitration and then discarded it (save perhaps for essential industries or times of emergency), its survival in Australia can in no small measure be attributed to the attitude of organised labor. Resoundingly defeated in a series of major disputes in the 1890s, in which employers took advantage of an economic downturn to take back many of the gains secured for workers over the previous 50 years, the union movement made two momentous decisions. The first was to seek political representation through the formation of the Australian Labor Party (ALP), which quickly became one of the two dominant forces in Australian politics. The second, albeit taken with reluctance and considerable dissension from more militant unions, was to cooperate with the federal system of compulsory arbitration introduced in 1904. Under this system registered unions were in effect guaranteed the right to represent workers and be heard in the tribunal. The price of registration was significant: Not only would the union's internal affairs be subjected to stringent controls, it would also have to accept a prohibition on all strike action. Nevertheless, most unions were prepared to pay this price, judging that it was far outweighed by the security offered by registration: employers who refused to bargain with registered unions would quickly be compelled to attend proceedings in the tribunal. Unencumbered by the cost and effort of recognition disputes, unionism flourished under compulsory arbitration. In practice, unions were still able to galvanise their membership through strategic strike action, designed to soften up employers and the tribunal itself; employers quickly discovered that it did not pay to put too much reliance on the remedies theoretically available against such action.

The initial assumption of those who introduced the federal system was that it would deal with only serious, large-scale disputes, with the bulk of the work left to the systems created in each of

⁴Higgins, *A New Province for Law and Order*, 29 Harv. L. Rev. 13, 14 (1915).

Australia's six States.⁵ However, unions who chose to register under the federal system were often federations determined to create national standards for the workers they represented, or at least to deal with employers in a single forum if at all possible. They achieved these aims by simultaneously serving demands for a common set of employment conditions, or a common improvement in those conditions, on as many employers as possible. The federal tribunal was then asked to settle this dispute by making an award, a binding instrument regulating employment conditions with the force of delegated legislation, or by varying an award already in force. This award was binding upon all employers represented in the tribunal proceedings, regardless of whether or not they employed any union members, unless deliberately exempted by the tribunal.

In this way, from originally being an option of last resort, the federal tribunal has become a bureaucratic agency for the regulation of employment conditions. In doing so, it has been encouraged by the legislature to have regard to the public interest, including the general state of the economy.⁶ Consequently, the tribunal cannot simply search for a settlement acceptable to the immediate parties; the outcome must ideally serve the common good, however that is conceived. The tribunal has for most of the century accepted the union case for uniformity of conditions, so that awards typically set minimum standards operating across each industry or craft. This centralised approach reached its zenith with the practice of national wage cases. These are hearings which in theory concern a dispute over wage movements in a selected industry, but which in practice offer an opportunity to the peak employer and union bodies, as well as the federal and State governments, to put arguments to the tribunal over the wages of all workers covered by federal awards. In handing down its decision, the tribunal takes the opportunity to formulate and publish the principles it will apply in relation to any dispute concerning wages over the ensuing period. It has also been common to hold test cases, albeit on a less regular basis, in order to determine the tribunal's attitude toward other important issues, such as working hours, job security, or leave arrangements.

⁵Most States used a combination of arbitration tribunals and wages boards, tripartite bodies with union and employer representatives and an independent chair, vested with authority to regulate employment conditions for designated industries or crafts. During the course of this century, the wages board has disappeared from most State systems.

⁶See Isaac & McCallum, *The Neutral and Public Interests in Resolving Disputes in Australia*, 13 Comp. Lab. L.J. 380 (1992).

Some 80 percent of Australian employees are now covered by awards, which stipulate minimum standards on matters such as wages, working hours, and leave.⁷ Many awards are made by State tribunals, whose powers are broadly similar to the federal tribunal. Over the years many unions and employers have chosen for a variety of reasons to conduct their relations through the State systems. Nevertheless, most of the more important industries fall within the federal system, and federal tribunal decisions on wage principles and other major test cases are generally adopted by the States. For those reasons this paper is principally concerned with developments in the federal system.

The Role of the Arbitrator

In order to understand the complex role that the arbitrator plays under the Australian system, it is necessary to know something about the structure of the modern federal tribunal, the Australian Industrial Relations Commission (Commission). Under the Industrial Relations Act 1988, the Commission is composed of government appointees who must possess "skills and experience in the field of industrial relations." By convention, a rough balance is maintained between those with a union background and those associated with employers. Many are lawyers and, indeed, the president must have a legal background. On taking office, commissioners are expected to put their past behind them and carry out their functions in a strictly neutral manner. To encourage this, appointments are made for life, with a retirement age of 65. In practice, it has been rare to hear accusations of government stacking of the federal tribunal or of personal bias by tribunal members. Each commissioner is allocated to a number of panels, each with responsibility for a particular industry or craft. In this way members gain familiarity with the background of the disputes they are called upon to resolve; and parties come to know the characteristics of the three or four officials whom they are likely to encounter on a regular basis. Most Commission functions

⁷In most instances the parties bound by an award are free to negotiate "over award" conditions. This is very common in practice where wages are concerned, with most over-award payments negotiated at the enterprise level, or even between the individual worker and the employer on the basis of merit or the worker's market value. Accordingly, there is less uniformity in wage rates than the formal award system might suggest. Nevertheless, unions have traditionally placed great emphasis on "comparative wage justice," leading to a greater degree of compression in wage differentials than is found in most other industrialised countries.

are exercised by single commissioners, though provision is made for appeals to a full bench of (usually) three. Full bench hearings are also convened to deal at first instance with particularly significant matters, such as national wage claims. There is no appeal to a court of law against the merits of a Commission decision, though jurisdictional error can be raised in the courts. Strictly speaking, the Commission cannot under the Constitution exercise any kind of judicial power. Thus, separate provision is made that any rights and obligations created by Commission awards or orders will be enforced in the courts.

When a dispute is notified to the Commission, it is allocated to a member of the appropriate panel, whose first task is to make a formal dispute finding, identifying the parties to the dispute and setting out the matters in contention between them. The commissioner then proceeds to mediate the dispute, summoning the parties to whatever conferences are considered necessary to bring the sides together.⁸ The procedure at this stage is extremely flexible. The extent to which the commissioner talks to the parties separately rather than together, acts as a messenger between them, or takes the lead in suggesting possible solutions, are all matters heavily dependent on the commissioner's individual style. If the parties are able to reach agreement, but on terms requiring a change in their existing rights and obligations, the agreement is submitted to the commissioner for ratification. Subject to what is discussed later in this paper about recent legislative changes, the commissioner is required to "vet" the agreement to ensure that it is in the interests of the parties and, more significantly, of the public. The commissioner is expected in particular to ensure that the agreement complies with relevant principles (especially on wage fixation) established by a full bench decision. If the agreement is accepted, it is accorded the formal status of an award; if not, the parties and the commissioner must continue the search for an acceptable resolution.

If the mediation process fails to produce a settlement, the commissioner refers the dispute to arbitration. The same commissioner takes on this role, unless any of the parties objects, in which event another member of the relevant panel takes over. This right

⁸This process is actually termed "conciliation" in the governing legislation. However, it is appropriate to refer to it as "mediation," since the commissioner is expected not only to bring the parties together but also to take an active role in suggesting and monitoring the terms of settlement.

of objection is intended to encourage both parties and the commissioner to be as free as possible in expressing their views during the mediation hearings. It overcomes one of the commonest criticisms leveled at mediation-arbitration (which is what the Australian system effectively involves), that parties are reluctant to say too much during the mediation stage for fear of compromising their position later on if the matter goes to arbitration. It also avoids the need to insist on a rigid distinction between those who mediate and those who arbitrate, something that is important, given the constant interaction between the two processes.

The arbitration hearing is a reasonably formal affair, with witnesses called and submissions put on behalf of the parties by representatives who may or may not be legally qualified. However, the Commission is not bound by the rules of evidence and is encouraged by the statute to "act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms." At any stage the commissioner may resume mediation if there is a chance of reaching a negotiated settlement. If all else fails, however, the commissioner will consider the matter and hand down a decision, together with a published judgment setting out the relevant reasons. This is often followed by discussions with the parties as to the implementation of the decision, leading if necessary to a further round of mediation or arbitration.

It is important to appreciate that in the course of its work the Commission deals with all kinds of disputes. The federal system has not hitherto drawn the distinction between disputes of interests and rights that is so familiar in other countries.⁹ For example, there is no bar on the Commission dealing with a dispute as to the possible variation of an award still in force,¹⁰ whether the party seeking the variation is concerned that circumstances have changed since the award was made or last varied, or is simply interested in having the Commission revisit an earlier decision. Much of the Commission's workload involves fairly localised situations where exception has been taken to some action or inaction by one of the parties and conflict has either suddenly flared up or seems imminent. Generally speaking, the Commission intervenes and attempts to mediate in these cases without bothering to inquire

⁹See Provis, *Rights Disputes v Interest Disputes: A Distinction for Australia?*, 6 Austl. J. Lab. L. 205 (1993).

¹⁰Whether or not awards have fixed terms, they continue in force until canceled or superseded.

whether the dispute concerns the interpretation and enforcement of existing obligations. Even if the Commission lacks any formal jurisdiction, it will often arbitrate with the consent of the parties and issue recommendations they are free to accept or reject.¹¹ To my knowledge, nobody has yet challenged the Commission for spending public funds in resolving disputes in this private fashion!

A curious feature of the otherwise voluminous literature on Australian labor relations is worth noting. Unlike North America, where studies of the dynamics and outcomes of labor arbitration are common, it is rare to find research on the way commissioners go about their tasks and conceive their responsibilities. Most evidence as to what goes in the Commission is obtained in an informal, anecdotal fashion. An explanation for this gap is that commissioners (and their State equivalents) exercise a variety of functions. Instead of making a one-off decision on a single, isolated issue, a commissioner expects in practice to have continuous involvement with a set of parties over a period of time. Both the parties' attitude toward the commissioner and the commissioner's sense of what the parties will or will not find acceptable must inevitably be conditioned by an awareness of the need to continue doing business with each other. The Commission's published decisions cannot be read in isolation from this practical context. The most valuable evidence of the Commission's true thinking is often found in what is said during mediation—and that must remain confidential for obvious reasons. All this makes it hard to study the arbitral process in any scientific fashion.

Another possible reason for the lack of academic attention to the dynamics of Australian labor arbitration is more personal in character. My own experience with American labor law professors is that many are interested in the broader field of dispute resolution, often teaching and writing not only about negotiation skills, advocacy techniques, and the like, but also about broader questions as to the utility of processes providing alternatives to

¹¹In the past this has been a feature of the Commission's approach to disputes over wrongful discharge. Constitutional complexities have made it difficult to find a satisfactory way to provide a remedy to workers covered by federal awards who are unfairly dismissed; see Stewart, *Employment Protection in Australia*, 11 Comp. Lab. L.J. 1 (1989). However, the situation has been resolved by the Industrial Relations Reform Act 1993, which implements the requirements of the International Labour Organisation Convention No. 158, concerning Termination of Employment at the Initiative of the Employer. Workers who have no other adequate remedy may now complain to the newly created Australian Industrial Relations Court, with the Commission's role being to mediate each complaint in an effort to settle the matter before court proceedings: see Creighton & Stewart, *Labour Law: An Introduction*, 2d ed. (Federation Press 1994), 201–10.

litigation. This is hardly surprising, since they also act as labor arbitrators and thus have firsthand experience. In Australia, by contrast, the burgeoning literature on alternative dispute resolution makes little reference to the mediation and arbitration of labor disputes, despite the fact that these processes were in place decades before the first experiments with the mediation or arbitration of family disputes, antidiscrimination suits, or small commercial claims. It is surely no coincidence that the leading academics in the dispute resolution field tend to lack any background in labor relations, or that labor law academics like me have not acted as arbitrators and thus do not have the same personal interest in pursuing more general issues of dispute resolution.

Compulsory Arbitration and Collective Bargaining

It is common for those writing about the Australian system of compulsory arbitration, particularly in a critical vein,¹² to contrast it with systems based on pure collective bargaining. This is not to suggest that collective bargaining does not take place in Australia, far from it. There is abundant evidence that many disputes are not referred to tribunals at all, but settled between the parties, often by agreements which, even if reduced to writing, are never submitted for ratification.¹³ And many disputes that do come before the tribunals are resolved with minimal involvement from the tribunal members, beyond creating a channel of communication between the parties. Nevertheless, it can hardly be denied that collective bargaining in Australia takes place under the shadow of unilateral access to the tribunals. There is bound to be a chilling effect, in the sense that the parties know they do not have to take ultimate responsibility for finding a settlement, but can always leave it to the tribunal. And parties know too that, if they want to give legal effect to any agreements they might reach, they must satisfy the tribunal's requirements.

While these points are valid, it is vital not to underestimate the complexity of what goes on in the tribunals. Theoretically, as

¹²See, e.g., Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales Univ. Press 1978).

¹³The Spread and Impact of Workplace Bargaining: Survey Evidence From the Workplace Bargaining Research Project (Department of Industrial Relations/Australian Centre for Industrial Relations Research and Teaching 1993). It is a moot point whether unregistered agreements have contractual force between the parties; see Mitchell & Naughton, *Collective Agreements, Industrial Awards and the Contract of Employment*, 2 Austl. J. Lab. L. 252 (1989).

Dennis Nolan points out, a compulsory arbitration system presupposes that "for every industrial dispute there exists some determinable 'correct' answer" and that "a tribunal can mandate the correct terms to the exclusion of the parties' preferences."¹⁴ It may well be that those originally responsible for adoption of the Australian system did think in those terms. But, as ever, life is not that simple. Just as compulsory arbitration has not heralded the end of strikes, so in practice the tribunals cannot impose their will upon management and labor merely because they have the legal authority to do so. They must constantly tread a fine line between exercising their powers on the basis of an independent judgment as to the interests of the parties and of the public, and maintaining the respect and cooperation of the parties. This point has repeatedly been stressed by Joe Isaac, a former commissioner. It is worth quoting his description of the Australian system at some length:

It does not have a magic wand to reduce inflation, increase productivity and reduce industrial actions, independently of tangible and appropriate support of the other players. It does not serve the public interest—its *raison d'être*—by prescribing principles or taking actions which, however admirable in the abstract, do not work in practice, generating an unacceptable degree of industrial unrest or adverse economic consequences. Although referred to as a *compulsory* arbitration system, its capacity to achieve favourable economic and industrial outcomes depends on broad consensus on the principles and procedures it formulates, and on its ability to apply these consistently in individual cases.¹⁵

The case of New Zealand is instructive in this regard. That country's system of compulsory arbitration withered away during the 1970s and 1980s, before it was legally put to rest, essentially because of lack of support and respect from major unions and employers.¹⁶ That the Australian tribunals have (so far at any rate) survived periods of uncertainty and challenge to their authority, is as much a testimony to their political skills and adaptability as it is to any innate sense of national attachment to the idea of compulsory arbitration.

Rather than contrast compulsory arbitration and collective bargaining so starkly then, it may be helpful to think of the

¹⁴Nolan, *Regulation of Industrial Disputes in Australia, New Zealand, and the United States*, 11 Whittier L. Rev. 761, 764 (1990).

¹⁵Isaac, *The Australian Industrial Relations System: A Flexible Institution*, Working Paper No. 54 (Centre for Indus. Rel. and Lab. Stud., Univ. of Melbourne 1990), 13 (emphasis in original).

¹⁶See Nolan, *R.I.P.: Compulsory Labour Arbitration in New Zealand, 1894–1984*, 12 Comp. Lab. L. J. 411 (1991).

Australian system, as it operates in practice, as involving a form of *multipartite* collective bargaining. The Commission has two separate roles to play. At one level, it is the neutral facilitator/adjudicator, helping the parties to negotiate and deciding between them if they cannot agree. But, unlike many third party neutrals, it is not indifferent either to the outcomes or to the parties' reaction to that outcome. In order to discharge its statutory responsibilities and to retain the confidence and cooperation of the parties, it must strive for an outcome they can live with, which is in the public interest. In effect then, the Commission is also a party in its own right, since it must bargain with management and labor to determine the limits of what they will accept, while staying within parameters acceptable to the other party whose interests the Commission is charged with representing, that is, the public.

To speak of the Commission bargaining with management and labor may seem strange because, after all, the Commission has the legal authority to impose its will on them. But no amount of legal authority counts if parties consistently refuse to accept the Commission's decisions. In one sense this is a corollary of the bargaining power that management and labor bring to the system, which can be used against the Commission as much as against each other: in the case of management, the economic threat of restructuring, relocation, or reduction in investment; in the case of unions, the capacity to organise industrial action on a scale that cannot be suppressed without excessive cost.¹⁷ But management and labor are also able to exert political power against the Commission. This may be achieved merely by open revolt. If a system premised on the encouragement of industrial peace is producing chaos and conflict, public and governmental pressure will soon be brought to bear on the Commission to change its stance. It may also be achieved by lobbying the government behind the scenes, a tactic particularly valuable for unions when the ALP is in power, and conversely for the employers when the conservative parties (who traditionally are pro-business) are in office.

This in turn introduces a further complexity. Just as the Commission must achieve an acceptable level of compliance from management and labor, so it must also perform its functions to the reasonable satisfaction of the federal government. Apart from

¹⁷The weaker the union(s) and employer(s) involved in any given case, the stronger the Commission's bargaining power and the greater its capacity to impose outcomes it considers desirable. The Commission has little difficulty, for instance, in dealing with disputes over the employment conditions of academics!

disputes in the public service, where the government is the employer, the government has a general interest in the outcomes of Commission proceedings in terms of their overall effect on the economy. This interest is at its most pronounced in national wage cases, where the government is represented and puts formal submissions to the Commission. Once again, the Commission must in effect bargain with the government, as much as with employers and unions. In the Commission's favour is the moral authority stemming from its independent status and its guardianship of the public interest. The government, on the other hand, has two levers: the legitimacy of its claim to determine the nation's economic policy, and, more pointedly, its power to amend the legislation governing the Commission. As Isaac and McCallum put it:

In serving what it perceives to be in the public interest, the Commission has had to walk a tightrope, balancing viable industrial realities against the government's desire that Commission rulings fit within its federal economic policy. Not surprisingly, the Commission occasionally loses its footing.¹⁸

This process of accommodation has been particularly awkward for the Commission over the past decade. During that time the ALP has been in power federally and has sought to determine wages policy by reaching a succession of Accords with the Australian Council of Trade Unions (ACTU), with the outcome of these negotiations then presented to the Commission as a joint submission to national wage hearings. In most cases the Commission has had little political choice other than to accept the broad thrust of each Accord, though it has often insisted on varying some details. The one occasion where it rejected the Accord partners' submissions outright has resulted in profound changes in the Commission's role, as will be explained in the next section. In any event, the Commission's recent experiences underscore the need to view the modern Australian system as a complex interplay of political and economic forces, rather than in the simplistic terms in which it was first conceived.

Changing Times: Compulsory Arbitration Under Threat

As noted in the introduction, Australia has not been immune to domestic and international pressures favouring significant re-

¹⁸Isaac & McCallum, *supra* note 6, at 397-98.

forms to the labor market.¹⁹ During the mid-1980s a broad consensus emerged that, in order to improve the competitiveness and efficiency of Australian industry, significant changes must be made in Australian work practices. Most unions and employers acknowledged the need for a fundamental shift in their attitudes towards labor relations: henceforth, emphasis must be on cooperative rather than adversarial behaviour. Unsurprisingly, however, the consensus disappeared when it came to the question of how to achieve these laudable goals. Two competing views could be discerned.

The *first* was espoused by the ALP government, the ACTU, and (albeit quietly) many large employers: that change could be generated from within the existing system of regulation. With the support of the Accord partners, the Commission was given the job of encouraging and managing the necessary reforms. This strategy took shape in 1987 and following years, when wage increases were tied to the elimination of restrictive work practices and other changes designed to improve flexibility and productivity. In return, unions sought to have awards restructured to place more emphasis on multiskilling and the creation of career paths for workers. It was also common for them to agree to formal grievance procedures, which in the past had been less common than in other countries.

In the *second* view, by contrast, all this was too little, too late. For a growing number of critics in business and elsewhere, the problem was the system itself.²⁰ The objection in part was to the framework of awards created over the previous 80 years, with its emphasis on uniformity of conditions and the maintenance of wage relativities between different groups of workers. More fundamentally though, the system was considered to entrench unions to an unacceptable degree, making it difficult for employers to bargain directly with their workers, whether unionised or not. The critics, many of whom espoused libertarian philosophies of freedom of choice, found common cause with academic commentators, such as John Niland, who had long bemoaned the extent to which the compulsory arbitration system constrained collective bargaining.²¹ Accordingly, they proposed its abolition, or at least

¹⁹See generally Stewart, *Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation*, 5 Austl. J. Lab. L. 101 (1992); Mitchell & Rimmer, *Labour Law, Deregulation, and Flexibility in Australian Industrial Relations*, 12 Comp. Lab. L.J. 1 (1990).

²⁰See, e.g., *Arbitration in Contempt* (H.R. Nicholls Soc'y 1986).

²¹Niland, *supra* note 12.

substantial amendment, to facilitate decisions by employers and employees to opt out of award coverage. This approach was adopted by the conservative Liberal and National parties. By the 1993 federal election it had become a central plank in their manifesto for change.

That election campaign was a watershed in Australian politics. To the surprise of many, the ALP triumphed, in no small part due to its stance on industrial relations. With strong support from the union movement, the government emphasized the extent to which the award system operated as a safety net, providing minimum standards for workers and protecting them from exploitation by unscrupulous employers. Much was made of the government's commitment to social justice; this was contrasted with the effect the conservatives' deregulationist policies would have on female workers, migrants, and other disadvantaged groups who lacked the industrial muscle to protect their interests. As a result, the government was elected with a mandate to continue the process of labor market reform, but on its own terms and very much with the involvement of the unions.

At this point it might be thought that the future of the Commission and its power of compulsory arbitration would be relatively secure. This has not proved the case, attributed in no small measure to the souring of relations between the ACTU and the Commission over the past few years. The rift can partly be traced to dissatisfaction on the part of unions with alleged inconsistencies between individual commissioners in the processing of award restructuring agreements. However, it really flared up in April 1991. After repeated calls from business for the introduction of a greater measure of decentralised bargaining,²² the ACTU and the government proposed a new wage fixation system whereby wage increases would be available predominantly through enterprise bargaining. From the ACTU point of view, the strategy could best be regarded as a proactive response to the very real threat of a conservative government: unions must learn how to prosper in a decentralised environment before it was forced on them. The Commission refused to accept the new system, citing inconsistencies and unanswered questions in the submissions put before it.²³ Within six months the Commission had reversed its stance and

²² See, e.g., *Enterprise-Based Bargaining Units: A Better Way of Working* (Business Council of Australia 1989).

²³ National Wage Case April 1991, 36 Indus. Rep. 120 (1991).

incorporated an element of enterprise bargaining into its wage-fixing principles.²⁴ But relations have remained strained ever since and were certainly not improved by two government decisions, allegedly at the ACTU's behest: restructuring of the Commission so that members must now apply to the government for internal promotion, and breaking the salary nexus between commissioners and Federal Court judges.

The extent to which the Commission has fallen out of favour with the leadership of the ACTU and their allies in the federal government is apparent in the Industrial Relations Reform Act 1993, which came into force in March 1994. Among the many changes made by this complex piece of legislation are several casting the role of the Commission in completely different terms. The key reform relates to the certification of agreements. Extending the effect of 1992 amendments, the new Act has now created a situation where, provided certain criteria are met, the Commission *must*, not may, ratify any collective agreement submitted to it. If the agreement is confined to a single enterprise, and at least one union is a party,²⁵ the Commission is prohibited from considering whether its terms are in the public interest unless the agreement involves a reduction in the employment conditions of some or all of the covered workers. Once an agreement is certified, it overrides any award otherwise applicable. The legislation makes it clear that, if management and labor wish to engage in enterprise bargaining, the Commission may assist them by mediating any differences. It is also empowered to intervene if it believes that either party is not bargaining in good faith, a legal requirement familiar to North Americans but hitherto unknown in Australian labor law. But it must not exercise its powers of arbitration to override the parties' deliberations.

These reforms do two things. *First*, they provide a clear incentive to employers and unions to engage in collective bargaining, particularly at the enterprise level, with fewer constraints on the content or outcome of their negotiations, albeit perhaps slightly greater regulation of the bargaining process itself. The changes in

²⁴National Wage Case October 1991, 39 Indus. Rep. 127 (1991).

²⁵The legislation does make separate provision for enterprise flexibility agreements, which employers may negotiate directly with their employees and register without union consent. Although bitterly opposed by the ACTU, the provisions are in practice unlikely to be used very much, given the complexity of the procedures involved and the right of unions to intervene in the Commission to oppose registration. For an overview of the new statutory provisions relating to bargaining agreements, see Creighton & Stewart, *supra* note 11, ch. 6.

this regard will not satisfy those who prefer to see the Commission's role curtailed altogether; but they do undoubtedly reduce the element of compulsion in the system. *Second*, while the Commission is still required to act as a guardian of the public interest, its primary role is to ensure that the award system continues as a "safety net," a phrase that has now found its way into the legislation. This is emphasized by one major addition to the Commissioner's powers: the capacity, on application, to formulate minimum wage rates for groups of workers who are not covered by federal awards and who do not otherwise have unilateral access to arbitration at State level.²⁶

The corollary of this protective role is that the Commission has been relieved of much of its power to control increases in award conditions. A union may, for example, persuade an employer to agree to wage rises not justified by improvement in productivity or even profitability. As long as these rises are included in an enterprise agreement, the Commission no longer has the power to object, whatever fears it may have for the inflationary consequences of the agreement, its effect on employment levels, or its impact on settlements in other sectors of the economy. This clearly suggests a loss of trust in the Commission, an impression strengthened by the remarkable transformation the new Act has effected in the tone and complexity of the governing legislation. When originally passed, the 1988 Act set out the Commission's powers and functions in concise terms which concentrated on empowering the Commission to act in accordance with its view of the public interest. The new Act, by contrast, has more than tripled the size of the relevant provisions, going into excruciating detail as to procedures. The dominant tone of the new provisions is prescriptive rather than facilitative: they make clear what the Commission must and must not do.

It is not at all certain that these reforms will achieve the objectives suggested by the government's rhetoric. In the first place, there is no guarantee that, left to their own devices, employers and unions will in fact engage in the kind of enterprise bargaining the government seems to want or envisage. This problem has been

²⁶The aim is to protect workers who have been precluded from access to State compulsory arbitration by recent reforms implemented by conservative governments, notably in Victoria. The Commission has comparable powers in relation to equal pay, consultation over redundancies, and severance payments. As with the new system for complaining of wrongful discharge (*supra* note 11), these new powers have been introduced to implement ILO standards.

repeatedly highlighted by recent research: the absence in most Australian firms of the enterprise culture necessary for decentralised bargaining.²⁷ No matter how much local bargaining actually goes on, most parties are used to having a range of important issues determined at the industry or national level. As the Commission pointed out in its much maligned national wage decision of April 1991, there is little evidence that either managers or union officials have developed the skills or maturity required for enterprise bargaining.²⁸ No doubt these skills will develop over time, but they will certainly not appear overnight. This point is emphasized by studies suggesting that the majority of enterprise agreements registered in the last few years are "add-ons"—that is, they deal with wage increases and a few other selected changes to working conditions that have been negotiated, but operate in addition to the relevant awards rather than in substitution for them.²⁹ There is little evidence that parties are doing what the government insists is a natural consequence of its approach: incorporating all applicable conditions into a single enterprise agreement owned by the parties.

More serious (at least for supporters of compulsory arbitration) is the risk that the government's reforms may actually hasten the demise of the Commission. For all that the Commission's protective function has been strengthened, the overall effect of the new Act is undoubtedly to weaken its authority. Whatever the government's motives, it seems intent on laying the groundwork for the conservative parties to finish off the Commission after a future election.

Does Compulsory Arbitration Have a Future?

It is not my intention in this paper to set out a detailed case for the retention of compulsory arbitration in Australia, much less suggest that it is readily transplantable into countries with different culture and traditions.³⁰ But it is important not to make the mistake of judging Australian-style compulsory arbitration by reference to the intentions of its founders. Although it has failed

²⁷ See, e.g., Callus, *The Australian Workplace Industrial Relations Survey and the Prospects for Enterprise Bargaining*, 2 Econ. & Lab. Rel. Rev. 42 (1991).

²⁸ *Supra* note 23.

²⁹ See, e.g., Labour Information Network, *Trends in Enterprise Bargaining*, Bull. 1 (ACTU Dec. 1993).

³⁰ Cf. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1 (1974).

to eliminate strikes or entirely substitute reason for economic or industrial power, it has at least provided a *workable* framework for the resolution of disputes that has stood the test of time quite remarkably. As Ben Aaron observes:

The Australian system of compulsory arbitration is like that country's duck-billed platypus, which combines features of several different birds and animals. It survives and works with at least moderate success, it would seem, in defiance of inherent inconsistencies.³¹

Of course, a system cannot and should not be judged simply by its capacity to endure. Nevertheless, compulsory arbitration arguably offers certain advantages over other models of regulation.³²

Its principal asset is that it provides a forum in which, potentially at least, account can be taken of the wide range of competing interests indirectly at stake in any labor dispute. Naïve as it may sound to those who place their faith in the operation of market forces alone, the Australian tribunals are able to consider not only the economic forces at work in any management/labor contest but also broader interests that society may have in the achievement of various goals. These goals may include maintaining reasonable living standards, providing some measure of job security, eliminating arbitrary or discriminatory treatment, raising productivity, and improving worker skills. No doubt concern with the public interest may produce less efficient outcomes than in a deregulated market: but it may also result in a less inequitable distribution of wealth and opportunities.³³ A system based on unregulated collective bargaining also does this, but not to the same extent. The weakness of such a system is that it favours stronger unions, often at the expense of workers whose unions do not have the same bargaining power, or who are not unionised at all. Insofar as women and other disadvantaged groups have historically been discouraged from participation in unions, compulsory arbitration at least offers a rare opportunity for their voices to be heard.

Compulsory arbitration also compares favourably with direct state intervention. Most systems rely on explicit statutory prescriptions to moderate the operation of the labor market or to deal with issues on which collective bargaining cannot be expected to

³¹Aaron, *Settlement of Disputes Over Rights*, in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Vol. 1, 4th ed., ed. Blanpain (Kluwer 1990), 241, 259.

³²The typology of regulatory models adopted here has been suggested by Nolan, *supra* note 14.

³³See Bennett, *The American Model of Labour Law in Australia*, 5 *Austl. J. Lab. L.* 135 (1992).

produce appropriate outcomes. At the very least, these may include minimum wages and standards of workplace safety. The problem with state intervention is the difficulty in tailoring it to the specific needs of different groups or sectors. Thus, in order not to introduce unacceptable rigidities, it must be set at the lowest possible level. Compulsory arbitration can overcome this weakness by greater sensitivity to context. It also helps to alleviate the single greatest difficulty facing any central planner: lack of information as to the needs and desires of individual parties. The compulsory arbitrator, while not as knowledgeable as the parties, through constant exposure to the same sectors and firms is much better placed than the far-off legislator.

It is not surprising then that many in Australia (not least in the ranks of trade unions and employers) are concerned as to the potential loss if compulsory arbitration is gradually eliminated from the Australian system. It would be ironic indeed if, at the very time other parts of the world are at least taking an interest in compulsory arbitration, it is abandoned by the one country that has nurtured it over the past century.

PART II. THE VIEW FROM HERE

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In the not far distant past American industrial relations scholars who embarked upon an exploration of foreign practices tended to do so in the spirit of the Ming Dynasty, which sent a fleet under the eunuch of Cheng Lo to demonstrate to the world the glory of the Middle Kingdom, with no intention to learn from foreigners or to gain anything from them other than their admiration of the excellence of China. Unfortunately for us, given the current general disarray of our industrial relations system, we now find ourselves exploring more in the tradition of Columbus, looking for treasures to bring back to enrich our own system. This paper is an attempt to take a look abroad to see where we stand in what has traditionally been considered an area of strength in the American system—labor arbitration.

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