ARBITRATION REFORM

The system of arbitration is capable of improvement. The new Bill tackles the defects, but it would probably not succeed in overcoming them. The great need is not for more elaborate machinery to settle disputes, but for less disputes to settle.

Outstanding Points of Arbitration Bill

1. Transfers authority and jurisdiction from the Commonwealth Arbitration Court to Conciliation Commissioners. The Court is restricted to the determination of standard hours, the basic wage, annual leave and female minimum rates of pay, and of questions of law.

2. Conciliation Commissioners to have power to determine all other matters, e.g., sick leave, marginal rates of pay, overtime and penalty rates, conditions of employment. There is no right of appeal (as under the present Act) against the decisions of Commissioners.

3. Conciliation Commissioners to be appointed at a salary of £1,500 a year and to hold office until the age of 65.

(The Attorney-General has indicated that the number of Commissioners would be in the neighbourhood of fifteen. The existing Act allows for the appointment of only three Conciliation Commissioners —appointments are made for a term of five years only).

4. The Chief Judge is authorised to assign Conciliation Commissioners to particular industries or groups of industries, or to deal with a particular industrial dispute.

5. Widens the definition of industrial dispute to include "a situation which is likely to give rise to a dispute" of an interstate character.

6. Abolishes the present formal procedure by which the Court may obtain "cognizance" of a dispute and which is necessary before the exercise of arbitral functions.

7. Empowers the Court and Conciliation Commissioners to determine the periods of time to be permitted the respective parties to present their case, to require evidence to be presented in writing, and to decide the matters upon which oral evidence or argument will be heard.

8. Prohibits the appearance of lawyers or paid agents in proceedings before Conciliation Commissioners (but they can still appear in cases heard by the Court).

9. Empowers Conciliation Commissioners to grant preference to Unionists. (Under the existing Act this power is limited in three ways.

(a) It applies only as between persons "offering or desiring employment at the same time."

(b) It does not apply as against sons or daughters of the employer.

(c) It applies "other things being equal.")

10. Provides for the creation of a Bureau of Research and Statistics to assist the Court and Conciliation Commissioners.

Arbitration Reform—

ON the 12th March the Attorney-General, Dr. Evatt, introduced into the House of Representatives, a Bill for the amendment of the Commonwealth Conciliation and Arbitration Act. This Bill, the most significant points of which are summarised on this page, contemplates far-reaching changes in the Australian system of arbitration.

The Bill is partly the outcome of the impact of post-war industrial unrest on the machinery of arbitration, and of the failure of the machine—which is perfectly understandable—to cope effectively with the excessive and impossible load it has been forced to carry. But it is also the culmination of a long-held, if ill-defined feeling, that the system of arbitration is not working as it should and as its founders envisaged. It is important to bear in mind that criticism of the existing system does not emanate solely from Com-

munist sources, intent upon its complete overthrow. Impartial students of the Act, as well as many of those closely associated in a practical capacity with its operation, also hold that there is scope and need for substantial improvement.

The adequacy and value of the changes contemplated by the architecture of the new Bill can be appraised only by reference to the more prominent defects of the existing structure. These are three in number.

Limited Constitutional Authority

The first arises from the limited constitutional authority of the Federal Parliament in industrial matters. **This authority embraces no more than the prevention and settlement of disputes extending beyond the limits of any one State.** The balance of jurisdiction over industrial matters is exercised by the individual States themselves, according to the manner in which they individually decree. This means that there are seven distinct governmental systems of industrial negotiation and settlement operating in a community, whose proportions are insignificant when measured alongside those of the great industrial nations. Altogether it provides an outstanding instance of the administrative inefficiency which tends to accompany a federal system of government. The boundaries of authority are uncertain and have repeatedly to be defined by High Court Judgments, awards on wages and conditions by State and Commonwealth instrumentalities often overlap and conflict, the whole structure of industrial settlement is needlessly complex, cumbersome and top-heavy.

Because of the limited industrial authority of the Commonwealth under the constitution the Commonwealth Arbitration Court has been held to have no power to make a common rule for an industry—the application of its judgments is restricted to the parties directly concerned in a dispute; its jurisdiction does not extend to the hearing and determination of purely intra-State disputes even in the numerous cases in which that would be desirable; it is unable to provide directly for a national basic wage. It is noteworthy that the Industrial Peace Regulations, introduced by the Menzies administration in the early days of the war, are largely designed to overcome the weaknesses inherent in the constitutional position of the Commonwealth Court under normal peace-time conditions, and to pave the way for a smoother and more effective settlement of industrial differences.*

The new Bill of course, does not—because it cannot—in general attempt to remedy these important defects in the structure of arbitration. **They are mentioned here merely to stress the fact that, without an alteration in the Constitution granting increased industrial powers to the Commonwealth, any changes that may be made to the Arbitration Act must leave many serious weaknesses untouched and cannot be completely satisfactory.**

Slow-Moving!

The second weakness of the existing machinery—and the one most strongly cited by its critics—is that it moves too slowly. Frequently considerable intervals of time elapse before claims lodged with the Court are heard. When a hearing does commence it often takes the Court many months to complete it and to announce its judgment. These delays place a severe strain on the patience of the disputants and are themselves a powerful incitement of industrial unrest. The hearing of the 40 Hours Week Case, which has already extended over twelve months, is a supreme example of the slow-moving character of the arbitration system and has given rise to widespread dissatisfaction among workers throughout industry.

*The Industrial Peace Regulations were issued under the defence powers of the Commonwealth. They enable the Commonwealth Arbitration Court to declare a common rule and extend the jurisdiction of the Court to cover intra-State disputes as well as disputes extending beyond the limits of any one State. Under the regulations it ceases to be a condition precedent to the Court's jurisdiction that there should even be an industrial dispute. If the Minister for Labour and National Service should form the opinion that an industrial matter has led or is likely to lead to industrial unrest he is at liberty to refer the matter to the Court. The regulations lapse at the end of this year.

The causes of this tardiness are many. One is to be found in the strict respect—to many critics excessive and unnecessary respect—which is paid to legal formalities and procedures. While having a definite purpose in ordinary courts of law, these legalities can be great consumers of time, and, to the lay observer, often appear unreal in the proceedings of a tribunal concerned with industrial questions. A visitor to the Arbitration Court during the hearing of the 40 Hours Case could hardly fail to be impressed by the remoteness of some of the proceedings; the long-drawn-out cross-examination of witnesses on matters of apparently doubtful relevance; the hearing through to the bitter end of the testimony of witnesses often glaringly unskilled in the subject-matter of their evidence; the constant repetition of economic and statistical fallacies already perpetrated by previous witnesses.

But, if the slowness of the machinery is partly attributable to the over-legalistic nature of the Court's proceedings, it is also partly attributable to the numerous witnesses called and to the tremendous mass of evidence placed before the Court by the parties in dispute. Those directing the cases for the respective parties often appear to act on the conviction that the judgment can be tipped in their favour so long as they provide a greater quantity of material than their opponents for the Court's digestion. They appear to lose sight of the fact that the members of the Court are too experienced and too highly skilled to be influenced by other than the quality of the evidence and its relevance to the matter at issue. **Those who complain most strongly of the tardiness of the Court in reaching its decisions are often a major cause of it.**

Too Many Disputes!

A third, and probably the most important, reason why the system operates so slowly lies in the vast mass of business with which it has to contend. **The plain fact is that there are far too many disputes in Australian industry, and of those disputes far too great a proportion require to be settled by the process of arbitration.**

Attempt to Speed Up Machinery

The most impressive feature of the new Bill is that it does attempt to grapple seriously with these defects. By providing for the appointment of an increased number of Conciliation Commissioners (the existing Act restricts the number to three) empowered with final and absolute authority over all industrial matters apart from national standards (which are allocated exclusively to the Court) the Bill enlarges the scope and machinery for settling industrial disputes. **The Bill empowers both Court and Conciliation Commissioners to determine the period of time to be allowed the respective parties for presentation of their evidence,** and to decide whether evidence is to be given orally or in the form of a written document. It does away with the existing legal process which is necessary before the Court can gain cognizance of, and thus proceed to deal with, a dispute. And in an effort to get away from legalistic procedures it debars the appearance of paid agents or counsel in hearings by Conciliation Commissioners. Finally it provides for a Research and Statistical Bureau to be attached to the Court to assist in the more rapid and accurate determination of facts bearing on the case at issue. All in all the Bill makes a formidable attempt to achieve the much-lauded objective of "streamlining" the arbitration system.

Might Lead to More Disputes

Not all of these provisions can of course be held to be unreservedly good. There is for instance, no certainty that the process of arbitration will be speeded up, just because the machine itself is enlarged or because access to the arbitral authorities is simplified. **If hearings can be obtained more easily, and determinations of claims expedited, if cases can be conducted at cheaper cost in time and money, other things being equal, there is clearly an encouragement for the number of disputes to multiply.** This is probably what would take place. If you increase the size of the train, make it more comfortable and efficient, and cut fares in half, you must ex-

pect the number of passengers to increase.

This could well prove to be the test point of the proposed new system. If it is to be overcome successfully the Conciliation Commissioners would have to discharge their duties with a rare degree of acumen and understanding and above all with vision. **In fact it is not too much to say that the whole system contemplated by the Bill would stand or fall by the quality and political impartiality of the Commissioners.** It is by no means certain that sufficient numbers of men of the required attributes are available, and, if available, whether they will be appointed. If the system, largely through the Conciliation Commissioners, brought about a real and enduring improvement in industrial relationships, if it helped to replace the existing distrust and hostility by trust and confidence between employers and workers, it would succeed in curing the defects at which it is expressly directed. If not it would fail. **The great need is not for more elaborate and efficient machinery to settle disputes, but for less disputes to settle.**

This leads to a consideration of the most serious defect of the present system —**that is its tendency to perpetuate and emphasise the traditional conflict between employers and workers. It does not stress the true identity of interest of the parties to industry. It fails to encourage voluntary agreement and private settlement of differences.** Industrial relations in Australia have come to be dominated by the system of compulsory arbitration. An attitude of mind, which might be called the "arbitration mind," has developed in industry that is not conducive to the growth of mutual understanding and of good and friendly relationships. As soon as there is a serious difference, both employers and employees almost automatically think in terms of arbitration. Why take the trouble to understand the other man's point of view, when there is ready at hand a tribunal paid to do it, and whose decision has the force of law. Why make a concession when there is a possibility of convincing the Court that it would be against the public interest for such a concession to be granted? Why refrain from creating a dispute when there is always a chance of obtaining from the Court some concession, even if only a small one?

Roots of Industrial Unrest

It is this attitude of mind, this psychological approach to industrial relations, which is at the root of the industrial unrest in this country, and the widespread suspicion and hostility that exists. The main hope, in fact the only hope, for the future, is to replace this very attitude with one that seeks to understand the other man's point of view, that is willing to explore patiently the reasons behind what he is asking for, that is eager to achieve a just settlement of a difference without recourse to a third party. Where, as in Australia, compulsory arbitration prevails, employers and employees do not acquire a high sense of responsibility toward one another. The old adage "two's company, three's none" is singularly appropriate to the field of industrial relations. **A settlement achieved through mutual agreement is a very different thing to a settlement by compulsory arbitration. The former tends to promote good feeling, the latter to destroy it.** Arbitration can bring about a settlement of a dispute; it cannot, and does not, engender good relations between the parties concerned.

Much nonsense has been talked from time to time about Australia leading the world with its system of arbitration. It is often claimed that this system is the envy of other nations. In fact, there is little or no sign that other countries are anxious to follow Australia's "lead." The Australian record in working days lost through industrial disputes is unequalled by any other democratic country. This kind of talk should cease. Whether it arises from an exaggerated Australianism or from sheer ignorance it is harmful because it tends to prevent the kind of dispassionate appraisal of the real virtues

and failings of the arbitration system which is necessary if it is to be improved.

Voluntary Agreement

It is often claimed that, notwithstanding the key position of arbitration in Australia, there is a great deal of voluntary negotiation and agreement and, where agreement cannot in the first place be achieved, of conciliation. There is some substance in this claim—but not very much. **The Australian structure of industrial relations, in contrast to that of Great Britain and perhaps to a lesser extent of America, is tilted strongly towards compulsory arbitration of differences and away from voluntary settlement.***

It must be said at once that the new Bill does little to remove or to correct this basic and far-reaching defect in the present structure of arbitration. In fact by widening the definition of a dispute to include "a situation which is likely to give rise to a dispute . . ." and by enlarging the legal machinery for the settlement of disputes, it tends to exaggerate the worst features of the existing structure. **On the face of it, the Bill makes more remote than ever the private voluntary agreements and settlement of differences "out of court" which, on a large scale, are the essential characteristic of a healthy system of industrial relations.**

Admittedly the Bill attempts to turn away from arbitration and to emphasise conciliation. In making provision for a large increase in the number of Conciliation Commissioners it provides that only when conciliation fails, and not till it does fail, shall a Commissioner proceed to prevent or settle a dispute by making an award or order. But the fifteen Conciliation Commissioners, contemplated by the Attorney-General, all have arbitral powers, and, if experience is any guide, **it is only too likely that in practice they will tend to become "arbitration" rather than "conciliation" commissioners.** And, in any case, conciliation is of a lower order of merit than unassisted voluntary agreement.

Two other points should be mentioned.

Penalties

The Bill refrains from empowering the Court, Conciliation Commissioners, or any authority to impose heavy penalties, such as prohibitive fines, for the non-observance of awards. In a democratic state it is not an easy matter to achieve by force, or threat of force, the acceptance of laws that are opposed by a large majority of the people to whom they directly apply.

Uniformity of Conditions

One of the distinctive features of the Australian industrial structure is that there is a large degree of comparability and uniformity of conditions of employment throughout industry. This has developed because of the central position of the Commonwealth Court and because of the fact that the Court is generally recognised by other industrial tribunals and by State legislatures and wages boards as the supreme authority in industrial matters. It has been able to act as a co-ordinating authority by establishing general principles which other industrial authorities have been prepared to apply to specific instances. This broad uniformity has also arisen partly because of the dearth and the restricted character of private voluntary agreements. It is difficult to see how this uniformity could be maintained when, as the Bill contemplates, there are numerous Conciliation Commissioners acting more or less independently and each with final authority in his own field.

In Britain there is no such close similarity of conditions between different industries. This has not proved to be a serious disadvantage. But the position may be very different in Australia where

*The achievements of the arbitration system in Australia have been more noteworthy in the domain of high economic policy than in that of industrial relations. The variation of the wage level to suit the needs of national economic policy as in the 10% cut during the depression and the 1937 6/- "prosperity loading" is an outstanding example. It is not too much to say that the Commonwealth Court has developed into an economic instrumentality with a great background of experience and of a high order of economic understanding and judgment.

unions and workers in separate industries have over a long period become accustomed to and look for similar terms of employment. If one industry succeeds in gaining an advance in say overtime rates of pay, it is more than probable that a whole host of other industries will apply for a corresponding increase in their own rates. In these conditions a particularly "generous" Commissioner would be able to set a pace, which his colleagues might be impelled, against their better judgment, to follow.

Machinery of Consultation

There is no certainty that the Bill is an improvement on the Act at present in force. Equally there is no certainty that it is not. Experience alone would tell. On many counts there is reason for grave misgivings. On others and particularly on minor points the Bill appears to have fairly pronounced advantages over the existing Act. But everything would depend on the Conciliation Commissioners. To make a success of the system contemplated in the Bill, more than tact, more than expert knowledge, more than judicial competence, they will need a vision—a vision which is only too rare—of what good relations in industry should entail. If they possess that vision they would refrain from jumping into the fray every time there is sign of impending trouble. They would know that every change of wind or temperature does not necessarily herald the approach of a storm. They would encourage the processes of voluntary agreement — negatively, by standing aloof until their services become plainly imperative; positively, by encouraging the creation and development of permanent machinery of consultation between employers and employees capable of reaching intelligent compromises and agreement without the assistance of third parties or of that provided by the compulsion of law. In fact, it is in this latter, and unofficial, sense that their greatest opportunity would reside. If they grasped it they would help to lift industrial relations in Australia out of the pit into which it has gradually descended over many years of misconception of its true nature.

Summary Statement of Views of the Editorial Committee on the Arbitration Bill

(1) The main provision of the Bill, the appointment of a large number of Conciliation Commissioners, clothed with far-reaching authority and with power of final decision, is of doubtful wisdom. It would have been better to provide for the appointment of a limited number of additional commissioners (say five) with restricted arbitral authority and whose prime function would be that of conciliation.

(2) The function of arbitration should remain, as at present, mainly under the control of the Court. But in order to relieve the Court of the present congestion of business, an attempt should be made to remove from the arena of industrial dispute the settlement of standard wages and hours by providing some means for their automatic adjustment. This task would have to be undertaken by the Commonwealth Government which should endeavour to conclude binding agreements between representatives of employers and employees. (This subject will be discussed in some detail in the next issue of "The I.P.A. Review.")

(3) If the present course of appointing a large number of conciliation commissioners clothed with extensive powers is persisted in—as it seems certain to be—then it would be desirable to place the matter of their appointment to, and removal from, office under the control of the Arbitration Court and to retain the existing right of appeal against their decision.

(4) The provisions in the Bill attempting to do away with excessive legal formalities and generally to speed up and simplify the machinery of settling disputes are a definite improvement and should be retained.

(5) The intention to attach to the Court a Bureau of Research and Statistics is a praiseworthy improvement.

(6) In order to make the system of conciliation and arbitration work effectively, representatives of employers and employees should attempt to set up permanent machinery of consultation, with provision for regular meetings, for each industry or main sections of industry, as well as at State and national levels. The scope and authority of such consultative bodies might at first be restricted to a limited number of functions and gradually extended as experience is gained. Through this machinery an effort should be made to expand the number and scope of voluntary settlements of differences without recourse to conciliation and arbitration authorities.

(7) The legal machinery for the settlement of industrial disputes should be as efficient as it is possible to make it. The effective working of this machinery presupposes reasonably good relations between the parties to industry. But no government machinery of conciliation and arbitration will operate smoothly where those relations are bad. There is an outstanding and urgent need of a radical improvement in employer-employee relationships in both private enterprise and public utilities but this is unlikely to be brought about through amendments to the arbitration system. The solution lies elsewhere.

Since this article was sent to the printer, the Commonwealth Conciliation and Arbitration Bill 1947 has passed all stages in the House of Representatives. A number of amendments were made to the Bill as originally drafted. These amendments do not alter the basic structure of the Bill. The broad survey of its provisions made in this article is, therefore, unaffected.