

THE MACHINERY OF ARBITRATION

DISSATISFACTION with the arbitration system is widespread. The President of the A.C.T.U. (Mr. Monk) recently stated that the A.C.T.U., at its next Congress, would recommend fundamental changes in the present system. Many economists and other authorities, such as the former Chief Justice, Sir John Latham, have severely criticised important aspects of the existing methods. Although the official employer bodies have proposed no basic changes, employers in private conversation are ready to voice a strong dissatisfaction with the system. Two or three essays in collective bargaining, mainly by American construction companies and the unions concerned, have stimulated thought as to whether arbitration could not be profitably replaced by direct negotiation over a much wider field.

A great deal of confusion in discussions of the Commonwealth Arbitration Court would be avoided if the critics were careful to draw a clear distinction between arbitration as a *system* for establishing conditions of employment, and the *machinery* of arbitration which exists in Australia and through which the system is administered.

Broadly there are two distinct *systems* for settling industrial disputes and determining conditions of employment in operation in the English-speaking countries. In North America and Britain, wages and industrial conditions are determined, in the main, by direct negotiation between employers and unions. This is the process commonly called collective bargaining. In Britain the bargaining usually takes place on an industry-union basis; whereas in America it is more often on a company-union basis. The results are normally embodied in written agreements. Arbitration, by some independent authority, only takes place where negotiation breaks down and usually only after every possible avenue to achieve a voluntary settlement has been exhausted.

In Australia, on the other hand, wages, hours and the main provisions affecting employment are determined by industrial tribunals. The supreme authority is the Commonwealth Arbitration Court, whose decisions are usually taken by other tribunals as a standard on which to base their own. There are, admittedly, exceptions, such as the Wages Boards in Victoria. But even these Boards, which consist of representatives of employers and employees, are largely guided by

the determinations of the Commonwealth Court in reaching their decisions. Direct negotiation between employers and unions is also not uncommon on a multitude of minor matters affecting the terms of employment. But it still remains true that the essential framework of wages and industrial conditions is established by the Commonwealth Arbitration Court—including the system of Conciliation Commissioners attached to it—and the various State and special industry tribunals which closely follow the lead given by the Commonwealth Court.

Both systems—direct negotiation and arbitration—have their merits and demerits. But, on balance, and in the light of experience, the former would appear superior.

The arbitration system, as practised in Australia, has admittedly one important advantage. It provides a suitable instrument for the administration of a more or less uniform national wages policy. But against this it has manifold defects. The main one is that it engenders an irresponsible attitude on the part of both employer and employee representatives; moreover, the very fact of its existence in the forefront of industrial relationships tends to emphasise the divergence, rather than the unity, of interest between employers and employees. It acts, in effect, as an umpire on the conflicting claims of employer bodies and unions, but no one would pretend, in the light of the industrial history of Australia, that the umpire's decisions are accepted with good grace by the contending parties and without leaving behind a residue of bitterness and frustration.

On the other hand the methods of direct negotiation and voluntary settlement possess one overwhelming, indeed conclusive, advantage. They promote a high sense of responsibility on the part of employer representatives and unions. If the decisions reached are bad ones, that is, if they react adversely on the industry concerned, or on the wider national economy, the contending parties cannot avoid their share of the responsibility. They cannot shelve it off on to some third party. Moreover, the fact of having to thrash out their differences in often lengthy and difficult negotiations, gives each side a better appreciation of the difficulties confronting the other. Over the years this tends to build up a bond of mutual respect and understanding. This responsible approach bears a sharp contrast to the highly extravagant attitudes

which not infrequently characterise the claims and advocacy of Australian employer and union organisations in Arbitration Court proceedings.

The entire replacement of compulsory arbitration by a system of collective bargaining is not, however, an immediately practicable policy for Australia to pursue. Such a transition could be effected, if at all, only over a period of years. Success in collective bargaining needs an attitude of tolerance and responsibility and a determination to reach a reasonable and successful issue on the part of the parties concerned. The long reliance on arbitration by Australian employers and unions has hardly been conducive to the creation of the right attitude of mind. A highly developed and workable system of voluntary negotiation, such as exists in Britain, can be achieved only step by step as part of an evolutionary process. It cannot be introduced, with any hope of success, at one fell swoop. Moreover, in the political sense, Australia seems wedded to the methods of arbitration and it is doubtful indeed whether a policy to abandon these methods would command any substantial electoral support.

A highly intricate and extensive network of wages and conditions has been built up in Australia on the basis of a multitude of Arbitration Court decisions and precedents. To abandon overnight the legal and administrative foundation on which this network rests would almost certainly give rise to industrial confusion in extremis. Thus, whether we like it or not, it would seem that, for some considerable time ahead, Australia is saddled with compulsory arbitration as the basis of its wage-fixing system. This does not mean that, along with the existence of arbitration, there should not take place a steady extension of voluntary negotiation along the lines of British and American methods. Indeed there are good reasons why such a development should be given positive encouragement. After all, the founders of the Commonwealth Arbitration Court never envisaged that the instrument of their creation would be a substitute for direct negotiation between employers and unions. The arbitration power was visualised as something to fall back upon when all efforts at voluntary settlement had proved abortive. The predominant position that the Commonwealth Court has assumed in the industrial picture over the fifty years of its existence would almost certainly have horrified its creators could they return to see it.

They would realise that the modest institution they had devised with the best of intentions had grown into a kind of industrial Frankenstein.

All this does not mean, however, that because we cannot forthwith abandon the *system* of arbitration, we cannot therefore improve the *machinery* by which it is administered. It is regrettable that the former difficulty is too often used as an excuse for doing little or nothing about the latter.

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The machinery in its present form has three outstanding weaknesses. The first arises from the Constitution, which limits the power of the Commonwealth in industrial matters to the settlement of disputes extending beyond the limits of any one State. This has two main consequences.

It means, first, that the arbitration machinery cannot act unless there is a dispute. Since the Commonwealth Arbitration Court is the supreme authority in the fixation of wages and conditions, this limitation on its power—arising from the Constitution—encourages the deliberate manufacture of disputes in order to gain the attention of the Court and achieve an alteration in existing conditions. A piece of machinery, established for the express purpose of promoting industrial peace, therefore acts as an incitement to industrial discord and unrest. As Sir John Latham has pointed out, the psychology of this approach to industrial problems is deplorable—"It is wrong to lay down a rule that you can't get what you regard as justice unless you first have a dispute about it".

Second, the limitation of the Court's authority to interstate disputes means that matters of purely State concern fall within the jurisdiction of the States themselves. While it is true that on the whole the State industrial authorities follow fairly closely the awards of the Commonwealth Court, discrepancies naturally arise on questions of detail. This leads to serious anomalies. For instance, employees working in the same industry, and even business, are not infrequently paid different wages according to whether they come under State or Commonwealth awards. A recent and notable example is to be found in the refusal of some States to follow the ruling of the Commonwealth Court on the abolition of the cost-of-living adjustments. Variations in the wages or conditions of employees working in close proximity may not only be inequitable but are hardly conducive to industrial contentment and harmony.

This state of affairs has existed for too long. Its manifest disadvantages have frequently been assailed by highly respected authorities with no axe to grind. An appeal to the common-sense of the people to achieve a suitable amendment to the Constitution, if backed by the major political parties, should be successful. There is no longer any reason or excuse to delay action on a matter of vital concern to the future of industrial relationships in Australia.

The second serious weakness of the present machinery lies in the structure of the Arbitration Court itself. The original conception of the Court was that it should be an instrument for settling industrial disputes by conciliation and arbitration. In practice, the Court has become an economic policy-making body of transcendent importance. The Court virtually sets the level of wages to be paid and the hours to be worked throughout Australian industry. In effect, it administers a national wage policy, a policy which must necessarily be determined in the light of present and prospective economic conditions. The decisions at which the Court arrives are of such significance that they can, for better or worse, affect the stability and prosperity of the whole economy and thus the welfare of the Australian people.

The Court is singularly ill-equipped for this task. It is comprised of men whose basic training and experience have been in the law, not economics. They are expected to appraise the significance of a multitude of economic trends and measurements, a task so complex that it would provide a severe test for men of outstanding intellectual calibre who had spent their entire lives in the study and practice of economics. It is an unfair burden for men of legal training, and one they should not be asked to carry.

How, then, should standard wages and hours be determined? The Commonwealth Government is responsible for national economic policy. If things go wrong the Government must expect to collect the blame. Yet one of the major factors determining the success or otherwise of its policy is entirely outside of its control. Few people, however, would be happy to see the level of wages in industry fixed by the Commonwealth Parliament, even if that were possible from the point of view of practical administration. The manifest danger is that wages would be used as a political play-thing and that, as with social services, political parties, in their

desire to achieve office, would vie in out-bidding one another in wage offers during electoral campaigns. The intrusion of politics directly into the industrial sphere is something which should at all costs be avoided. When it has occurred, on matters of much less importance than the national wage level, it has invariably had the most unhappy consequences. How, then, can the dilemma be solved?

Double-pronged action would seem to be necessary. First the Arbitration Court should be reconstituted as a standing Industrial Commission prepared to undertake periodic reviews of wages, if need be on its own initiative. The precise constitution of the Commission is not important at the moment, but clearly it should include one or two economists of national eminence, respected both for their intellectual stature and their independence of viewpoint. The Chairman of the Commission might be a Judge. It may be desirable, although this would need deep consideration, to invite the unions and the employer bodies each to nominate one person for appointment to the Commission. A Commission would have the advantage over a Court—a considerable one as we shall see in a moment—that it would be perfectly free to follow its own methods of procedure.

There would, however, still remain the problem of achieving at least a broad co-ordination between the decisions of the Commission and the objectives of the economic policy which the Government is pursuing. It would be necessary, for example, to avoid the kind of situation which arose a few years ago when, on the same day that the Government announced a policy of counter-inflation, the Arbitration Court brought down a judgment which worked in precisely the opposite direction. This does not mean that the Commission should follow what it believes to be the Government's wishes. In that event there would be no purpose in having an independent wage-fixing body. But it does mean that such a body, in arriving at its decisions, should have the assistance of a comprehensive interpretation of the economic situation as seen through the eyes of the Government and its advisers, and also a full explanation of Government policy. This advantage has been denied the Arbitration Court, and whatever Government has been in power has only itself to blame if decisions of the Court have sometimes been seriously contrary to the purposes of its own policy.

Australia needs, and needs not only for purposes of wage-fixing, what the British Government provides in its Annual Economic Survey and the American Government in its President's Economic Report to Congress. When the Commonwealth Government sees the necessity for publishing a periodical economic survey of a similar kind, the prospect of wise decisions on standard wages and hours will be greatly advanced.

The third disadvantage of the present machinery is that it is slow-moving, cumbersome, costly, round-about, and wedded to a procedure ill-suited to the determination of major industrial and economic issues. These defects are what the critics have in mind when they speak of the need for "streamlining" the existing methods. There is a strong, and justified, feeling that the machinery could be simplified and the administration of industrial justice greatly expedited with advantage to all concerned.

Much of the trouble arises from the over-legalistic character of the proceedings. This has aspects too numerous to mention here. But one point can be referred to briefly. The Arbitration Court in its hearings proceeds in an almost identical fashion to an ordinary Court of Law dealing with civil or criminal litigation. There is a vast array of "witnesses". There are barristers whose knowledge of economic and industrial questions may be limited and whose main purpose is to discredit the personal qualifications of the witnesses and the reliability of their evidence. All this takes immense time, it promotes ill-feeling, it is excessively costly and, in relation to the matters with which it is concerned, it has an unreal and indeed a Gilbertian quality. The procedure of the Arbitration Court is an affront to the good sense of Australians. It is certainly far removed from the severely pragmatic Australian approach to most other matters.

A Commission of the kind suggested would feel no obligation to base its methods on those of an ordinary Court of Law. It could devise its own form of procedure. It might prefer to conduct its hearings in camera. But whatever the procedure adopted the object should be to arrive at a wise and just determination by the simplest and shortest route.

What matters is the quality of the final decision. No one can surely pretend that the complicated, costly, and time-consuming procedure of the present methods is a necessary adjunct to that end.